COVID-19 and Its Impact on Tax and Estates

Presented by: Lorne Saltman with assistance from Jennifer Searle
October 1, 2020

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Topics to Discuss

1. Introduction
2. International Tax Issues
3. Extension of Payment Deadlines
4. Charity Registration Applications
5. Suspension of Limitation Periods
6. Witnessing Formalities
7. Solicitor-Client Communication

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International Tax Issues

- Income Tax Residency
  - Individuals
    - Effect of Covid 19 travel restrictions on common law test and 183-day deeming rule
  - Corporations
    - Effect of Covid 19 travel restrictions on determining “central management and control”

- Carrying on Business and Permanent Establishments

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International Tax Issues …cont'd

- Cross-Border Employment
  - Non-Resident Employees
  - Canadian-Resident Employees
- Procedural Matters
  - Regulatory Waiver Requests
  - Dispositions of Taxable Canadian Property

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Extension of Payment Deadlines

- Tax payment deadline extended to September 30
- Interest on existing tax debt waived for limited period
- Deadline for filing tax returns extended to September 30
- No extension for filings claims for Scientific Research and Experimental Development tax credits
- Amend *Income Tax Act* to provide flexibility for certain time limits

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Charity Registration Applications

- Extension of time to respond to CRA's requests
- Can apply online for charitable status
- Audit activities are suspended
- T3010 filing deadline extended to December 31, 2020

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Suspension of Limitation Periods

- Ontario limitation periods that were suspended on March 20, 2020 have resumed on September 14, 2020
- Federal limitation periods that were suspended on March 13, 2020 have resumed on September 13, 2020

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Witnessing Formalities

- Wills and Powers of Attorney
  - Remote execution permitted
  - Temporary measure – current Order expires October 22, 2020
  - Practicalities of remote execution
- Commissioning of Affidavits
  - Amendment to s. 9 of *Commissioners for Taking Affidavits Act* - permit remote administration of oath or declaration
  - Regulation outlining procedure in force August 1, 2020
- Notarization of Documents
  - Amendment to s. 3 of *Notaries Act* - permit notaries to perform duties without being in person's physical presence by Regulation
  - No Regulation permitting remote notarization made

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Solicitor-Client Communication

- Communicating with clients during a pandemic and compliance with LSO Rules of Professional Conduct
- Client identification and verification
- Assessing capacity virtually for Wills and Powers of Attorney

Questions?

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COVID-19, A Time to Take Advantage of Unique Tax Planning Opportunities

Presented by: Lindsay Histrop
September 2020

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Tax Planning with Losses

Carrying capital losses backwards or forwards

- Allowable capital losses may be carried back against taxable capital gains realized in the last 3 years
  - Capital losses realized in 2020 can be carried back and deducted against capital gains realized in 2019, 2018, and 2017
- Allowable capital losses may also be carried forward indefinitely to offset capital gains in future years
- Superficial loss rules deny the capital loss if the taxpayer or an affiliated person (which includes a spouse and a corporation controlled by the taxpayer) acquires an identical security within 30 days of the disposition

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Income Splitting Opportunities

Attribution

- Attribution rules apply when an individual gifts, or loans without interest, funds to certain family members for the purpose of earning income from property or capital gains
- When funds are gifted to a spouse, income from property (including dividends and interest) and capital gains derived from those funds are attributed to the individual who made the gift
- When funds are gifted to a minor child, income from property (but <u>not</u> capital gains) derived from those funds are attributed to the individual who made the gift

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Income Splitting Opportunities

Attribution

- Attribution does not apply to income from property or capital gains derived from funds gifted to an adult child
- Capital gains earned by a trust, the beneficiaries of which include only children (whether minor or adult), are not subject to attribution

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Income Splitting Opportunities

Income Splitting with a Trust for Children

- Loan funds without interest to a trust, the beneficiaries of which include only your children
- Trust invests in investments with primary goal of earning capital gains
- Capital gains realized by the trust are distributed to children who have little or no other income and taxed at a lower tax bracket
- The proceeds of disposition can be used to pay for the child's expenses, provided the trust authorizes this, or reinvested by the child

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Income Splitting Opportunities

Income Splitting with a Prescribed Rate Loan

- Funds loaned to a spouse or trust for minor child, with interest charged at a rate at least equal to the prescribed rate at the time the loan is made, are exempt from attribution
- From April 1, 2018 to June 30, 2020, the prescribed rate was 2%
- Since July 1, 2020, the prescribed rate has fallen to 1%, which is the lowest possible rate, making these loan plans very attractive
- Interest must be paid within 30 days after the end of each year that the loan is outstanding

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Income Splitting Opportunities

Income Splitting with a Prescribed Rate Loan

- The individual making the loan will recognize the interest income earned in his or her tax return
- The family members (or trust for spouse and/or children) receiving the loan will deduct the interest expense against investment income earned
- The loan may be called at any time if the funds are required
- The appreciation in the invested assets remains with the family members or trust to whom the loan was made

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Income Splitting Opportunities

Income Splitting with a Prescribed Rate Loan - Example

- Mrs. A, a high-income taxpayer, has a husband, Mr. A., and 2 minor children, all of whom earn no income
- Mrs. A has $600,000 to invest
- If Mrs. A invests the funds herself and earns an 8% return, she would earn $48,000 and pay tax of $25,694 (after-tax net income of $22,306)

