

Court of Queen's Bench of Alberta

Citation: R v Aiello, 2021 ABQB 772

Date: 20210923
Docket: 190960880Q1
Registry: Calgary

Between:

Her Majest the Queen

Crown

- and -

Vince Maresio Aiello

Defendant

Corrected judgment: A corrigendum was issued on September 24, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Oral Judgment
of the
Honourable Mr. Justice N.E. Devlin**

[1] The Court convened this morning to select a jury for the accused's trial on charges of sexual assault set to commence next Monday. This trial is taking place in what is colloquially known as the "fourth wave" of the COVID 19 pandemic. Less than a week ago, the Government of Alberta declared a public health emergency as a result of the number of individuals becoming critically ill and hospitalized by this disease.

[2] Prior to selection, I raised with Counsel whether unvaccinated jurors should be excused pursuant to s. 632(c) of the *Criminal Code*. Neither the Crown nor the accused took any position on this issue. Orally in the presence of the jury panel, I indicated that my decision was to exercise my discretion to excuse any juror who did not confirm that they were fully vaccinated, and indicated that I would provide reasons to follow. These are those reasons.

[3] Factually, I am satisfied that vaccination is a safe and highly effective means of preventing the spread of the coronavirus, the development of COVID 19 infections, and severe illness in those who do become infected. The scientific consensus on this fact is notorious and beyond reasonable dispute. I take judicial notice of it: ***R v Find***, 2001 SCC 32 at para 48.

[4] Short of ceasing all contact with other humans, vaccination is now proven to be the single most effective method of reducing the risk and prevalence of COVID 19, a disease which has ravaged our society, its institutions, and the physical and mental well-being of all Canadians.

[5] Conversely, I have no evidence before me, and indeed can posit none, that would suggest that an absence of vaccination is more or less prevalent in any one or more social, ethnic, or other demographic group. Indeed, through the selection process that followed my oral decision, the handful of individuals who stated that they were not fully vaccinated spanned the age, gender, and ethnic spectrums.

[6] Legally, section 632(c) of the *Criminal Code* provides the following authority.

Excusing jurors

632 *The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of...*

(c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

[7] This judicial discretion to safeguard the proper administration of justice is paramount over any provincial privacy legislation. Moreover, privacy interests must yield to rights protected by the *Canadian Charter of Rights and Freedoms*.

[8] The right to trial by jury is guaranteed by section 11(f) of the *Charter*. This right necessarily comprises a requirement that that jury be fair and impartial. That means they must not be influenced by outside factors extraneous to the evidence presented in the case.

[9] The Supreme Court has also confirmed that the right to trial by jury does not include an entitlement that the jury include a proportional representation of all the diverse groups in Canadian society: ***R v Kokopenace***, 2015 SCC 28 at para 39. In that same judgement, the Supreme Court quoted Rosenberg J.A. in ***R v Church of Scientology***, 1997, 33 O.R. (3d) 65 (CA), at p 121, where in the late distinguished juror stated that:

What is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system.

[10] Excusing unvaccinated individuals does not reduce the representativeness of the jury in any discernible manner. There is, therefore, no right to have unvaccinated individuals on a jury.

[11] I do, however, find as a fact, based on our current state of scientific knowledge, that unvaccinated jurors stand at a significantly elevated risk of contracting, developing, and spreading COVID 19. This fact has numerous implications.

[12] First, an unvaccinated individual is at increased risks of contracting COVID 19 both between jury selection today and the commencement of the trial next week and during the trial. This would unfairly and unnecessarily compromise the health and safety of the other jurors, court staff who work closely with them, and indeed all trial participants.

[13] Second, a juror becoming symptomatic during the trial would likely scupper the entire proceeding. Calling together hundreds of citizens, as a necessary prerequisite to a jury trial, is no small matter. This is particularly true during a pandemic. Moreover, a backlog of trials, and demand for trial time, has built up over the past year. The public and judicial resources dedicated to a jury trial are both scarce and precious, especially right now. Needlessly increasing the risk that a trial run under these circumstances is aborted due to a COVID 19 infection would bring the administration of justice into disrepute in the eyes of the public.

[14] Third, any potential delay to the successful completion of the trial implicates the section 11(b) rights of the accused. The Supreme Court's decisions in *Jordan* and *Cody* make it abundantly clear that timely justice is a key element of meaningful justice. An accused person whose trial was derailed and further delayed because a potentially unvaccinated juror brought COVID 19 into the jury room could legitimately complain that the conduct of the state in creating that situation was not reasonable. *R v Jordan*, 2016 SCC 27; *R v Cody*, 2017 SCC 31.

