

REFLECTIONS ON COVID-19 AND CRIMINAL LAW: HOW DOES JUDICIAL DOCTRINE FUNCTION IN A CRISIS?

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This article reviews the impact of COVID-19 on judicial decision-making in certain areas of criminal law. Reviewing decisions from the areas of bail, sentencing, and trial within a reasonable time, the author analyzes how COVID-19 has been integrated into legal doctrine. The author concludes that doctrines are flexible enough to accommodate COVID-19 concerns. At the same time, doctrine is firmly entrenched, meaning the pandemic has not presented the opportunity for judges to rethink incarceration as some had hoped.

TABLE OF CONTENTS

I.	INTRODUCTION	587
II.	JUDICIAL INTERIM RELEASE	588
III.	SENTENCING	597
IV.	TRIAL WITHIN A REASONABLE TIME	602
V.	CONCLUSION	609

I. INTRODUCTION

The novel coronavirus abruptly and significantly changed everyday Canadian life in March of 2020. The criminal justice system was not immune from this upheaval. Courthouses closed abruptly delaying thousands of trials.¹ Prisons were locked down, with inmates kept in their cells for most of the day and denied visitors.² Despite attempts to keep the coronavirus out of prisons, thousands of prisoners have developed COVID-19 over the last year and a half.³ Courthouses have reopened, but trial delays continue.⁴ Meanwhile,

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¹ See e.g. Elizabeth Raymer, “Courts Across Canada Restrict Access or Suspend Operations Due to COVID-19,” *Canadian Lawyer* (16 March 2020), online: <www.canadianlawyermag.com/news/general/courts-across-canada-restrict-access-or-suspend-operations-due-to-covid-19/327534>; Alicia Bridges & Kendall Latimer, “COVID-19 has Delayed Criminal Trials Across Canada. Is the Justice System Doing Enough to Address the Problem?,” *CBC News* (4 July 2021), online: <www.cbc.ca/news/canada/saskatchewan/covid-19-delays-justice-system-jordan-rule-fertuck-canada-1.6087923>.

² Andrea Woo, “COVID-19 Lockdowns in Federal Prisons Violate Inmates’ Charter Rights, Lawsuit Says,” *The Globe and Mail* (8 March 2021), online: <www.theglobeandmail.com/canada/article-covid-19-lockdowns-in-federal-prisons-violate-inmates-charter-rights/>; Rosemary Ricciardelli & Sandra Bucerius, “Canadian Prisons in the Time of COVID-19: Recommendations for the Pandemic and Beyond,” *The Globe and Mail* (23 June 2020), online: <www.theglobeandmail.com/opinion/article-canadian-prisons-in-the-time-of-covid-19-recommendations-for-the->.

³ Valérie Ouellet & Sylvène Gilchrist, “Some Prisoners Not Offered COVID-19 Shots until Months after General Public, CBC Analysis Finds,” *CBC News* (16 June 2021), online: <www.cbc.ca/news/canada/covid-vaccinations-in-jails-1.6066293>; Karen Pauls, “Inside Canada’s Largest COVID-19 Outbreak in a Federal Prison,” *CBC News* (26 January 2021), online: <www.cbc.ca/news/canada/manitoba/covid-coronavirus-outbreak-prison-class-action-lawsuit-1.5886561>.

⁴ See e.g. Heather Polischuk, “Queen’s Bench Courts Forging Ahead with Jury Trials,” *Regina Leader-Post* (7 October 2020), online: <leaderpost.com/news/saskatchewan/queens-bench-courts-forging-ahead-with-jury-trials>; Paola Loriggio & Liam Casey, “COVID-19 Measures Could Have Lasting Impact on Ontario Courts: Experts,” *National Post* (13 March 2020), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/schlatter-trial-continues-amid-new-covid-19-measures-halting-upcoming-jury-trials>.

vaccines provide hope of return to normal, but low vaccination rates in some parts of the country and new variants of the virus continue to cause concern.⁵

COVID-19 has impacted the criminal justice system widely and in many ways, from policing to imprisonment. In this article, I focus on how COVID-19 has affected judicial doctrine by looking at three areas of criminal law: bail, sentencing, and trial within a reasonable time. Prisons in the pandemic are more dangerous than usual, as inmates are unable to physically distance, and lockdown makes detention time more onerous. How do judges factor these concerns into bail and sentencing determinations? At the same time, court closures have caused significant trial delays. How has the judiciary responded?

Decisions in these three areas are scrutinized to evaluate the operation of judicial doctrine during the COVID-19 crisis. Through a review of illustrative cases and description of trends, I consider how judges have incorporated COVID-19 into their decision-making and what this reveals about the adaptability of those doctrines and judicial decision-making in times of pressure. I conclude that doctrine in these areas has been flexible enough to accommodate COVID-19 concerns. At the same time, doctrine has proven entrenched meaning that judges are unable to dislodge it to deal with larger questions about the use of incarceration within the criminal justice system.⁶

II. JUDICIAL INTERIM RELEASE

Accused persons have a right under section 11(e) of the *Canadian Charter of Rights and Freedoms* “not to be denied reasonable bail without just cause.”⁷ The statutory scheme governing judicial interim release and Supreme Court jurisprudence affirm that release is preferred, and to overcome this presumption, the Crown must demonstrate the accused’s detention is required for one of the reasons found in section 515(10) of the *Criminal Code*: flight risk, public safety, or to “maintain confidence in the administration of justice.”⁸

Conditions on remand are notoriously unpleasant: overcrowding and lack of programming combined with stress over uncertain resolution of charges and the possibility of losing one’s job or housing make pre-trial custody especially challenging.⁹ Detention conditions further deteriorated during the pandemic, as lockdowns and isolation were used to physically

⁵ See e.g. Lauren Pelley & Adam Miller, “Omicron Could Threaten COVID-19 Immunity – But We’re Not Going Back to ‘Square One’” *CBC News* (1 December 2021), online: <cbc.ca/news/health/omicron-variant-where-we-stand-1.6268508>.

⁶ See e.g. Lisa Kerr & Kristy-Ann Dubé, “The Pains of Imprisonment in a Pandemic” (2021) 46:2 *Queen’s LJ* at 330 [Kerr & Dubé, “Pains”] (suggesting that “the pandemic is an occasion to deepen our recognition of the risks and effects of detention generally, many of which are graver than that posed by COVID-19”).

⁷ *Canadian Charter of Rights and Freedoms*, s 11(e), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [Charter].

⁸ *Criminal Code*, RSC 1985, c C-46, ss 493.1, 515; *R v St-Cloud*, 2015 SCC 27 at paras 8, 29 [St-Cloud]. See also *R v Antic*, 2017 SCC 27 at para 34.

⁹ Terry Skolnik, “Criminal Law During (and After) COVID-19” (2020) 43:4 *Man LJ* 145 at 164. See also *R v Summers*, 2014 SCC 26 at para 28.

distance prisoners, personal hygiene products were unavailable, and visitors were restricted or prohibited.¹⁰

Because of their restrictive living conditions, incarcerated people face a heightened risk of contracting COVID-19.¹¹ A CBC report found that from March 2020 to June 2021, for every 1,000 people in provincial jails, 268 contracted COVID-19 compared to 37 per 1,000 among Canada's non-imprisoned population.¹² At the same time, some provinces have been slow to roll out vaccination programs in jails, despite the recommendation by many health experts that prisoners receive priority for vaccination given their heightened risk.¹³

Reducing the number of people in jails can slow the spread of COVID-19 by letting individuals who would otherwise be incarcerated shelter at home and by increasing the capacity for physical distancing by the remaining prison population.¹⁴ The John Howard Society, the BCCLA, and other advocacy groups have called on governments to release detained persons to mitigate COVID-19 risks.¹⁵ The Public Prosecution Service of Canada issued a memorandum on COVID-19 in the spring of 2020 instructing prosecutors to seek release in less serious cases and to avoid release conditions that required travel or face-to-face meetings in order to reduce COVID-19 exposure.¹⁶ Some provincial Crowns followed suit.¹⁷ Numbers on the ground confirm that these early efforts to reduce the prison population were successful. According to Statistics Canada, there were 6,283 fewer provincially incarcerated adults (including those on remand) from February 2020 to May 2020 (a decline

¹⁰ Terri Theodore, "Doctors Urge Governments to Release as Many Inmates as Possible amid COVID," *The Globe and Mail* (7 April 2020), online: <www.theglobeandmail.com/canada/article-doctors-urge-governments-to-release-as-many-inmates-as-possible-amid/>; Skolnik, *ibid* at 165; Nomi Claire Lazar, "Mass Solitary Confinement in Prisons is Illegal, Even in a Pandemic," *Toronto Star* (24 November 2020), online: <www.thestar.com/opinion/contributors/2020/11/24/mass-solitary-confinement-in-prisons-is-illegal-even-in-a-pandemic/>.

¹¹ Skolnik, *ibid* at 165–66; Ouellet & Gilchrist, *supra* note 3.

¹² Ouellet & Gilchrist, *ibid*.

¹³ *Ibid*; Canada, National Advisory Committee on Immunization, *Guidance on the Prioritization of Initial Doses of COVID-19 Vaccine(s)* (Ottawa: National Advisory Committee on Immunization, 2020); World Health Organization Regional Office for Europe, "People in Prisons Should Not Be Left Behind amid COVID-19 Vaccination" (26 April 2021), online: <www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/news/2021/4/people-in-prisons-should-not-be-left-behind-amid-covid-19-vaccination>; Thia James, "Experts Recommended Including Sask. Inmates in Vaccine Priority: Leaked Q&A," *Saskatoon Star Phoenix* (23 April 2021), online: <thestarphoenix.com/news/local-news/with-147-active-covid-19-cases-and-four-inmates-in-hospital-sask-s-plans-for-jail-inmate-vaccinations-questioned>.