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Income Splitting Opportunities

Income Splitting with a Prescribed Rate Loan - Example

- If Mrs. A loans $200,000 to each of Mr. A and her 2 children, and charges 1% interest on the loans, Mrs. A will earn $6,000 in interest income and pay tax of $3,212
- Each of Mr. A and the 2 children earn the same 8% return on investment or $16,000 each. They deduct the interest expense of $2,000 each for a net investment return of $14,000 each. They pay income tax of $278 each.
- The total tax paid in this scenario by all the family members is $4,046
- Tax savings of <u>$21,648</u> per year compared to first scenario

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Income Splitting Opportunities

Income Splitting with a Prescribed Rate Loan to a Trust

- Prescribed rate loan can be made to a family trust to provide for greater flexibility
- Lender may be the trustee (but should not be settlor)
- Income can be sprinkled among family members
- Control is maintained over the type of investments made
- The trust is subject to a deemed disposition of its capital property every 21 years

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Estate Freeze

- Downward pressure from Covid-19 on value of marketable securities, private businesses and real estate
- Opportunity for an estate freeze at low values, which allows for greater income tax deferral
- Generally, an individual is deemed to have disposed of all of their property at death at fair market value
- An estate freeze fixes the fair market value of property at a point in time, so that the future growth in value of the property may accrue to the person’s heirs

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Estate Freeze

- Typically a freeze is effected utilizing shares of a private corporation
- Where the individual owns assets directly, the first step is to transfer those assets to a private wholly owned holding company on a s. 85 rollover basis
- The individual receives shares equal to the value of the assets transferred to the holding company

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Estate Freeze

- The equity shares are exchanged for fixed-value preferred shares, and new growth shares are issued to the intended beneficiaries or to a discretionary family trust
- The fixed-value preferred shares can be redeemed over time to reduce or eliminate the capital gain otherwise realized on death
- The individual effecting the freeze may be a beneficiary of the trust
- Future growth accrues to the shares owned by the trust
- The trust is subject to a deemed disposition of the shares every 21 years requiring further planning before that time

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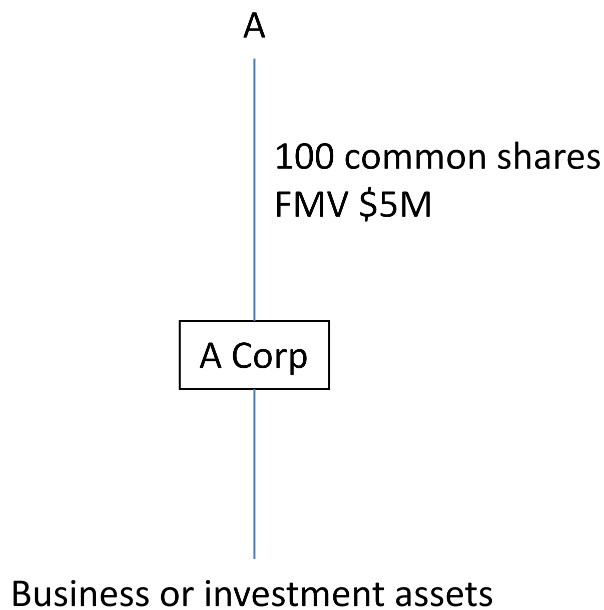
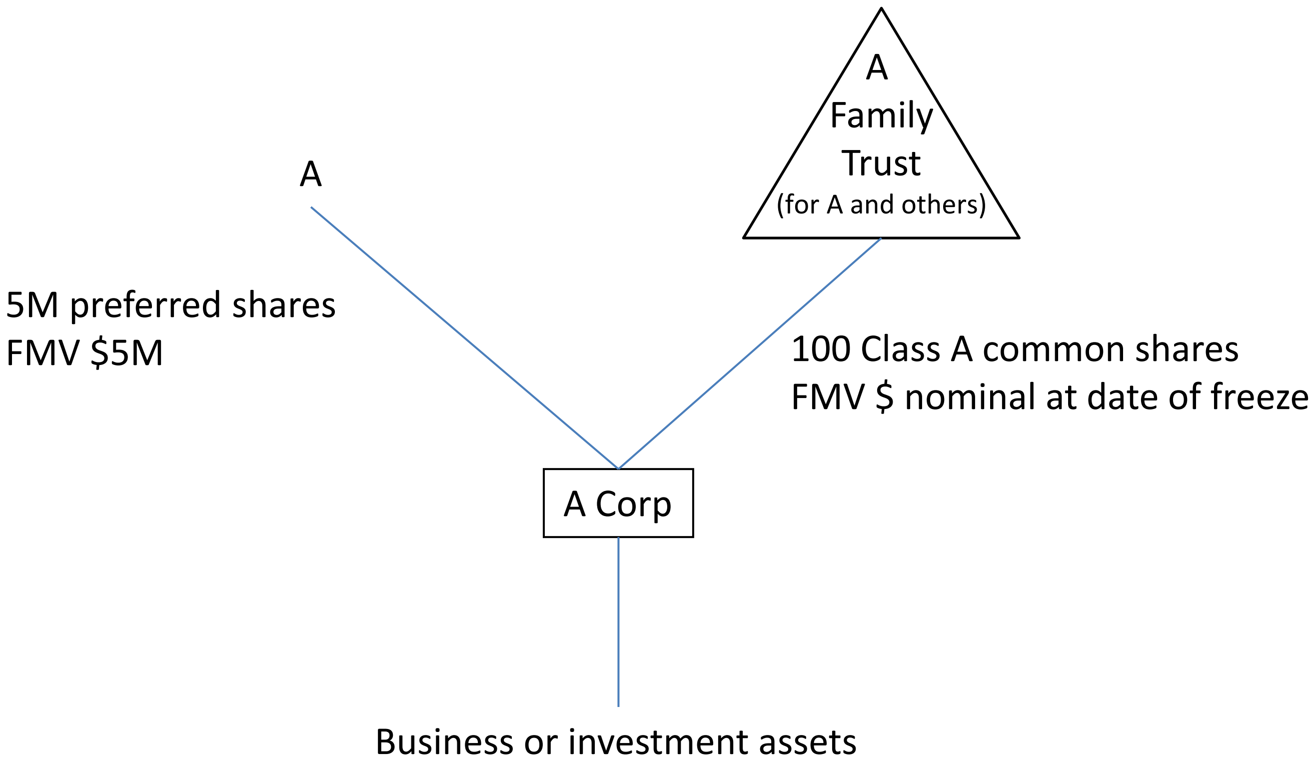
Estate Freeze