[15] I find that protecting the right to expeditious justice mandates screening for unvaccinated jurors at the present time.

[16] Fourth, jurors must feel secure in carrying out their duties. Triers of fact in criminal cases must not have extrinsic concerns play upon their minds in the course of their work. I find that members of the jury who are unsure as to one another's vaccination status would be reasonably concerned and apprehensive about this factor throughout the proceedings. This distraction could well undermine their focus on the trial. While likely unquantifiable, such a distraction would implicate the essence of the right to be tried by an impartial jury.

[17] In both of these respects, I agree with Justice Phillips who recently concluded as follows in *R v Frampton*, 2021 ONSC 5733 at para 7:

To my mind, in the context of the burgeoning "fourth wave", allowing an unvaccinated person to serve as a juror would irresponsibly introduce risk to the trial. An unvaccinated juror is a potential conduit for the Covid-19 virus to make its way into the jury room. Obviously, such a result would derail the proceeding. Indeed, worrying about such an outcome would likely become a constant distraction.

[18] These considerations are, in my respectful view, decisive in favour of exercising my authority under section 632(c).

[19] A fifth concern also arises which, while not necessary to decide the issue, is nonetheless worthy of consideration. Specifically, the jury's working dynamic may be compromised by uncertainty as to their mutual vaccination status. The strain being placed upon our critical healthcare infrastructure, and the resulting limits that have been imposed through emergency

measures upon the fundamental freedoms of all citizens, has made the question of vaccination status a particularly deeply felt and heated matter in Canadian society.

[20] While future social and scientific developments will hopefully calm this divide, it is fair to say that the vaccinated members of the jury could well fear and resent any of their number who had not taken similar, sensible health precautions for the mutual benefit of all. Equally, an unvaccinated juror may feel singled-out or unwelcome. Introducing this potential source of tension and dissension into the jury room is undesirable, especially when there are other compelling reasons to avoid doing so. Again, I note that this concern is very much of the present moment and not one that would, of itself, justify exclusion.

[21] While I am in general agreement with the reasons expressed by Justice Phillips in *Frampton*, I place no reliance on the notion of the juror's physical fitness to perform their function being relevant. A healthy but unvaccinated juror is likely fit, within the meaning of that concept in the *Jury Act*, RSA 2000, c J-3, s 5(1)(e). The animating concern is not their current well-being, but the possibility that their incautious behaviour will disrupt the trial.

[22] For all these reasons, I am satisfied that the administration of justice is better served at this singular point in time, in the unique circumstances we face, by providing the jury with the comfort and security of knowing that they are all fully vaccinated.

[23] Finally, I am buttressed in my conclusion by the increasingly universal requirement that individuals in this province, and indeed across the Western world, provide proof of vaccination status before accessing public spaces or events, as well as by the recent order issued by Chief Justice of the Ontario Superior Court requiring that all jurors in that jurisdiction be fully vaccinated: *Order of Chief Justice Geoffrey B. Morawetz*, August 31, 2021.

[24] Prophylactic measures have been taken in Alberta to safely conduct jury trials, and have largely been able to do so throughout the pandemic. However, it is only recently that full vaccination has become readily and universally available. While our jury process is designed to be physically distant and compliant with public health measures currently prevailing, those measures are a minimum, not a maximum. Vaccination is the most certain, safe, and obvious way of preventing the spread of COVID 19 and attenuating the risk it poses to the most important parts of our life, including the proper administration of criminal justice.

[25] For all of those reasons, jurors who advise me that they are not fully vaccinated, or declined to state their vaccination status, shall be excused.

Heard on the 23rd day of September, 2021.

Dated at the City of Calgary, Alberta this 23rd day of September, 2021.

N.E. Devlin
J.C.Q.B.A.

Appearances:

Devinder Brar
for the Crown

Darin D. Sprake
for the Defendant

**Corrigendum of the Oral Judgment
of
The Honourable Mr. Justice**

Corrected paragraph 8:

The right to trial by jury is guaranteed by section 11(f) of the *Charter*. This right necessarily comprises a requirement that that jury be fair and impartial. That means ~~that~~ they must not be influenced by outside factors extraneous to the evidence presented in the case.

Corrected paragraph 24:

Prophylactic measures have been taken in ~~this~~ Alberta to safely conduct jury trials, and have largely been able to do so throughout the pandemic. However, it is only recently that full vaccination has become readily and universally available. While our jury process is designed to be physically distant and compliant with public health measures currently prevailing, those measures are a minimum, not a maximum. Vaccination is the most certain, safe, and obvious way of preventing the spread of COVID 19 and attenuating the risk it poses to the most important parts of our life, including the proper administration of criminal justice.