¹⁴ Giovanni SP Malloy et al., "Effectiveness of Interventions to Reduce COVID-19 Transmission in a Large Urban Jail: A Model-Based Analysis" (2021) 11:2 *BMJ Open* 1 at 8.

¹⁵ John Howard Society of Canada, *News Release*, "The Second Wave of Covid-19 in Canada's Prisons," (21 December 2020), online: <johnhoward.ca/uncategorized/second-wave-of-covid-19-in-canadian-prisons/>; Letter from British Columbia Civil Liberties Association to the Parole Board of Canada, the Ontario Parole Board, and la Commission Québécoise des Libertations (27 March 2020) to conditionally and compassionately release incarcerated people to prevent the spread of COVID-19, online: <bccla.org/our_work/letter-on-the-conditional-and-compassionate-release-of-incarcerated-people-to-prevent-the-spread-of-covid-19/>; United Nations Human Rights, "Urgent Action Needed to Prevent COVID-19 'Rampaging Through Places of Detention,'" *United Nations* (25 March 2020), online: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>.

¹⁶ Memorandum from Public Prosecution Service of Canada (31 March 2020) regarding COVID-19 Bail and Resolution Principles, online: <www.ppsc-sppc.gc.ca/eng/pub/memoranda-notes/covid19.html> [PPSC, Memorandum].

¹⁷ Kevin Martin, "Prosecutors Directed to 'Reduce Inmate Populations' in Face of COVID-19: Lawyer," *Calgary Herald* (16 March 2020), online: <calgaryherald.com/news/crime/prosecutors-told-to-do-all-they-can-to-reduce-inmate-population-in-alberta-says-president-of-criminal-lawyers-group>; Sean Fine, "Calls to Release Some Prisoners Intensify as First Known Coronavirus Outbreak Announced in Canadian Prison," *The Globe and Mail* (30 March 2020), online: <www.theglobeandmail.com/canada/article-calls-to-release-some-prisoners-intensify-as-first-known-coronavirus/>.

of 26 percent).¹⁸ Looking at remand specifically, Statistics Canada data shows a 24 percent decrease in the adult remand population from March 2020 to April 2020.¹⁹ However, the numbers began to increase again in June 2020 and “by September, the number of adults in remand exceeded pre-pandemic levels in Prince Edward Island, New Brunswick, Saskatchewan and Nunavut.”²⁰

The early push to decrease the jail population was accompanied by judges’ willingness to take COVID-19 into consideration when deciding whether to grant release pending trial (section 515 of the *Criminal Code*) or pending appeal (section 679 of the *Criminal Code*).²¹ Several authors have written on bail cases from early in the pandemic to which I refer readers for reviews of the case law.²² What follows here is a summary of the jurisprudence and a discussion of illustrative cases.

The cases confirm that COVID-19 can constitute a material change in circumstances warranting revisitation of a previous order.²³ While a handful of cases have found COVID-19 relevant to the accused’s willingness to comply with court orders,²⁴ the vast majority of cases have found it is relevant to the “public confidence” ground in section 515(10)(c) and the “public interest” factor in section 679(3)(c).²⁵ Generally speaking, cases demonstrate a judiciary alive and responsive to COVID-19 concerns, favouring release when possible (for example, in the absence of safety or flight concerns).

One of the main points of contention in the case law is whether there must be evidence that the applicant’s *personal* risk from COVID-19 is heightened because of a pre-existing health condition before the “COVID-19 factor” will favour release.²⁶ During a pandemic fueled by an air-borne virus — the spread of which can be counteracted by physical distancing — general efforts to reduce the jail population benefits both detained persons and the wider community by reducing overall viral spread. This is true regardless of the personal health status of those released. Accordingly, a policy that prioritized public health would not require the applicant establish heightened individualized risk from COVID-19.

¹⁸ Statistics Canada, *Changes in Federal, Provincial and Territorial Custodial Populations During the COVID-19 Pandemic, July to September 2020*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210310/dq210310a-eng.htm> [Stats Can].

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Supra* note 8, ss 515, 679.

²² Lisa Mathews, “Bail in the Time of COVID-19” (2020) CanLIIDocs 564, online: <www.canlii.org/en/commentary/doc/2020CanLIIDocs564>; Paul L Moreau, “COVID-19 and the Tertiary Ground” (2020) CanLIIDocs 676, online: <www.canlii.org/en/commentary/doc/2020CanLIIDocs676>; Skolnik, *supra* note 9 at 165; Lisa Kerr & Kristy-Ann Dubé, “Adjudicating the Risks of Confinement: Bail and Sentencing” (2020) 64:7 CR 311 (WL Can).

²³ See e.g. Moreau, *ibid.*; Skolnik, *ibid.* at 163; *R v Boast*, 2020 ONSC 2684 at para 31; *R v Cain*, 2020 ONSC 2018 at para 8 [*Cain*]. See also *R v JA*, 2020 ONCA 660 (majority finding that the pandemic did not constitute a “material change” in the context of that case at para 84; contrast with the dissent at para 109: “COVID-19 constitutes a material change in circumstances with respect to every detention order that was made prior to the advent of the pandemic”).

²⁴ See e.g. *Cain*, *ibid.* at paras 15–17; *R v SA*, 2020 ONSC 3622 at paras 42–44; but see *R v Kedoin*, 2020 SKQB 121 at paras 41–46 [*Kedoin*].

²⁵ *St-Cloud*, *supra* note 8 at paras 68–71: (“public confidence” may include factors outside those listed in section 515(10)(c)). See also Skolnik, *supra* note 9 at 163.

²⁶ See e.g. *R v Nelson*, 2020 ONSC 1728 at para 41 [*Nelson*]; *R v Bear*, 2010 SKCA 47 at para 16 [*Bear*]; *R v Shingoose*, 2020 SKCA 45 at para 52 [*Shingoose*]; *R v Kazman*, 2020 ONCA 251 at para 17 [*Kazman*].

Further, obligations to produce personal health information may impose additional burdens on already vulnerable groups. As Terry Skolnik has observed, impoverished individuals may lack the resources to obtain such medical documentation.²⁷ Thus, such an evidentiary burden may be in tension with section 493.2(b) of the *Criminal Code*, which requires judges to take into account “the circumstances of ... accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.”²⁸

Furthermore, as Lisa Kerr and Kristy-Anne Dubé point out, focusing on personal health risks overlooks the severe conditions to which individuals are remanded:

[T]he very measures which help to prevent outbreaks — cancelling visits, suspending programs, isolating inmates in cells — are precisely what make the experience of custody more severe. This is why the pandemic matters in all cases, not only in cases of individual vulnerability or during active outbreaks.²⁹

Given the benefit of release to the individual accused and to the community, have judges required evidence of personal health risk, or have they recognized the need to undertake a more generalized depopulation mandate? The cases reflect a somewhat divided judiciary. While appellate cases on section 679 have largely found that the accused must present evidence of individual risk, lower courts dealing with section 515 are more variable, especially those from the start of the pandemic.³⁰ A handful of illustrative decisions are reviewed below.

Appellate courts considering whether to grant release pending appeal under section 679 have generally required the offender to establish a particularized risk.³¹ For example, the Saskatchewan case of *Shingoose* involved a 69-year-old diabetic offender, making him especially vulnerable to an adverse outcome if he were to contract COVID-19.³² Justice Jackson was satisfied he had a reasonable release plan and, combined with the threat COVID-19 presented to him, found he ought to be released.³³ *Shingoose* can be contrasted with *R. v. Bear*, released 4 days later, also written by Justice Jackson, regarding a healthy 41-year-old offender who had not presented any evidence regarding his unique risks from COVID-19 as compared to the general prison population.³⁴ Accordingly, Justice Jackson found no material change in circumstances which would warrant revisiting the earlier decision to deny him release.³⁵

Another early, and now widely cited, case is *Kazman*, from Ontario, which involved a 64-year-old with chronic health conditions who sought release pending the results of his

²⁷ Skolnik, *supra* note 9 at 169.

²⁸ *Supra* note 8, s 493.2(b).

²⁹ Kerr & Dubé, “Pains,” *supra* note 6 at 334.

³⁰ *Criminal Code*, *supra* note 8, ss 515, 679.

³¹ See e.g. *Shingoose*, *supra* note 26 at paras 48, 52; *Bear*, *supra* note 26 at paras 15–19; *Kazman*, *supra* note 26 at para 17–21; *R v Ledesma*, 2020 ABCA 194 at paras 26–27 [*Ledesma*]; *R v Myles*, 2020 BCCA 105 at para 40; *R v JJ*, 2020 ONCA 280 at paras 36–37; *Currie v R*, 2020 CanLII 42273 at paras 21–25 (NBCA).

³² *Shingoose*, *ibid* at paras 7–48.

³³ *Ibid* at paras 50–52.

³⁴ *Bear*, *supra* note 26 at paras 15–16.