Estate Freeze



Questions?

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THANK YOU

Frustration and Pandemic – A Long Term Perspective on COVID-19 and Frustration of Contracts

Presented by: Kenneth Jull
October 1, 2020

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Frustration and Pandemic

- In these times of global health uncertainty and economic troubles it is tempting to jump to the "frustration of contract" conclusion.
- While it is tempting to see the current economic trouble as frustrating the performance of contract, there are a number of factors that must be considered when undertaking an analysis to determine if a performance of a contract has been frustrated as a result of the COVID-19 global pandemic.

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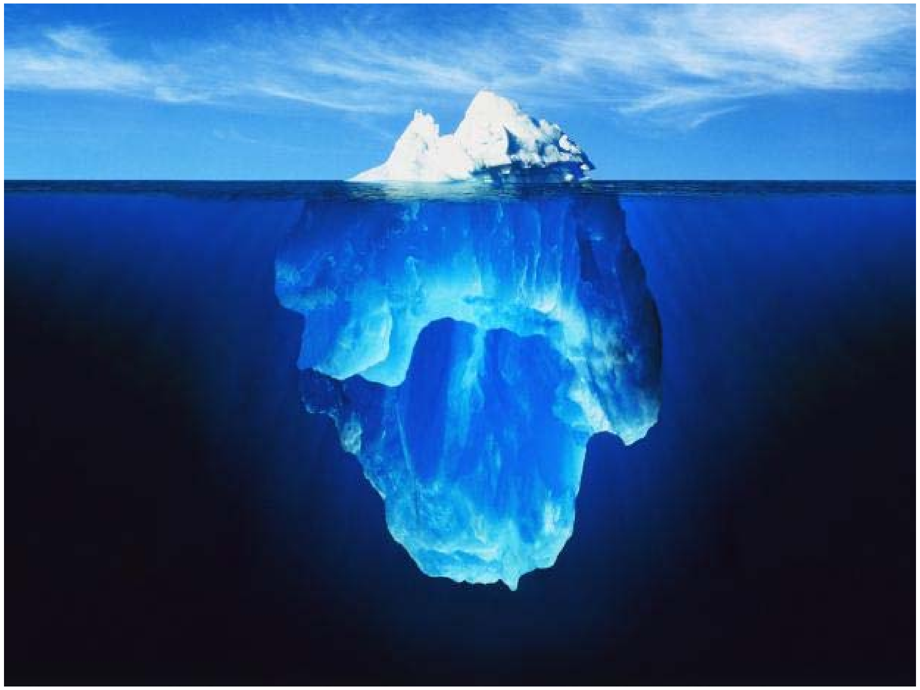

RISK

RISK ASSESSMENT

- The basic and generally accepted model of risk assessment is divided into four activities:

- (i) identifying the potential hazard;
- (ii) drawing a dose/response curve;
- (iii) estimating the amount of human exposure; and
- (iv) categorizing the result.

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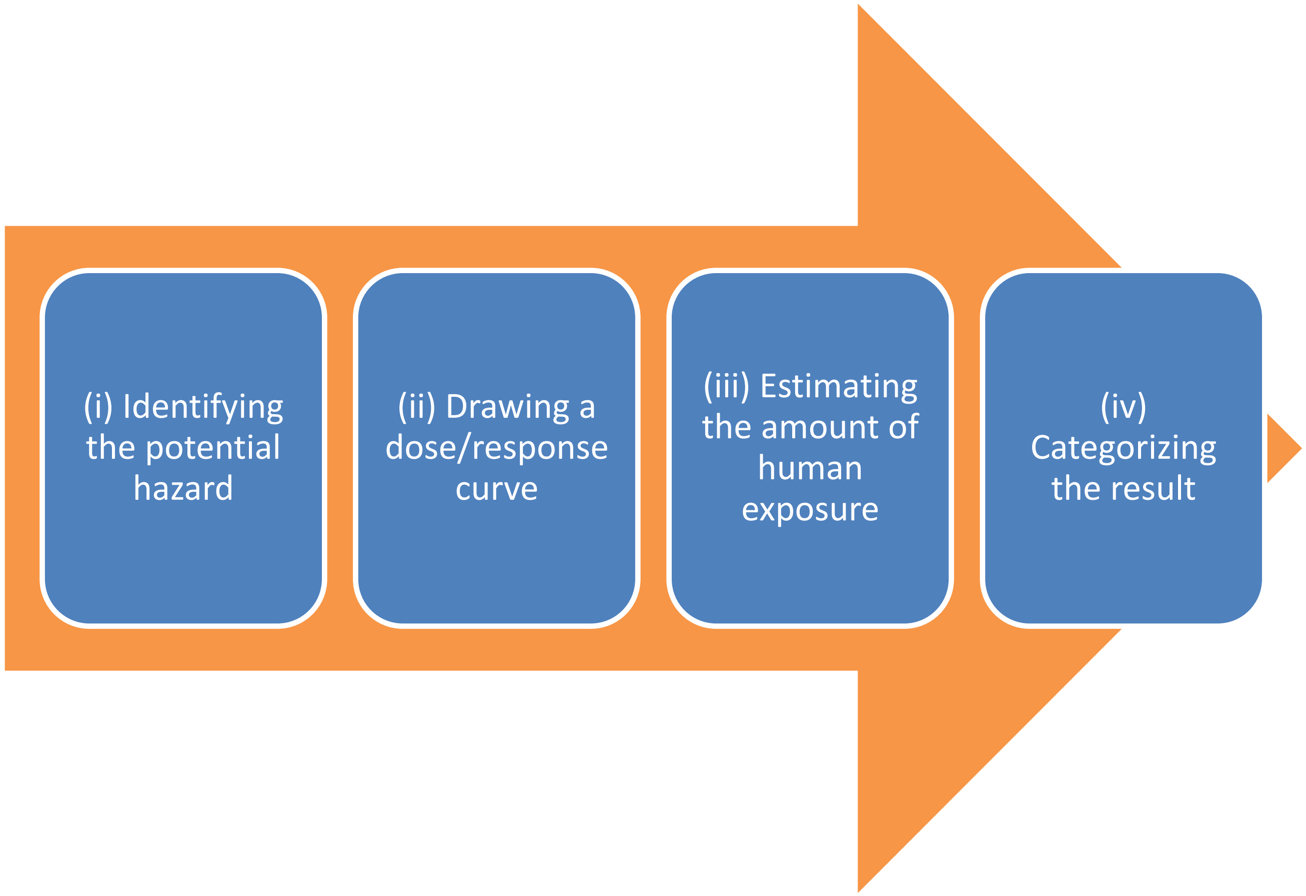
RISK ASSESSMENT



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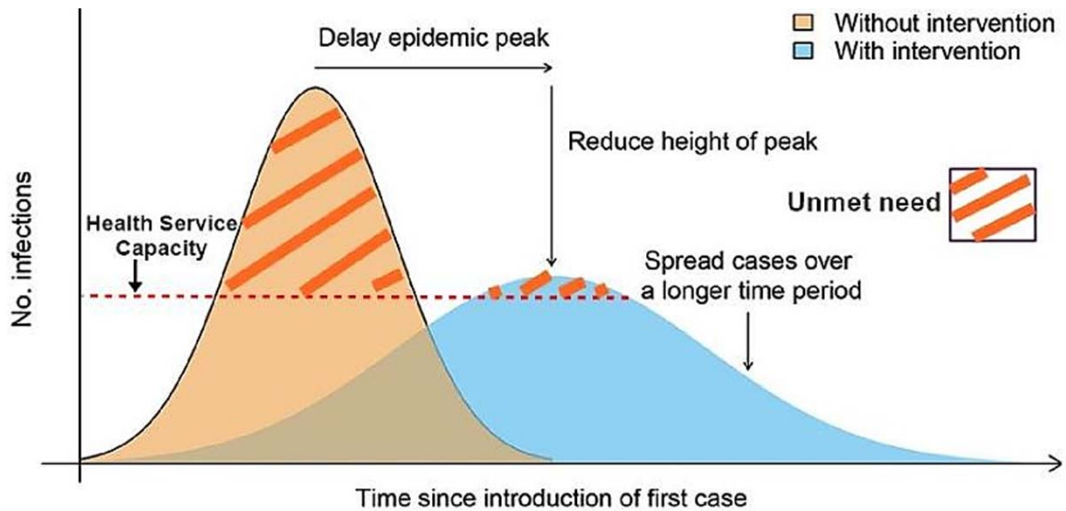
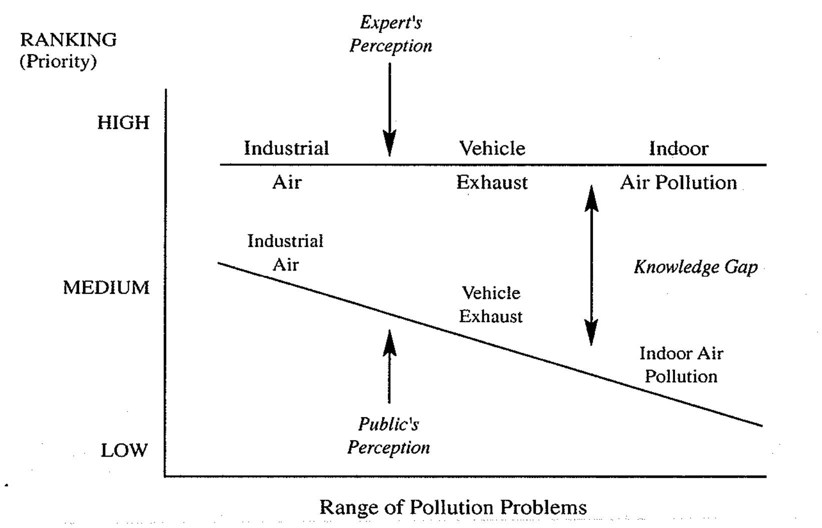