³⁵ *Ibid* at para 19.

application for leave to appeal to the Supreme Court.³⁶ While the merits of his application were weak, the offender did not present any safety or non-compliance risks and his medical condition made him especially vulnerable to serious illness if he contracted COVID-19, which favoured release.³⁷ While Justice Harvison Young expressly noted the offender's poor health, she also referenced the community benefits flowing from depopulation of the prisons:

As the public health authorities have emphasized at this time, the need for social distancing is not only a question of protecting a given individual but also the community at large. In the prison context, a COVID-19 outbreak may turn into wider community spread as prison staff return home. As we are repeatedly hearing during this pandemic, the wider the spread, the greater the pressure will be for scarce medical resources.³⁸

While this passage emphasizes the community benefits of release and could be read as suggesting the pandemic has introduced a more general depopulation mandate, Justice Harvison Young then expressly noted that the circumstances of this case warranted release and that bail in other cases would not be automatically granted just because COVID-19 was raised.³⁹

A month later, Justice Rowbotham on the Alberta Court of Appeal authored *R. v. Ledesma*, where a 33-year-old offender submitted expert evidence that highlighted the heightened risk of contracting COVID-19 in prison settings.⁴⁰ However, the affidavit did not deal specifically with the offender or his place of imprisonment.⁴¹ Justice Rowbotham found general arguments about the need to reduce prison populations in order to reduce the spread of COVID-19 were not sufficient to support the offender's release.⁴² More specific evidence about his institution or his health condition would be required to support release on the basis of COVID-19.⁴³

In contrast to these appellate decisions, several lower courts considering release under section 515 have not required the accused to establish heightened individualized risk from COVID-19.⁴⁴ Many of these cases occurred at the beginning of the pandemic: the newness and urgency of the crisis seemed to spur more ambitious depopulation objectives, and consequently, cases in this vein appear less common in recent months.⁴⁵ For example, *R. v. J.R.* was released 20 April 2020, authored by Justice Schreck, who observed:

Everyone must play a part if attempts to control this pandemic are to be effective. This includes the courts. In my view, during this pandemic, reasonable members of the public would expect the courts to give significant weight to the public health implications of incarcerating individuals. Obviously, there will be some people who cannot be released notwithstanding the pandemic. However, in my view, while this

³⁶ *Kazman*, *supra* note 26 at paras 1, 8.

³⁷ *Ibid* at paras 15–17.

³⁸ *Ibid* at para 18.

³⁹ *Ibid* at para 20.

⁴⁰ *Ledesma*, *supra* note 31 at paras 13, 27.

⁴¹ *Ibid* at para 13.

⁴² *Ibid* at para 28.

⁴³ *Ibid* at paras 27–28.

⁴⁴ *Criminal Code*, *supra* note 8, s 515.

⁴⁵ See Kerr & Dubé, "Pains," *supra* note 6 at 334 ("[a]s the pandemic wore on into fall 2020, decisions from the Court of Appeal for Ontario seemed increasingly unwilling to let it function as a robust factor").

pandemic is ongoing, where a person's detention is not required on the primary or secondary ground, detention on the tertiary ground alone will rarely be justified.

...

[R]educing the inmate population does not only benefit the inmate being released but, rather, the community as a whole. It follows from this that in considering whether bail should be granted, the accused's health, while relevant, is by no means dispositive.⁴⁶

Similar sentiments can be found in the May 2020 decision of *R. v. E.M.*, where Justice Quigley wrote:

Crown counsel argues that E.M. is healthy, and housed in an institution which is free of infection, at least at the present time.

...

However, as the scientific evidence shows, it is not just a question of the particular inmate: reducing the prison population benefits not only inmates, but equally importantly, correctional staff and the public as a whole.

...

COVID-19 is not, as has been suggested, a "Get Out of Jail Free" card.... Accused persons who were previously un-releasable remain un-releasable. However, ... [a]s long as this pandemic persists with no vaccines or other strategies to truly control it, detention on the tertiary ground alone will rarely be justified absent primary or secondary ground concerns.⁴⁷

Both decisions suggest that section 515(10)(c) should not be used to justify detention whilst the pandemic continues, a stance that would set apart the tertiary ground by essentially suspending its operation during COVID-19. Judge Gorman rejected this approach in *R. v. Jeon*, released at the end of April 2020:

To suggest that detention pursuant to section 515(10)(c) will be "rarely justified" ignores the nature of section 515(10) of the *Criminal Code*. The three grounds for denial of release in that provision are separate and distinct.

...

In *St-Cloud*, the Supreme Court rejected the proposition that the denial of bail pursuant to section 515(10)(c) of the *Criminal Code* is limited to "rare cases" or "exceptional circumstances."

⁴⁶ 2020 ONSC 1938 at paras 47, 50 [citations omitted]. See also *R v CJ*, 2020 ONSC 1933 at paras 8–10; *Cain*, *supra* note 23 at paras 8–9.

⁴⁷ 2020 ONSC 3099 at paras 62–63, 67.

...

As a result, I conclude that the Pandemic has not changed the manner in which section 515(10)(c) is to be applied.

...

For the Pandemic to be considered as a circumstance in determining if bail should be granted, there must be an evidentiary basis beyond its mere existence.... There should be evidence relating to the specific accused.

...

[T]he Pandemic is not a stand-alone grounds for release. Release or detention is based solely of the provisions contained within the *Criminal Code*. There is no inherent power to deny or grant judicial interim release. In limited circumstances, the presence of the Pandemic may be a factor, but not one that can be used to ignore the mandatory statutory criteria.⁴⁸

Judge Gorman’s approach largely accords with a “Business as Usual” attitude to the pandemic.⁴⁹ Under this model of emergency response, legal frameworks operate the same in times of normalcy as in times of crisis: “Ordinary legal rules and norms continue to be followed strictly and adhered to with no substantive change or modification.”⁵⁰ Judge Gorman’s approach might allow some exceptions on the margins: cases close to release anyways, with individualized risk tipping the scale. But by and large, his approach would not encourage the more wide-spread use of bail during the pandemic or alter the considerations that usually go into release determinations.

Other cases have similarly dismissed the idea that the pandemic has granted authority to release in the absence of personal health vulnerabilities. For example, in *Nelson*, released on 23 March 2020, a 27-year-old accused with no medical conditions sought release.⁵¹ After taking judicial notice of the fact that younger people were at lower risk from COVID-19, Justice Edwards observed:

Mr. Nelson, while at a heightened risk of contracting the virus, nonetheless is relatively young. There is no evidence his pre-existing physical or mental health puts him into a category of persons that contracting the virus could result in severe health issues or even death.

...

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

⁴⁸ 2020 CanLII 29475 at paras 54–56, 61, 66 (Nfld Prov Ct) [citations omitted]. The *EMJR* approach was also rejected by the Ontario Court of Appeal in *R v Jaser*, 2020 ONCA 606 at para 103.

⁴⁹ See e.g. Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) at 86–89.

⁵⁰ *Ibid* at 88.

⁵¹ *Nelson*, *supra* note 26 at paras 6, 9.

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.⁵²

Similar comments emphasizing that the pandemic has a limited albeit real role to play in bail assessments can be found in *R. v. Kedoin*:

I take no issue with any person being alarmed by the spread of this virus. Still, as a matter of law, it is not determinative of judicial interim release. It is a factor, but not the only factor. If it was the sole factor to examine, the federal government could pass emergency measures to provide for the release of all remand inmates until the most serious threat from this virus has abated. It has not done that. As well, Canadian courts could decide that COVID-19 was the determinative factor. They have not done so, nor even determined that it is the most important factor when considering release.⁵³

In *Kedoin*, the accused had Hepatitis C, but Justice Danyliuk refused to draw an inference that this condition made him more vulnerable to severe outcomes from COVID-19 in the absence of evidence demonstrating that Hepatitis C was a COVID-19-risk factor.⁵⁴

The result is that young healthy people — or people that are unable to present evidence of personal risk — will remain in jail where they are more likely to catch COVID-19 than if they were able to isolate in their home communities. Even though young people face a very low chance of dying or being hospitalized, COVID-19 is not inconsequential for them.⁵⁵ First, as noted, some of these people may have high-risk conditions but are unable to present evidence of this condition.⁵⁶ Second, disregarding the risks to young, healthy people overlooks the effect of “long COVID-19,” a long-term, debilitating illness that may impact as much as a third of those who contract COVID-19.⁵⁷ Media reported on the prospect of COVID-19 causing long-term effects as early as late spring and beginning of summer 2020.⁵⁸ In the course of acknowledging the risks that detention presents, a few judges have noted that penal authorities should follow health protocols and are expected to keep inmates safe but, as the statistics on rates of disease in prison reviewed at the start of this segment suggest, keeping COVID-19 out of institutions has not been possible.⁵⁹

⁵² *Ibid* at paras 35, 41–42. See also *R v Brown*, 2020 ONSC 2626 at paras 41–42.

⁵³ *Kedoin*, *supra* note 24 at para 20.

⁵⁴ *Ibid* at para 58.

⁵⁵ *Nelson*, *supra* note 26 at para 35.

⁵⁶ Kerr & Dubé, “Pains,” *supra* note 6 at 330–31.

⁵⁷ Adrian O’Dowd, “Covid-19: Third of People Infected Have Long Term Symptoms” (2021) *BMJ* 373:n1626 1 at 1; Vanessa Bryant et al, “The Mystery of ‘Long COVID’: Up to 1 in 3 People Who Catch the Virus Suffer for Months. Here’s What We Know So Far,” *The Conversation* (6 June 2021), online: <theconversation.com/the-mystery-of-long-covid-up-to-1-in-3-people-who-catch-the-virus-suffer-for-months-heres-what-we-know-so-far-161174>; Alice G Walton, “How Common is ‘Long Covid’? New Studies Suggest More Than Previously Thought,” *Forbes* (11 April 2021) online: <www.forbes.com/sites/alicegwalton/2021/04/11/how-common-is-long-covid-new-studies-suggest-more-than-previously-thought/>.

⁵⁸ See e.g. Kelly Servick, “For Survivors of Severe COVID-19, Beating the Virus is Just the Beginning,” *Science* (8 April 2020), online: <www.science.org/content/article/survivors-severe-covid-19-beating-virus-just-beginning>. An influential Atlantic article on “long COVID” was published online in early June 2020: Ed Yong, “COVID-19 can Last for Several Months,” *The Atlantic* (4 June 2020), online: <www.theatlantic.com/health/archive/2020/06/covid-19-coronavirus-longterm-symptoms-months/612679/>.

⁵⁹ See *R v Shahid*, 2020 ONSC 6308 at para 57; *R v Phuntsok*, 2020 ONSC 2158 at para 48; Ouellet & Gilchrist, *supra* note 3.