Delay epidemic peak
Without intervention
With intervention
Reduce height of peak
Unmet need
Health Service Capacity
Spread cases over a longer time period
No. infections
Time since introduction of first case

EXPERTS VERSUS PUBLIC PERCEPTION



These steps assist a business in assessing the risks posed by various scenarios. The example here, regarding pollution, shows the importance of identifying the expert and public perceptions and using those metrics in ranking the various risks within each scenario.

HEALTH AND THE ECONOMY

- Risk assessment will produce two calculations:

(1) Risk to health and safety from the virus; and

(2) Risk to the economy from the cancellation of events, remote work, business failures in relation to businesses that are shut down and impacts on the stock market and banking. ("Pricing the Economic Risk of Coronavirus: a Delay in Consumption or a Recession?" Yosef Bonaparte University of Colorado at Denver March 5rd, 2020 https://ssrn.com/abstract=3549597)

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SHORT TERM RISK ASSESSMENT

- In the short term, these calculations do not compete or conflict.
- Essentially, economists say, there won’t be a fully functioning economy again until people are confident that they can go about their business without a high risk of catching the virus.
- https://www.nytimes.com/2020/04/06/business/economy/coronavirus-economy.html

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SHORT TERM

- "Our ability to reopen the economy ultimately depends on our ability to better understand the spread and risk of the virus," said Betsey Stevenson, a University of Michigan economist who worked on the White House Council of Economic Advisers under President Barack Obama. "It's also quite likely that we will need to figure out how to reopen the economy with the virus remaining a threat."
- https://www.nytimes.com/2020/04/06/business/economy/coronavirus-economy.html

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Force Majeure v. Frustration

- Force majeure and frustration are often confused with one another. While there is some overlap between the two, they are distinct.
- In order for force majeure to apply, a specific provision must be contained in the contract. Force majeure clauses provide that parties to a contract may be excused from performance as a result of some specific event or condition, or an "Act of God". Force majeure clauses can be tailored to specific potential events.
- In contrast to force majeure, the common law doctrine of frustration may relieve parties of their contractual obligations, but only where a force majeure clause is not present.

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Frustration

- The doctrine of frustration is applicable where, "a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes a '**thing radically different from that which was undertaken** by the contract.'(*Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 SCR 943 at para 53.)

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Frustration

- The contract must at its essence become impossible to fulfil due to an unforeseen event outside the control of the parties.
- Performance must not be simply more onerous or more expensive; it must be radically different than initially anticipated. **Price volatility** is generally viewed as an **inherent risk in any market**, and most claims of frustration based on fluctuations in price, even extreme swings, will fail (*Paterson Veterinary Professional Corporation v. Stilton*, 2019 ONCA 746.)

Frustration: *High Bar for Success*

- Frustration is a limited excuse and has a high bar to meet, because of its severe impact on the contractual relationship. There is a strong policy argument against the success of frustration claims. Contract is a fundamental principle of our economy, and allowing these claims detracts from the inherent predictability of the contractual relationship (*Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58, [2001] 2 SCR 943 at para 53)

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Frustration: *Long-term contracts*

- There is an apparent difference between short- and long-term contracts. A long-term contract is made with the knowledge that the world and economy will change, but the contractual terms will endure. A contract that spans a number of years with definite terms specifically avoids the uncertainties of the future (*Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, 2018 SCC 46.)

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Frustration: *Short-term contracts*

- However, where the contract was for the short-term (i.e. a short-term lease), there is a stronger argument that the parties believed, due to the nature of the contract, that there would not be major change, and intervening events would actually be unforeseeable.

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Frustration: *Short-term contracts*

- It is as yet unclear whether COVID-19 is an unforeseen event that will frustrate a contract.
- While it is certainly conceivable that this pandemic with its global and potentially long-term effects could be shown to render contracts radically different than what was undertaken, that must be balanced with the principles of contractual predictability.
- The term of contracts in dispute may play a large part in deciding the outcome of these debates.

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Kenneth Jull, "Coronavirus Emergency Response: Risk Assessment and Risk Management", Toronto Law Journal, March 2020.

- In the longer term, the calculations relating to health and calculations relating to the economy may start to conflict.
- This is where the problem starts. In the early stages, governments and organizations will identify both risks to both health and the economy, but may lack direction on how to prioritize these two sectors, which may in fact compete.

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- Comparing these risks is like comparing **apples** and **oranges**.
- The mathematical dilemma for governments is to find a common currency to compare the two types of risk.
- By assigning a monetary value to a human life, it is possible to compare **the apples** and **oranges.**
- **Marginal value per unit risk, or the VSL, considered below under § 2:46 Risk Measure**

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Marginal value per unit risk, or the VSL

- Consider the following thought experiment.
- Suppose that you are asked how much you are willing to pay to eliminate a one-time only 1/10,000 risk of immediate death. If your response is \$900, then your marginal value per unit risk, or the VSL, is given by \$900/(1/10,000) = \$9 million. Viewed somewhat differently, if 10,000 people faced a risk of death of 1/10,000, and each person was willing to pay \$900 to eliminate the risk, it would be possible to raise \$900 × 10,000 = \$9 million to prevent the one expected death (W. Kip Viscusi “Identifying the Legitimate Role of the Value of a Statistical Life in Legal Contexts” Vanderbilt Law School Forthcoming in Journal of Legal Economicshttp://ssrn.com/abstract id=3426763 at 3.)

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Risk Measure

- There have been hundreds of empirical estimates of the VSL using labor market data throughout the world. The most reliable estimates for the U.S. utilize fatality rates derived from the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI). This data makes it possible to construct risk levels conditional on a variety of worker characteristics including, among others—industry, occupation, gender, age, race, and immigrant status. Viscusi concluded that the appropriate VSL estimate based on CFOI data is **in the range of $10 million** (W. Kip Viscusi "Identifying the Legitimate Role of the Value of a Statistical Life in Legal Contexts" Vanderbilt Law School Forthcoming in Journal of Legal Economicshttp://ssrn.com/abstract id=3426763 at 6.)

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Risk Measure

Historically, companies undertook such calculations, but they used as their reference point **the value of wrongful death awards rather than the VSL.** This skews the analysis because wrongful death awards will tend to be lower than the VSL. In its analysis of the gas tank placement for the Ford Pinto, Ford relied on wrongful death awards for guidance, leading to the conclusion that the benefits of additional safety measures did not exceed the costs. **This was a gross error calculation**.(W. Kip Viscusi "Identifying the Legitimate Role of the Value of a Statistical Life in Legal Contexts" Vanderbilt Law School Forthcoming in Journal of Legal Economicshttp://ssrn.com/abstract id=3426763

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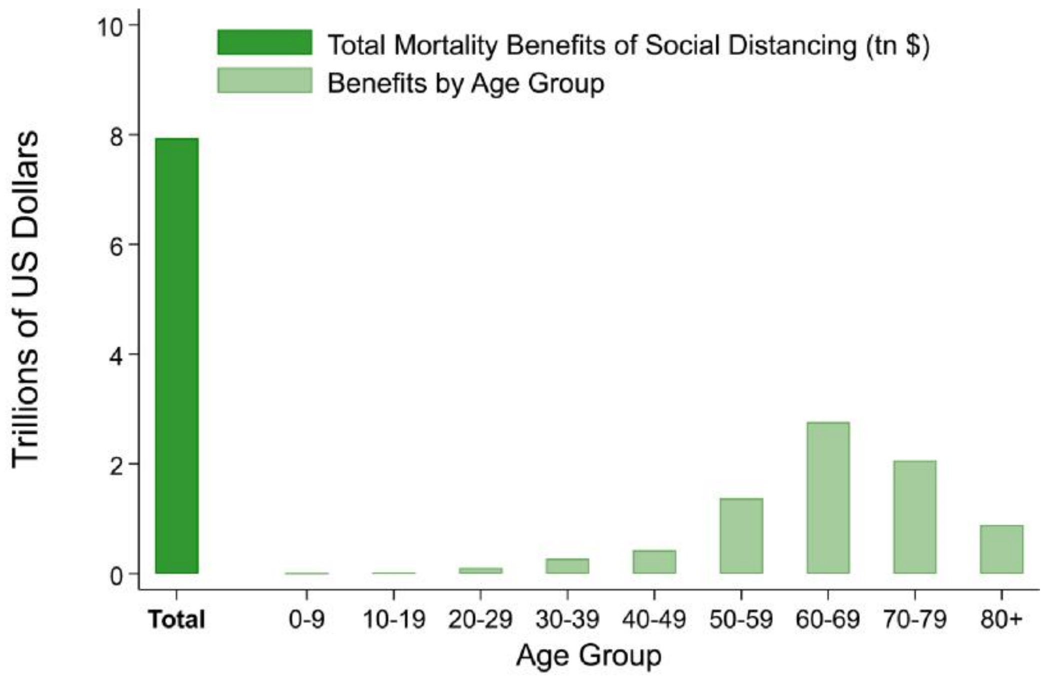
Does Social Distancing Matter?
Michael Greenstone and Vishan Nigam
MARCH 2020