A few observations flow from this review of bail jurisprudence. First, judges have continued to apply the usual legal framework but with adaptations to accommodate COVID-19. In particular, the “public confidence” ground in section 515(10)(c) has proven flexible, allowing incorporation of the accused’s health interest, which is an especially interesting development because, as Skolnik observed, the factors in section 515(10) do not generally permit consideration of the accused’s own interests.⁶⁰ These changes to doctrine — incorporation of accused’s interest under the “public interest” ground; recognizing that COVID-19 may permit revisitation of an earlier order — demonstrate judicial and doctrinal flexibility. The response generally fits within a model of “interpretative accommodation,” in which judges adopt existing legal frameworks to address emergency circumstances.⁶¹ Oren Gross and Fionnuala Ní Aoláin explain this type of legal response to crises:

Existing constitutional provisions, as well as laws and regulations, are given new understanding and clothing by way of context-based interpretation without any explicit modification or replacement.... While the law on the books does not change in times of crisis, the law in action reveals substantial changes that are introduced into the legal system by way of revised interpretations of existing legal rules.⁶²

This approach provides flexibility and ultimately promotes the rule of law by ensuring emergency responses take place within legal and constitutional frameworks.⁶³

The modifications to doctrine have been accompanied by measured changes in outcome: a greater tendency to release but certainly not opened floodgates. Many cases focus on the circumstances of the individual accused and reject the notion of a broader depopulation mandate brought about by COVID-19.⁶⁴ The result is far from the dramatic shift in ethos that some called for at the beginning of the pandemic.⁶⁵ The more ambitious cases came in the early days of the pandemic, as did the significant decrease in incarceration rates.⁶⁶ As the pandemic lingered, use of pre-trial detention returned to near pre-pandemic levels and the tone of cases became more tempered.⁶⁷ There are two explanations for this trend. The change in trajectory may suggest that decision-makers, including the judiciary, have become acclimatized to COVID-19. As COVID-19 becomes endemic and living with it becomes the “new normal” for judges, it no longer brings with it the same urgency for release.⁶⁸ Alternatively, or perhaps simultaneously, rejection of a broader depopulation mandate reveals a judiciary sensitive to separation of powers constraints and the limits on its ability to set broader policy objectives or implement sweeping reform to detention policies even in the context of an emergency.

⁶⁰ Skolnik, *supra* note 9 at 167; *Criminal Code*, *supra* note 8, s 515(10).

⁶¹ Gross & Ní Aoláin, *supra* note 49 at 72–79.

⁶² *Ibid* at 72–73.

⁶³ *Ibid* at 79–82.

⁶⁴ See e.g. Nelson, *supra* note 26 at paras 35, 39; Kazman, *supra* note 26 at paras 20–21.

⁶⁵ See e.g. Todd R Clear, “COVID-19 and Mass Incarceration” (2020) 72:5 Rutgers UL Rev 1417 at 1419 (writing in the American context, calling to use COVID-19 as an opportunity to reduce incarceration rates more generally: “In the spirit of never letting a good crisis go to waste, now is the time to enact a widespread, aggressive program of release from prison and jail in such a way that it will serve as the foundation for an end to mass incarceration” [emphasis omitted]). See also Kerr & Dubé, “Pains,” *supra* note 6 at 331–32.

⁶⁶ See also Stats Can, *supra* note 18.

⁶⁷ *Ibid*.

⁶⁸ Peter Zimonjic, Rosemary Barton & Philip Ling, “Tam Says the Pandemic Will Bring a ‘New Normal’ to Workplaces, Defends WHO’s Performance,” *CBC News* (28 April 2020), online: <www.cbc.ca/news/politics/tam-who-defend-new-normal-pandemic-covid-coronavirus-1.5548285>.

III. SENTENCING

As noted above, incarceration has been more onerous under COVID-19, as many institutions have tried to manage the risk by resorting to isolation and lockdown. The heightened risks of exposure in custodial settings have also already been highlighted. Recognizing these factors, prosecutorial services have been instructed to seek non-custodial sentences or reduced sentences when appropriate.⁶⁹

Cases reflect widespread consensus that COVID-19 may impact sentences through several mechanisms: a reduction in length of sentence, favouring non-custodial sentences, or an increase in credit for time in remand.⁷⁰ Judges sometimes phrase its impact in terms of a collateral consequence,⁷¹ a mitigating factor,⁷² or otherwise going to overall fitness or proportionality,⁷³ but regardless of characterization, the idea that COVID-19 properly plays a role in sentencing stems from recognition that detention conditions during the COVID-19 pandemic are worse and riskier. Thus, to ensure that the offender is not over-punished, the principle of proportionality requires modification to the sentence that might otherwise be imposed.⁷⁴ Thus, judges have been alive to the theory of what Skolnik calls “qualitative proportionality”:

Two defendants who commit a similar crime with comparable culpability may receive equally long prison sentences from a quantitative standpoint. Yet, the defendants may be sent to separate prisons with drastically different incarceration conditions, such that they experience disparate levels of hard treatment from a qualitative standpoint. The defendant who is subject to far harsher prison conditions, however, is arguably punished more than they deserve.

...

Custodial sentences during the pandemic are harsher than normal because inmates are exposed to extra health risks and psychological harms while in jail. When courts assess a sentence’s severity while ignoring the pandemic’s impact on inmates’ wellbeing, defendants can receive disproportionate punishments that are inconsistent with the basic principles of retributivism.⁷⁵

Regarding reduction in length of sentences, *R. v. Hearn*s is perhaps the leading case in this area.⁷⁶ Released in April 2020, it has been cited over 100 times since then. Dealing with a serious assault, the Crown and defence submitted a joint sentence proposal of time served.⁷⁷ Justice Pomerance accepted the proposal observing that although such a sentence would not

⁶⁹ PPSC, Memorandum, *supra* note 16.

⁷⁰ See generally Kerr & Dubé, “Pains,” *supra* note 6.

⁷¹ *R v Stevens*, 2020 BCPC 104 at para 47 [*Stevens*]; *R v Young*, 2021 BCPC 6 at para 182; *R v Chol*, 2020 ONSC 6644 at para 49; *R v Misay*, 2021 ABQB 485 at para 169 [*Misay*]; *R v Goodell*, 2021 BCSC 735 at para 50 [*Goodell*].

⁷² *R v Marmontel*, 2021 ONSC 2520 at para 37 [*Marmontel*]; *R v Aden*, 2021 ONSC 2370 at para 20 [*Aden*]; *R v Barry Mathews*, 2020 ONSC 5459 at para 46.

⁷³ *R v MW*, 2020 ONSC 3513 at paras 46–52 [*MW*].

⁷⁴ See Skolnik, *supra* note 9 at 175–76; Kerr & Dube, “Pains,” *supra* note 6 at 339.

⁷⁵ Skolnik, *ibid* at 175 [citations omitted].

⁷⁶ 2020 ONSC 2365 [*Hearn*s].

⁷⁷ *Ibid* at para 10.

be fit in ordinary times, it was warranted under COVID-19.⁷⁸ She noted that, while COVID-19 “does not do away with the well-established statutory and common law principles” of sentencing, it “may impact on the application of those principles.”⁷⁹ In particular, the condition of detention has a bearing on sentence fitness, and the pandemic had made the conditions of detention more onerous: “[J]ails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection.”⁸⁰ Accordingly, a reduction in length of sentence may be appropriate to ensure the sentence is fit.⁸¹ This was true even if the offender had no personal health conditions that raised his risk from COVID-19.⁸² Consideration of COVID-19 is still constrained by other sentencing principles, however. Justice Pomerance observed:

I am not suggesting that the pandemic has generated a “get out of jail free” card. The consequences of a penalty — be they direct or collateral — cannot justify a sentence that is disproportionately lenient, or drastically outside of the sentencing range. It cannot turn an inappropriate sentence into an appropriate one or justify dispositions that would place the public at risk.⁸³

Hearns focuses on the conditions of detention under COVID-19, not the risk to the offender, and thus does not require that the offender establish heightened risk from COVID-19 to receive a sentencing benefit.⁸⁴ Many judges have agreed, finding that COVID-19 consideration attaches irrespective of personalized risk.⁸⁵ However, *Hearns* has not been universally followed in this regard. Other judges have required, either expressly or implicitly, the offender establish personalized risk before being satisfied that COVID-19 impacts sentence.⁸⁶ A provincial divide seems to be emerging on this topic: the *Hearns* approach, with no need to establish personal risk is more common in Ontario, whereas British Columbia courts have generally required proof of individual jeopardy.⁸⁷

For example, in *R. v. Greer* out of the Supreme Court of British Columbia, Justice Crabtree declined to reduce the sentence on the basis of COVID-19, observing there was no evidence the offender was particularly vulnerable to negative COVID-19 outcomes.⁸⁸ Nor was Justice Crabtree satisfied detention conditions warranted a reduction in sentence, as it was not clear whether those conditions would continue or abate in the future and it would be “speculative” to take them into account.⁸⁹

As Justice Pomerance in *Hearns* made clear, COVID-19 does not throw sentencing principles out the window: a sentence reduction is not automatic.⁹⁰ In *R. v. Morgan*, for

⁷⁸ *Ibid.*

⁷⁹ *Ibid* at para 15.

⁸⁰ *Ibid* at para 16.

⁸¹ *Ibid.*

⁸² *Ibid* at para 12.

⁸³ *Ibid* at para 23.

⁸⁴ *Ibid* at paras 16, 20.

⁸⁵ See e.g. *R v Kleykens*, 2020 NSCA 49 [*Kleykens*]; *R v Kandhai*, 2020 ONSC 1611; *Hearns*, *supra* note 76; *MW*, *supra* note 73; *Marmontel*, *supra* note 72; *Aden*, *supra* note 72; *Stevens*, *supra* note 71 (health risk relevant but not necessary).

⁸⁶ *Goodell*, *supra* note 71; *R v Lariviere*, 2020 ONCA 324; *R v Greer*, 2020 BCSC 1131 [*Greer*]; *R v Chen*, 2021 BCSC 697; *R v Milne*, 2020 BCSC 2101; *Misay*, *supra* note 71.

⁸⁷ Kerr & Dubé, “Pains,” *supra* note 6 at 339–41.

⁸⁸ *Greer*, *supra* note 86 at para 51.

⁸⁹ *Ibid* at para 53.

⁹⁰ *Hearns*, *supra* note 76 at para 22.

example, the offender sought a reduced sentence because of COVID-19 lockdown conditions which kept him confined to his cell for significant periods of time.⁹¹ The Ontario Court of Appeal declined to intervene observing that his sentence was already light and reducing it further would result in an unfit sentence.⁹²

COVID-19 has also been used to prefer non-custodial sentences.⁹³ For example, in *R. v. McKibbin*, the British Columbia Court of Appeal considered the fitness of a 6-month prison sentence imposed for trafficking on a 62-year-old man with chronic obstructive pulmonary disease.⁹⁴ The Court concluded that the sentence would otherwise be fit if it were not for the pandemic and his personal health condition, which increased his risk of severe outcome if he contracted COVID-19.⁹⁵ The pandemic made the sentence “harsher” than it would be pre-pandemic and this warranted a departure from usual practice with the Court substituting a suspended sentence instead.⁹⁶

In *R. v. Kleykens*, the Nova Scotia Court of Appeal increased a sentence to two years less a day from the 90-day jail sentence imposed by the sentencing judge.⁹⁷ However, because of the pandemic, the Court ordered that the offender’s sentence be judicially stayed, as “[i]t would not be in the interests of justice to re-incarcerate him.”⁹⁸ The Court did not observe any health vulnerabilities for the offender but rather emphasized the importance of physical distancing to reduce viral spread.⁹⁹ Requiring him to return to jail would increase the risk to him, to other inmates, and to prison staff.¹⁰⁰ The decision in *Kleykens* was released in June of 2020, and the Nova Scotia Court of Appeal seems to have backed away from this approach with *R. v. Dawson*; *R. v. Ross* released in March 2021.¹⁰¹ In that case, the Court of Appeal overturned a conditional sentence order and substituted a lengthier period of imprisonment.¹⁰² The Court found that the conditional sentence was not an appropriate sentence, even taking COVID-19 into account:

The pandemic has not eliminated carceral sentences. Sentencing during COVID must still respect sentencing imperatives.... COVID is a relevant factor in the determination of what constitutes a fit sentence. However, the principles of sentencing, that include denunciation and deterrence, cannot be rendered meaningless.¹⁰³

⁹¹ 2020 ONCA 279 [*Morgan*].

⁹² *Ibid* at para 11.

⁹³ See also *R v DD*, 2020 ONCJ 218 at para 57 (granting a conditional sentence for a sexual assault conviction, noting that the offender would have been sentenced to imprisonment but for COVID-19); *Goodell*, *supra* note 71 at para 84 (issuing a conditional sentence order for a child pornography conviction, expressly noting that imprisonment was avoided only because of COVID-19); *Marmontel*, *supra* note 72 at paras 46–47 (finding COVID-19 one factor among others justifying a custodial sentence order instead of imprisonment on a charge of perjury).

⁹⁴ 2020 BCCA 337 at paras 2–3.

⁹⁵ *Ibid* at para 25.

⁹⁶ *Ibid* at paras 24, 30.

⁹⁷ *Kleykens*, *supra* note 85.

⁹⁸ *Ibid* at para 99.

⁹⁹ *Ibid* at para 94.

¹⁰⁰ *Ibid* at para 95.

¹⁰¹ 2021 NSCA 29 [*Dawson*]. See also *R v SCC*, 2021 MBCA 1 (refusing to judicially stay sentence after increasing initial sentence).

¹⁰² *Dawson*, *ibid* at para 110.

¹⁰³ *Ibid* at paras 105–106.

Unlike in *Kleykens*, the Court declined to judicially stay the sentence, writing that “in this case ... incarceration is necessary. A further reduction in the sentences or a stay of the sentences would be contrary to the cardinal principle of proportionality.”¹⁰⁴

Finally, judges have awarded additional credit for time spent on remand on account of the increased restrictions put in place during the pandemic. This effect has been especially noticeable in Ontario, taking the form of the “*Duncan* credit,” named for a 2016 case from the Ontario Court of Appeal which found especially onerous detention conditions may warrant a sentence deduction outside the statutory 1.5 to 1 credit.¹⁰⁵ Indeed, in *R. v. Marshall*, the Ontario Court of Appeal observed that “[t]he very restrictive conditions in the jails and the health risks brought on by COVID-19 are a good example of the kind of circumstance that may give rise to a ‘*Duncan*’ credit.”¹⁰⁶ In *R. v. M.W.*, Justice Boswell granted extra credit because of the harsh remand conditions which included substantial time in lockdown and a ban on visitors.¹⁰⁷ He did not require specific evidence about how the offender was impacted by the lockdown and was willing to judicially notice “that lockdowns and other COVID-19-related restrictions have a strong tendency to increase stress amongst inmates and tend to lead to feelings of depression and hopelessness.”¹⁰⁸

While several recent lower court decisions out of Alberta have also recognized that COVID-19 remand time ought to result in a sentence deduction,¹⁰⁹ generally speaking, courts outside Ontario have been less willing to recognize an additional or extra deduction for remand time served under COVID-19.¹¹⁰ For example, in both *R. v. Bennett*, out of Newfoundland, and *R. v. Thompson*, out of Saskatchewan, the sentencing judges refused to recognize a “*Duncan* credit” in part because there was no evidence on how COVID-19 made the offenders’ remand time more onerous.¹¹¹ In *Thompson*, the sentencing judge observed that the offender used his time in lockdown for personal betterment.¹¹² This observation seems to miss the point that lockdown can still have negative physical and emotional effects, even if the offender uses the time productively. These two decisions are at odds with Justice Boswell’s willingness in *MW* to take judicial notice of the negative impacts of lockdown.¹¹³

One question emerging from the sentencing cases: who bears responsibility for reducing inmates’ risk of exposure to COVID-19 by allowing early release: the parole board or sentencing judges? In several cases, courts have declined to reduce sentences and have instead observed that the parole board is best positioned to offer early release if deemed an appropriate response to COVID-19.¹¹⁴ These judges are essentially signalling that offenders’

¹⁰⁴ *Ibid* at para 99.

¹⁰⁵ *Criminal Code*, *supra* note 8, s 719(3.1). See also *R v Marshall*, 2021 ONCA 344 at paras 50–51 [*Marshall*] (explaining basis and rationale for credit).

¹⁰⁶ *Marshall*, *ibid* at para 50 [citations omitted].

¹⁰⁷ *MW*, *supra* note 73 at paras 40–44.

¹⁰⁸ *Ibid* at para 43.

¹⁰⁹ See e.g. *R v Leblanc*, 2021 ABQB 230; *R v Gaudrault*, 2021 ABQB 461; *R v Gordey*, 2020 ABQB 425.

¹¹⁰ The “*Duncan* credit” isn’t well-established outside Ontario: Kerr & Dubé, “Pains,” *supra* note 6 at 338; *R v Sheppard*, 2020 ABCA 455; *R v Beaver*, 2021 ABCA 227 (in both cases, not recognizing *Duncan* credit in the case at hand, but recognizing the basis for it is sound). For examples of cases not recognizing extra COVID-19 remand credit, see e.g. *R v Dillon*, 2021 SKQB 78; *R v Lemmen*, 2020 BCPC 67.

¹¹¹ 2021 NLSC 26; 2021 SKPC 13 [*Thompson*].

¹¹² *Thompson*, *ibid* at paras 140–42.

¹¹³ *MW*, *supra* note 73 at para 43.

¹¹⁴ See e.g. *Greer*, *supra* note 86 at para 54; *Morgan*, *supra* note 91 at para 12.

remedies to risks in prisons lie elsewhere. For example, recall *Greer* where Justice Crabtree declined to reduce the offender's sentence as he lacked evidence as to when the restrictive detention conditions would ease.¹¹⁵ He concluded: "[I]t strikes me that any impact that COVID-19 may have upon Mr. Greer and the sentence received is best left in the hands of the parole authority in this province."¹¹⁶

The concern is that judges may, by deferring to parole authorities, attempt to "wash their hands" of responsibility for the conditions to which they sentence individuals, refusing to acknowledge they actually have a large measure of control over whether to expose inmates to unsafe or onerous conditions.¹¹⁷ However, Justice Crabtree's point in *Greer* is well-taken: it is not clear how long the pandemic — and thus additional restrictions in prison — will continue especially with wide availability of vaccines.¹¹⁸ The immediate future is the most predictable that the judge is sentencing the offender to experience immediate restrictive conditions, but it becomes less certain further down the road, in a year or more, whether those restrictive conditions will still be in place. Thus, a sentencing judge is well-positioned to take into account the immediate conditions and the parole board is better positioned to take into account conditions later on. Thus, for short sentences, a judge can take COVID-19 into account without improper speculation; for longer sentences, the responsibility will be split between the judge and the parole board. This will ensure the principle of parity which may otherwise be at jeopardy: if a judge grants a large discount, but conditions revert to normal relatively soon, that offender will experience less punishment than similar offenders sentenced to a longer sentence during usual times.¹¹⁹

Overall, COVID-19 considerations have been well-incorporated into sentencing jurisprudence. Like in the realm of bail, some tensions have emerged: how much does personal risk matter? Who should be making these decisions: judges or other institutional actors? But overall, sentencing law has proven to be adaptable and flexible in these emergency circumstances. The result is more than outcomes that keep people out of jail. Kerr and Dubé have noted "judges have been willing to connect these changes to longstanding and central sentencing principles like proportionality and parity."¹²⁰ Doctrine in this area — already requiring consideration of a wide variety of factors from both the common law and

¹¹⁵ *Greer*, *ibid* at paras 52–53.