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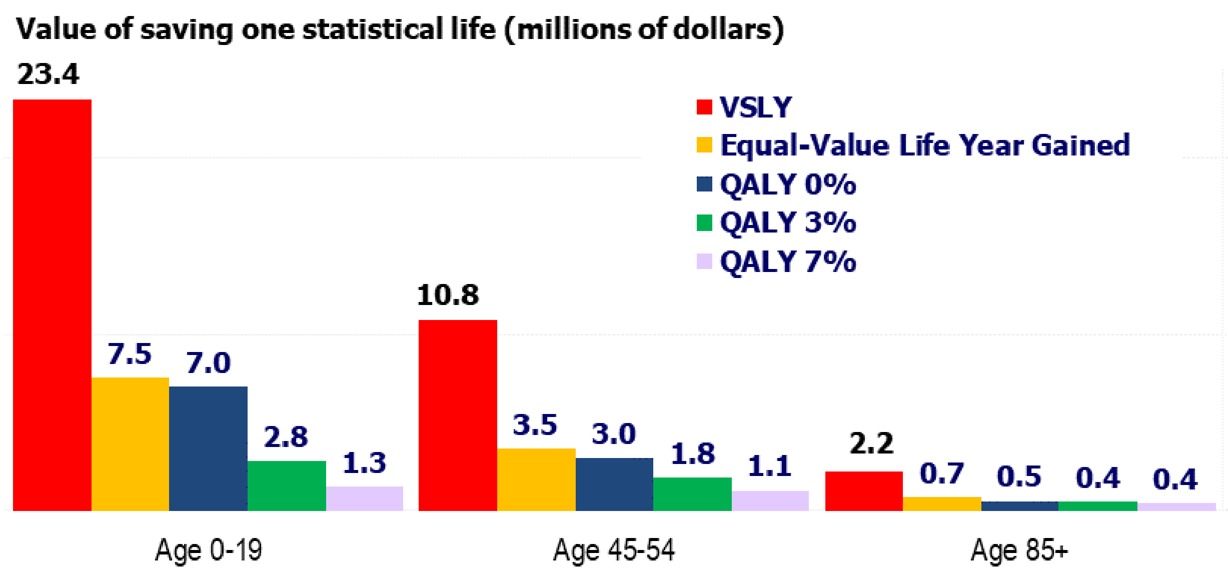
https://www.forbes.com/sites/theapothecary/2020/03/27/how-economists-calculate-the-costs-and-benefits-of-covid-19-lockdowns/#7be006de6f63

The value of saving one statistical life varies widely by patient age and value of life method used



VSLY=Value of Statistical Life Year: $311,194 x undiscounted years of life expectancy
Equal-Value Life Year Gained: $100,000 x undiscounted years of remaining life expectancy
QALY 0%=$00,000 x undiscounted quality-adjusted years (QALYs) of remaining life expectancy
QALY 3%=$100,000 x QALYs of remaining life expectancy discounted at 3%
QALY 7%=$100,000 x QALYs of remaining life expectancy discounted at 3%

§ 2:46 Risk Measure

- Joseph Aldy, a public policy professor at Harvard's Kennedy School of Government, said that under President George W. Bush, the Environmental Protection Agency tried to put a lower value on the life of an older person in calculating the benefits of air quality regulations.
- In their analysis, the life of a person over the age of 70 was worth 37 percent less than the life of a younger person. "It was a political disaster," Aldy said. The policy was christened the "senior death discount".

- https://fivethirtyeight.com/features/what-should-the-government-spend-to-save-a-life/

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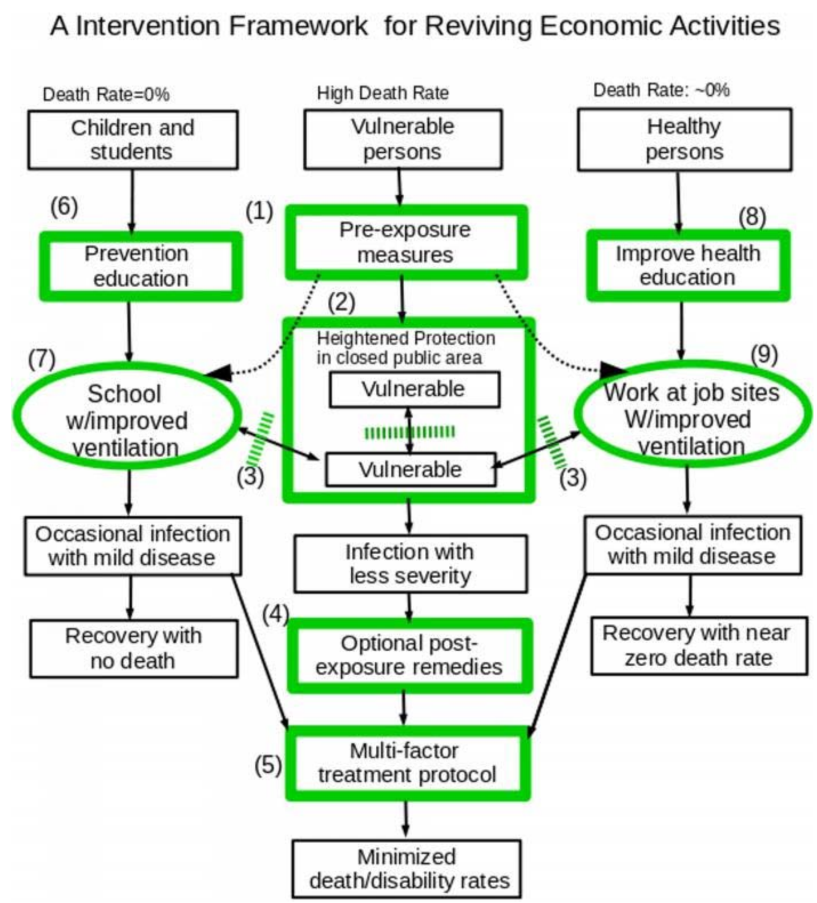
Public Health Intervention Framework for Reviving Economy Amid the COVID-19 Pandemic (1): A Concept

Jianqing Wu[1], Ph.D., J.D. and Ping Zha[2], M.D. (Chi. Med.)

April 8, 2020



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Risk Measure

- In blunt political terms this has been stated as follows: "As a senior citizen, are you willing to take a chance on your survival, in exchange for keeping the America that all America loves for your children and grandchildren? And if that's the exchange, I'm all in," said Texas Lt.-Gov. Dan Patrick, 70, in a much-quoted and much-shared clip from Fox News.
- One commentator summed the debate up as "should we sacrifice Grandma for the GDP? https://www.theglobeandmail.com/opinion/article-save-grandma-or-save-the-economy-it-depends/

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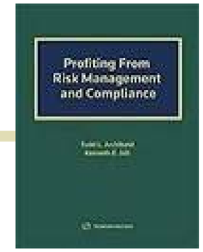
XIV. A NEW RISK-BASED REGULATORY APPROACH



- We argue that there are two fundamental principles that govern any distinctions based on age or other type of disability.
- (1) **First, section 217.1 of the *Criminal Code* requires that organizations take reasonable steps to prevent harm to workers and consumers arising from work**:

  - 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work.

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XIV. A NEW RISK-BASED REGULATORY APPROACH

- Section 217.1 puts a duty on corporations and supervisors to take reasonable steps to prevent bodily harm to workers and other persons, which arguably includes consumers. The Ontario Court of Appeal in the *Kazenelson* case upheld a prison sentence of three and a half years for breach of this duty.

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Metron Tragedy

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XIV. A NEW RISK-BASED REGULATORY APPROACH

- In *Kazenelson*, the supervisor became aware, well in advance of the collapse of a high rise construction stage, that there were only two lifelines available for the six workers who were working their way down from the top of the building.
- Applied to the coronavirus pandemic**, it is not permissible for organizations or governments to deprive some groups of lifelines.** This includes groups such as seniors and other groups who have health vulnerabilities or disabilities.

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XIV. A NEW RISK-BASED REGULATORY APPROACH

- **The second principle is derived from justice as fairness. John Rawls in *A Theory of Justice*,** constructed his theory of justice by utilizing an imaginary society that would be created by an original agreement where "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like".
- The use of the word "his" is historic, but in this theoretical construct one would not know which gender, age group, race, or health vulnerability a person might occupy. (*A Theory of Justice* Cambridge Mass. Harvard University Press 1971)

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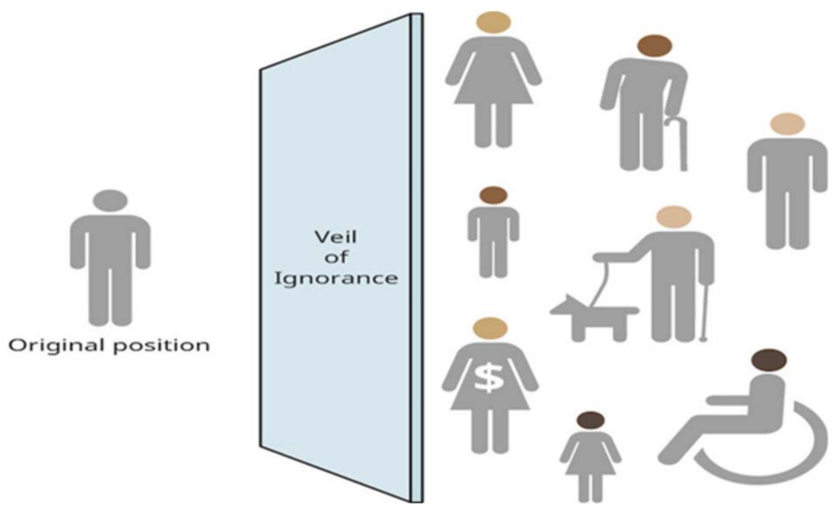
XIV. A NEW RISK-BASED REGULATORY APPROACH

- From behind this “veil of ignorance”, ask yourself what rules you would choose, not knowing whether or not you might fall into the class of persons more vulnerable to suffer serious consequences or even death from coronavirus?
- The first rule that you would choose is that regulatory measures must **promote human health and safety as a first priority.**



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XIV. A NEW RISK-BASED REGULATORY APPROACH

- From behind the veil of ignorance, you would not allow the sacrifice of the vulnerable minority for the greater good of all, **because you could be one of those vulnerable persons.** In other words, you would not approve of a system that would sacrifice the interests of persons over 70 or other vulnerable groups to favour the greater good of others who were more active in the economy.

- The only fair way to assess risk is to step back from who you are presently and what demographic you fit into, and imagine what system you would choose from behind the veil of ignorance.

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Questions?

Kenneth Jull (@KennethJull) | Twitter