¹¹⁶ *Ibid* at para 54. See also *R v Storey*, 2021 ONSC 1760 at para 68; *Morgan*, *supra* note 91 at para 12; *Dawson*, *supra* note 101 at para 108.

¹¹⁷ See similarly, Kerr & Dubé, "Pains," *supra* note 6 at 329–30 (observing similar comments made by judges in bail decisions that prison authorities have responsibility to keep detained persons safe: "In these approaches, we see an old trope of judicial deference that sees jails and prisons as 'beyond the ken of courts'" [citations omitted]).

¹¹⁸ *Greer*, *supra* note 86 at para 53. It appears that many restrictions in prison have started to ease, though some are still in place. For example, as of mid-July 2021, all but one federal prison in Ontario permitted visitors: Hala Ghonaim, "Grand Valley Institution is Only Prison in Ontario Still Closed to Visitors," *CBC News* (14 July 2021), online: <www.cbc.ca/news/canada/kitchener-waterloo/waterloo-region-grand-valley-institute-for-women-1.6101228>. As of early July 2021, provincial jails in Quebec continued to impose a 14-day quarantine on new arrivals: Ji Eun Lee & Craig Desson, "Quebec COVID Restrictions are Loosening, but Jails Are Still Putting Inmates in Solitary to Quarantine," *CBC News* (5 July 2021), online: <www.cbc.ca/news/canada/montreal/quebec-jail-quarantine-controversy-covid-1.6088287>.

¹¹⁹ *R v Pham*, 2013 SCC 15 at para 9 [*Pham*]: "[T]he parity principle requires that a sentence be similar to those imposed on similar offenders for similar offences committed in similar circumstances."

¹²⁰ Kerr & Dubé, "Pains," *supra* note 6 at 341.

the *Criminal Code* and permitting extensive judicial discretion — has been fairly easily adapted to deal with the COVID-19 crisis.¹²¹

IV. TRIAL WITHIN A REASONABLE TIME

Thousands of trials were delayed when courtrooms across the country shut down in mid-March 2020.¹²² When they reopened several months later in June and July, many did so only partially and with COVID-19-safety protocols like social distancing in place.¹²³ Courts encouraged virtual proceedings where possible, and some centres did not fully reopen until the fall of 2020 or later.¹²⁴ While courts work on clearing the backlog, many cases have surpassed the time limits set by the Supreme Court in *Jordan*, the leading case on the section 11(b) right to be tried within a reasonable time.¹²⁵ This section of the article reviews how judges have ruled on section 11(b) applications brought during the pandemic. As discussed in more detail below, courts have found that COVID-19-caused delay is permissible or, in the words of *Jordan*, delay caused by COVID-19 is an “exceptional circumstance” that ought to be deducted from the total time to trial.¹²⁶ However, two related matters of contention have arisen: how much delay should be deducted and whether the Crown has sufficiently mitigated COVID-19 delay. These questions are linked in theory though not always in the cases: how much time ought to be deducted depends on whether the Crown ought to have done more to mitigate the delay. Judges have tended to favour the government in their decisions finding Crown mitigation was sufficient and deducting the entire period of delay from shutdown to new trial date rather than the shorter period of court closures.¹²⁷ The decisions suggest that courts have significant leeway to determine how cases should be prioritized and what sort of delay associated with rescheduling and reopening is permissible. But as the initial disruption and shock of COVID-19 recedes and the profession adjusts to “the new normal,” there seems to be heightened dispute over whether continued delay should be attributed to COVID-19 or to institutional failures to deal with the pandemic’s fallout. The pandemic has exacerbated not created the delay problem. Failure to provide sufficient resources to address lengthy wait times predates the pandemic and this failure continues with COVID-19 making an already troubling situation worse. This section of the article begins with a brief review of *Jordan*, followed by a discussion of representative court decisions from the last year. The section concludes with some observations on trends and highlights future pressure points in this area.

¹²¹ *Ibid* at 339; *Pham*, *supra* note 119 at para 8.

¹²² Olivia Stefanovich, “Justice Minister Says He’s Ready to Legislate if Pandemic Delays Lead to Charges Being Tossed,” *CBC News* (15 July 2020), online: <www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893> (“in Ontario alone, the Criminal Lawyers’ Association estimates the backlog of delayed court cases now runs to 30,000”); Kevin Nielsen, “Ontario Courts Shutting down in a Bid to Slow Coronavirus,” *Global News* (16 March 2020), online: <globalnews.ca/news/6683865/ontario-courts-coronavirus/>.

¹²³ See e.g. The Canadian Bar Association, “Practice Direction and Order (COVID-19): Update #4 (June 11, 2020)” (17 June 2020), online: *Legal and Justice System Updates* <www.cba.org/Membership/COVID-19/Legal-Justice-Updates-Courts>; Ontario Court of Justice, “COVID-19 Notices and Information,” online: <www.ontariocourts.ca/ocj/covid-19/>.

¹²⁴ See e.g. The Canadian Press, “Alberta Jury Trials to Resume Next Month at Offsite Locations Due to COVID-19,” *Global News* (6 August 2020), online: <globalnews.ca/news/7256475/alberta-jury-trials-coronavirus-pandemic/>; Court of Queen’s Bench for Saskatchewan, “Directive Update” (31 August 2020), online: <sasklawcourts.ca/wp-content/uploads/2021/06/QB_COVID_Directive_Aug31.pdf>.

¹²⁵ *R v Jordan*, 2016 SCC 27 [*Jordan*].

¹²⁶ *Ibid* at para 75.

¹²⁷ See e.g. *R v Stack*, 2020 ONCJ 544 at paras 43–45 [*Stack*].

Jordan reworked the framework governing section 11(b) by setting numerical “ceilings” governing time to trial, namely, 18 months in provincial court and 30 months in superior court.¹²⁸ Once defence delay is subtracted from the overall time to trial, total delay falling above the ceiling is “presumptively unreasonable” and must be justified by the Crown as an “exceptional circumstance.”¹²⁹ The *Jordan* majority explained that “[e]xceptional circumstances lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.”¹³⁰ Further, the Crown must “show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling.”¹³¹

The majority identified two categories of exceptional circumstance, but only one is of concern here, namely “discrete exceptional events.”¹³² Examples given in *Jordan* include personal health emergencies of trial participants or recanting witnesses.¹³³ Importantly, the Crown and the justice system must “be prepared to mitigate the delay resulting from a discrete exceptional circumstance.”¹³⁴ For example, the justices highlighted the need to prioritize cases that have run into unexpected delays.¹³⁵ Delays caused by exceptional events should be subtracted from the total time and the remaining time compared to the ceiling to determine whether section 11(b) was breached.¹³⁶

Cases have held that the pandemic can constitute a discrete exceptional event which is unsurprising given that it was unforeseen and unavoidable and at the start of the pandemic at least, the Crown could not mitigate the delay. One of the earliest decisions is *R. v. Ali Ismail*, released in July 2020, where the accused’s trial for attempt murder was scheduled for April 2020 but was delayed when the courthouse shuttered.¹³⁷ The parties met for a special COVID-19 pre-trial conference when the court re-opened at the start of June, and new court dates in mid-August 2020 were selected.¹³⁸ Judge Boblin found COVID-19 was an “exceptional circumstance” as it was “reasonably unforeseen and reasonably unavoidable” and “neither Crown counsel nor the court could reasonably remedy delays emanating from the impact of the pandemic once they arose.”¹³⁹ The judge pointed to the Crown’s efforts to mitigate COVID-19-related delay, for example by asking the defence to consider making admissions and encouraging the defence to file its *Charter* applications with dispatch.¹⁴⁰ Judge Boblin also considered the actions of the court in mitigating delays pointing to, for example, its efforts to provide updates and its adoption of virtual technology to deal with matters where possible.¹⁴¹ Thus, the judge deducted the period from end of April (when the

¹²⁸ *Jordan*, *supra* note 125 at para 46, 58.

¹²⁹ *Ibid* at paras 47–48, 60–67.

¹³⁰ *Ibid* at para 69 [emphasis omitted].

¹³¹ *Ibid* at para 70 [emphasis omitted].

¹³² *Ibid* at paras 71, 75.

¹³³ *Ibid* at paras 72–73.

¹³⁴ *Ibid* at para 75.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

¹³⁷ 2020 BCPC 144 at para 138 [*Ali Ismail*].

¹³⁸ *Ibid* at paras 60, 62.

¹³⁹ *Ibid* at para 137.

¹⁴⁰ *Ibid* at para 139.

¹⁴¹ *Ibid* at paras 140–52.

trial was scheduled) to mid-June (the earliest the new trial could have been scheduled).¹⁴² Note that the period of delay was calculated from the date of the scheduled trial (late April), and not from the date of shutdown (mid-March) to the first date available for rescheduling (mid-June), and not the actual trial date (mid-August). The deductions brought the delay below the *Jordan* ceiling and the accused's section 11(b) application failed.¹⁴³

Another early and frequently cited decision is *R. v. Folster*, also released in July 2020, where the accused's trial on impaired driving charges had been adjourned from 28 November 2019 until 25 May 2020 to hear from the last few witnesses.¹⁴⁴ However, the court shut on 16 March 2020 as a result of the pandemic, and the trial was ultimately rescheduled for 11 August 2020.¹⁴⁵ The judge found COVID-19 was a discrete exceptional event over which no one had control.¹⁴⁶ The judge deducted 16 March (when courts closed) until 11 August (the new trial date) as COVID-19 delay.¹⁴⁷ Note the difference between this case and *Ali Ismail*: here, the judge deducted from the day of shutdown (16 March) rather than the scheduled, but delayed, trial (25 May), whereas in *Ali Ismail*, the judge deducted from scheduled trial (end of April) rather than date of shutdown (mid-March).¹⁴⁸ The difference in approach leads to over a month more counting as COVID-19 delay in *Folster* than in *Ali Ismail*. Respectfully, the approach in *Ali Ismail* seems the sounder of the two, as the shutdown did not affect the trial until it dislodged it from its scheduled date: the trial was not scheduled in March, and there is no suggestion it would have been moved up to March, so the shutdown did not cause delay to *this* case in March.¹⁴⁹ Ultimately deducting a longer period of time in *Folster* did not make a difference because even with this exceptional event and defence deductions, the time to trial was still over the *Jordan* ceiling, so the section 11(b) stay was granted.¹⁵⁰

In contrast, the judge in *R. v. Ottewell* only deducted the time the courthouse was shut, from mid-March to mid-June 2020 rather than the entire period of delay.¹⁵¹ In that case, the pre-trial scheduled for April 2020 had to be rescheduled because of the COVID-19 shutdown, but the Crown had failed to abide by its disclosure obligations, and disclosure problems continued into the spring and fall of 2020.¹⁵² The trial was ultimately scheduled for March 2021.¹⁵³ Because the matter was not ready to go to trial in spring of 2020 and the obstacle to proceeding was lack of disclosure rather than COVID-19, the judge was unwilling to deduct the whole period from court shutdown in spring 2020 until the actual hearing date in spring 2021.¹⁵⁴ *Ottewell* emphasizes the need for the Crown to show the delay is caused by COVID-19: delay and the mere presence of COVID-19 without linkage is insufficient.¹⁵⁵

¹⁴² *Ibid* at para 155.

¹⁴³ *Ibid* at para 156.

¹⁴⁴ [2020] MJ No 187 at paras 5–12 (Man Prov Ct) [*Folster*].

¹⁴⁵ *Ibid* at para 14.

¹⁴⁶ *Ibid* at paras 13–14.

¹⁴⁷ *Ibid* at paras 28–30.

¹⁴⁸ *Ibid* at paras 12, 29–30; *Ali Ismail*, *supra* note 137 at paras 143, 155.

¹⁴⁹ *Ali Ismail*, *ibid* at para 138.

¹⁵⁰ *Ibid* at para 43.

¹⁵¹ 2020 ONCJ 623 at 32 [*Ottewell*]. See also *R v ASL*, 2021 ONCJ 269 at paras 23–24 (the judge refused to deduct the entire period of delay from shutdown to new trial date, noting that even when sittings resumed at the start of July, the Crown still had not fulfilled its disclosure obligations).

¹⁵² *Ottewell*, *ibid* at 10–12.

¹⁵³ *Ibid* at 12.

¹⁵⁴ *Ibid* at 27, 31–32.

¹⁵⁵ *Ibid* at 27.

Many cases have recognized the “knock-on effects” COVID-19 has had and the difficulty in trying to reschedule cases into an already strained system. Often this recognition takes the form of finding that courts efforts to mitigate the exceptional circumstance of COVID-19 were sufficient. For example, in *R. v. Olmstead*, the accused’s trial initially scheduled for June 2020 was rescheduled to March 2021.¹⁵⁶ The defence argued that the judge should not deduct this entire eight month period of delay because “sufficient efforts were not made to ameliorate the delay caused by the pandemic.”¹⁵⁷ Justice Gee disagreed and after commenting on the unique, wide-spread, and unfamiliar nature of the COVID-19 emergency, he observed:

As Doherty J.A. stated in *R. v. Allen*, “no case is an island to be treated as if it were the only case with a legitimate demand on court resources.” The COVID-19 pandemic disrupted and delayed every case that was in the system when it struck. Crime did not cease due to the pandemic and new cases continued to be added to the backlog created by delay. Decisions had to be made to deal with this backlog in the context of a pandemic that was then, and still is ongoing. Priority in resetting cases was given, rightfully so, to in-custody matters. Out of custody and other matters were then allowed to reset their dates on a staggered basis, depending on when they were presumptively adjourned. The decision by the court to address these cases in this fashion was reasonable in the circumstances.

...

In this context, in this case, I find the steps taken by all parties to address the delay, move the matter forward and reset the trial dates were reasonable. This matter, even though it was approaching the 18 month presumptive ceiling prior to the pandemic caused delay, was not left to languish. The manner in which cases were prioritized to be reset was reasonable in the overall context of the pandemic and the disruption it caused. Furthermore, there is no evidence before me this prioritization methodology was not adhered to in resetting the dates in this case, or that other matters were inappropriately prioritized over this case.¹⁵⁸

Similar reasoning can be found in *Kalashnikoff v. Her Majesty the Queen*.¹⁵⁹ The accused’s trial was rescheduled from May 2020 to May 2021.¹⁶⁰ The accused argued that only the time from initial trial date until resumption of in-person sittings in summer 2020 should be deducted.¹⁶¹ According to Justice Dilts, the question turned on whether COVID-19-related delay had been properly mitigated.¹⁶² She reviewed numerous policies and procedures including the decision to prioritize in-custody matters and cases with *Jordan* problems adopting virtual technology, and introducing physical safeguards before concluding:

Against these observations, I have not been presented with any evidence that suggest this Court should have mitigated the delay caused by the COVID 19 pandemic differently. Nor am I aware that any Canadian

¹⁵⁶ 2021 ONCJ 327 [*Olmstead*]. See also *R v Mohamed*, 2021 ONCJ 325 at paras 28–32 (The judge found that the entire period of delay from initial trial date (26 June 2020) to rescheduled trial date (9 June 2021) was attributable to the pandemic and therefore should be deducted. The ripple effects of COVID-19 meant that, even when sittings reconvened, cases could not be heard immediately). See further *R v Khan*, 2021 ONCJ 195 at para 14.

¹⁵⁷ *Olmstead*, *ibid* at para 21.

¹⁵⁸ *Ibid* at paras 32, 36 [citation omitted].

¹⁵⁹ 2021 ABQB 327.

¹⁶⁰ *Ibid* at para 2.

¹⁶¹ *Ibid* at para 3.

¹⁶² *Ibid* at para 10.

jurisdiction responded materially differently than here. In fact, the Court of Queen’s Bench response to the pandemic was consistent with that of other superior courts across Canada.

...

This Court responded to the pandemic by setting priorities for when in-person matters could resume, allocating resources impacted by the pandemic in places to meet those priorities, allowing summer sittings, reconfiguring its courtrooms to allow for the resumption of in-person hearings and rolling out on line solutions. The challenges presented by the pandemic were unprecedented and complex. The magnitude of change in the context of this Court has been staggering.¹⁶³

Ultimately, Justice Dilts deducted over 12 months for COVID-19 which brought the delay below the *Jordan* ceiling.¹⁶⁴

What about matters not directly affected by the shutdown period because the trial was scheduled outside the time of shutdown? In both *Greenidge* and *Zappone*, trial dates were selected prior to the pandemic that would have put both cases over the *Jordan* ceiling (*Greenidge* was set for February 2021 and *Zappone* for December 2020).¹⁶⁵ The Crown in both cases argued that the pandemic was still responsible for the delay and ought to result in a deduction.¹⁶⁶ This argument was rejected in *Greenidge* where Justice Monahan observed that “the delay above the ceiling was put in place months before the pandemic.”¹⁶⁷ In order to accept a linkage between the delay and COVID-19, Justice Monahan held that the Crown had to prove on a balance of probabilities that an earlier trial date would have been found “but for the pandemic.”¹⁶⁸ The Crown could not satisfy this test, as its affidavit evidence only established that it would have *tried* to get an earlier date.¹⁶⁹ Further, even if the delay had been caused by COVID-19, he was not satisfied the Crown properly mitigated the delay, as it should have looked at the prospect of dropping charges against co-accused or asking the court to prioritize this case.¹⁷⁰

In contrast, Justice Duncan in *Zappone* found that some of the delay could be attributed to COVID-19.¹⁷¹ Just before the pandemic hit, the Crown sent emails to the defence seeking to find an earlier court date.¹⁷² The December 2020 trial date ultimately fell through and the parties were told that it would take some time to reschedule because of the COVID-19-related backlog.¹⁷³ It took over two months to set a new date, which was in June 2021.¹⁷⁴ Justice Duncan found that the pandemic had “an indirect effect in that it prevented the re-

¹⁶³ *Ibid* at paras 32–33.

¹⁶⁴ *Ibid* at para 35. See also *Stack*, *supra* note 127; *R v Matthew*, 2021 ONCJ 60 [*Matthew*]; *R v Venne*, 2021 ONCJ 80 (all finding that COVID-19 caused delay longer than just court shutdown).

¹⁶⁵ *R v Greenidge*, 2021 ONCJ 57 at para 28 [*Greenidge*]; *R v Zappone*, 2021 ONCJ 332 at paras 19–20 [*Zappone*].

¹⁶⁶ *Greenidge*, *ibid* at paras 9–10; *Zappone*, *ibid* at paras 8–11.

¹⁶⁷ *Greenidge*, *ibid* at para 28.

¹⁶⁸ *Ibid* at para 30 [emphasis omitted].

¹⁶⁹ *Ibid* at paras 32–36.

¹⁷⁰ *Ibid* at para 44.

¹⁷¹ *Zappone*, *supra* note 165 at paras 19–20.

¹⁷² *Ibid* at para 3.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

scheduling of the trial to dates falling within a constitutionally acceptable period.”¹⁷⁵ He observed that “had it not been for the pandemic, the Crown would have been successful in re-scheduling this trial to some date below the presumptive ceiling.”¹⁷⁶ This finding was based on the Crown’s affidavit that stated it would have been successful in finding a new date and this statement “was not challenged or contradicted” by the defence.¹⁷⁷ While the Crown did not try to find a date sooner than June 2021, Justice Duncan rejected the argument that the Crown should have acted more quickly to secure a new date: “Even if relentlessly pressed by the Crown to expedite this case, it is hard to imagine the system doing much better, particularly in the context of the pandemic.”¹⁷⁸ With proper deductions, the case was just below the ceiling so the accused’s section 11(b) application was rejected.¹⁷⁹

Note the different approaches taken in *Zappone* versus *Greenidge* on the issue of whether the Crown should have asked the court to prioritize the case in question. The judge in *Zappone* found that such a request would be pointless given the demands on the system, whereas the judge in *Greenidge* wanted the Crown to at least submit the request.¹⁸⁰ The former focuses on likely outcomes whereas the latter is concerned with effort.

In an article published in late 2020, Palma Paciocco argued that judges were ill-equipped to evaluate mitigation in the context of the pandemic because they lack both the evidence and the institutional competence to look at “systemic efforts to limit trial delay” unlike the usual review of “case-specific” steps courts and Crown prosecutors can take to mitigate delay.¹⁸¹ However, in her view, the solution to this problem was not to get rid of the requirement that the Crown demonstrate mitigation because that would allow “some accused persons to suffer avoidable, unreasonably protracted trial delay with no remedy.”¹⁸² For that reason and because COVID-19-related delay was a system-wide problem, she suggested that COVID-19 should not fall within the *Jordan* “exceptional circumstance” factor but rather should be dealt with in a new approach that granted sentencing discounts.¹⁸³ Courts have not adopted her proposal to modify the section 11(b) remedy and have continued to grant a stay instead of a sentencing discount.¹⁸⁴ And, as she predicted, judges have struggled to evaluate the Crown’s mitigation attempts.¹⁸⁵ Courts have been alive to the mitigation requirement, especially in more recent decisions, but the actual review has been done with a light touch and largely accepts those mitigation efforts were sufficient.¹⁸⁶ As a result, courts have found exceptionally long COVID-19-related delays — up to a year in some cases — permissible.¹⁸⁷ Courts have shown significant deference to institutional actors’ decision-making on reopening and prioritization. Delay — perhaps even lengthy delay — was understandable at the start of the pandemic when little was known about the novel coronavirus and its spread

¹⁷⁵ *Ibid* at para 20 [emphasis omitted].

¹⁷⁶ *Ibid* [emphasis omitted].

¹⁷⁷ *Ibid* at para 9.

¹⁷⁸ *Ibid* at para 41.

¹⁷⁹ *Ibid* at paras 20–21.

¹⁸⁰ *Ibid* at paras 38–39; *Greenidge*, *supra* note 165 at para 44.

¹⁸¹ Palma Paciocco, “Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19” (2021) 57:3 Osgoode Hall LJ 835 at 838, 851–53.

¹⁸² *Ibid* at 856.

¹⁸³ *Ibid* at 838, 840.

¹⁸⁴ See e.g. *Greenidge*, *supra* note 165 at para 49.

¹⁸⁵ Paciocco, *supra* note 181 at 853–54.

¹⁸⁶ See e.g. *Stack*, *supra* note 127 at paras 43–44; *Matthew*, *supra* note 164 at paras 127, 131.

¹⁸⁷ See e.g. *Stack*, *ibid* at paras 45, 54.

was unexpected and unpredictable. But now that courts have lived with the pandemic for more than a year and will continue to live with it well into the future, COVID-19 delays are increasingly predictable and rectifiable through increased resources in terms of additional court space and judges. Lengthy delays from COVID-19 seem less justifiable now than at the start of the pandemic. If COVID-19 continues to cause such significant delays, the real problem seems to be that the government has failed to provide sufficient resources so trials can run in a timely manner, with COVID-19-safe processes in place. The government has been aware of COVID-19's impact on the justice system for over a year, which is plenty of time to address the delays it is causing. Judges should increase scrutiny of mitigation efforts accordingly. In other words, at this point in the pandemic, the argument that COVID-19, rather than lack of institutional resources, is causing the delay is becoming less tenable. Having timely trials is not just a lofty goal but rather a constitutional right: it cannot continue to take a back seat.

Finally, with respect to doctrinal developments, COVID-19 has been dealt with in the regular section 11(b) framework.¹⁸⁸ The government did not invoke section 33; courts have not departed from *Jordan* (for example, no reworking or suspension of the ceilings globally; no revisit of the remedy such as a sentencing discount).¹⁸⁹ This is possible because built into *Jordan* is a sort of avenue to consider exigent circumstances, although the pandemic was clearly outside the sort of exceptional events the Supreme Court contemplated when it wrote the decision (the *Jordan* majority mentioned personal health issues like a judge getting sick or recanting witnesses).¹⁹⁰ However, this avenue left enough room for adaptation to address emergency situations.

It is often thought ordinary frameworks are more protective of rights than emergency frameworks.¹⁹¹ But, here, failure to deploy an emergency framework may prove to be problematic and come at the expense of section 11(b) rights over the long term. When an emergency framework ends — it expires or it is revoked — it should be made clear the emergency is over and the courts should return to business as usual.¹⁹² Without that clear endpoint, it may not be obvious when the pandemic and thus the emergency is over. After all, it is predicted COVID-19 will be endemic in our communities for years to come.¹⁹³ For the section 11(b) *Jordan* test, this means it's not clear when COVID-19 no longer qualifies as an exceptional circumstance, and thus no longer justifies delay. COVID-19 may indeed be used to justify delays well into the future. In this context, perhaps a “bright line” between exceptional and normal signified by the invocation of emergency powers would have been useful. *Jordan* itself is a “bright line” doctrine which was seen as preferable to the uncertainty that had accompanied the earlier flexible *Morin* test.¹⁹⁴ Dealing with COVID-19

¹⁸⁸ Paciocco, *supra* note 181 at 858.

¹⁸⁹ *Charter*, *supra* note 7, s 33 (section 33 of the *Charter*, often known as “the notwithstanding clause,” permits governments to enact laws even though they violate certain *Charter* rights).

¹⁹⁰ *Jordan*, *supra* note 125 at paras 72–73.

¹⁹¹ See Gross & Ní Aoláin, *supra* note 49 at 174–79.

¹⁹² *Ibid* at 171–75 (Gross and Ní Aoláin might dispute the premise underlying this position, that “emergency” times and “normal” times can be separated. They observe that “bright-line distinctions between normalcy and emergency are frequently untenable”).

¹⁹³ Katherine S Xue, “Coexisting with the Coronavirus,” *The New Yorker* (21 July 2021), online: <www.newyorker.com/science/annals-of-medicine/coexisting-with-the-coronavirus>.

¹⁹⁴ *Jordan*, *supra* note 125 at para 29; *R v Morin*, [1992] 1 SCR 771.

in the *Jordan* framework has reintroduced some of that uncertainty, without clear markers of when its impact will lessen or end.

V. CONCLUSION

The judicial response to the pandemic has not involved express departure from usual legal frameworks. But for judges, COVID-19 is certainly a present and prominent consideration, and usual frameworks have been modified to fit the urgency and unusualness of the times. Doctrine has proven sufficiently accommodating, as the tests are designed with mechanisms allowing consideration of exigent circumstances. While judges have acknowledged the pandemic and its impact, there has been some disagreement over how exactly it ought to be taken into account. As an example from the bail and sentencing contexts, judges have inconsistently answered the question of whether individual risk matters. Higher court guidance would be an asset, but it involves clarifying application of the tests, not serious departure from them.

On the other side of the coin, while doctrines are flexible, they are also hard to budge. They are goliaths, not to be toppled by even emergency circumstances. Doctrine's prongs are flexible and permit wide-ranging considerations, but doctrine itself is stable. What this means is that the pandemic has not been an opportunity for judges to rethink some of the issues around incarceration or the criminal justice system more globally, as some scholars and advocates have called for.¹⁹⁵ The doctrine is too tightly anchored to be dislodged, inhibiting judges from thinking in ways that challenge underlying assumptions or longstanding norms.

In the case of section 11(b), the doctrine might be too accommodating. The exceptional event "escape hatch" built into the *Jordan* ceilings has allowed huge amounts of delay to be excused. Unlike sentencing and bail jurisprudence which has involved more nuance, balancing COVID-19 as one factor among others, section 11(b) doctrine is more all-or-nothing. This is by design, as *Jordan* was intended to remedy the problems of unpredictability and inconsistency created by a complex, multi-factor balancing approach.¹⁹⁶ However, the all-or-nothingness during COVID-19 has served to benefit the state at the detriment of individual rights. The Supreme Court did build oversight into the provision in *Jordan* — the Crown must establish mitigation — but as Paciocco predicted, the judiciary has struggled with exercising this supervision in a robust way.¹⁹⁷

That judges have been unwilling to second-guess the state during an emergency would not surprise anti-terrorism scholars who have warned that courts tend not to be good guardians of individual rights during emergencies as they are reluctant to restrain government power for fear of obstructing emergency response.¹⁹⁸ This review has confirmed that courts' COVID-19 response generally demonstrates a high level of deference to the government.

¹⁹⁵ See e.g. Clear, *supra* note 65 at 1419; Kerr & Dubé, "Pains," *supra* note 6 at 330.

¹⁹⁶ *Jordan*, *supra* note 125 at para 38.

¹⁹⁷ *Ibid* at para 75.

¹⁹⁸ Gross & Ni Aoláin, *supra* note 49 at 77–79.

Finally, I want to comment on one challenge for the future. Gross & Ní Aoláin have documented how powers exercised during emergencies tend to get expanded into normal times.¹⁹⁹ With uneven vaccine coverage, more virulent variants, and predictions that the novel coronavirus is here to stay, how will we know when the COVID-19 emergency is over, and doctrine should return to “normal”? It seems increasingly likely there will be no clear endpoint, and doctrine will be stuck in COVID-19 limbo for a long time to come.

¹⁹⁹ *Ibid* at 171–243.