

CANADIAN RIGHTS DURING COVID-19

Interim Report on COVID's Second Wave

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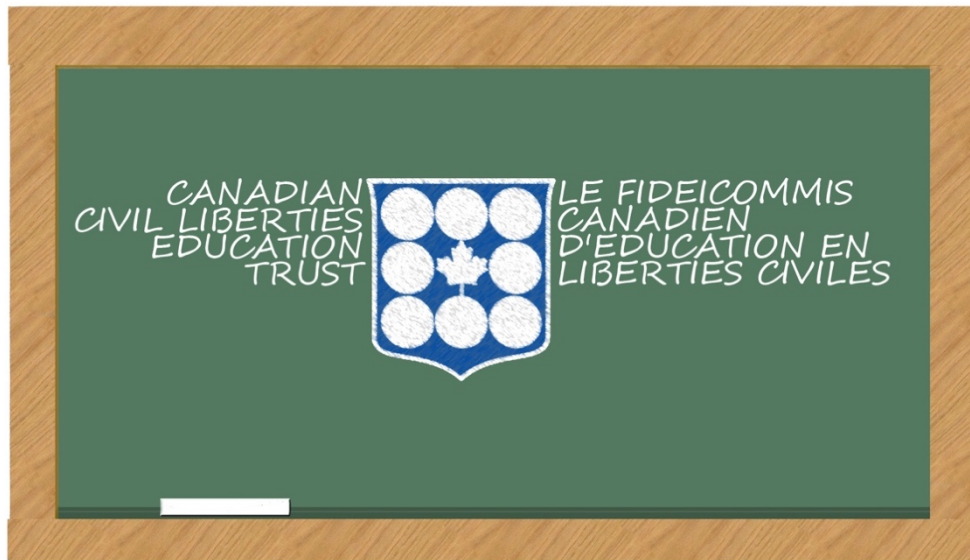


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The Canadian Civil Liberties Association was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties, and to defend and foster the recognition of those rights and liberties. We are a national, independent, non-governmental charity. We are in the courts, classrooms and in your community. Since our founding, CCLA has been at the forefront of protecting fundamental freedoms and democratic life in Canada. A wide variety of people, occupations and interests are represented in our membership. The Canadian Civil Liberties Education Trust, the CCLA's education arm, has been engaged in public education since its inception in 1968.



For more on CCLA and COVID Updates, please see our website: <https://ccla.org/coronavirus/>

Acknowledgements

“Human rights are hard work,” the Honourable Rosalie Abella said almost 20 years ago, as a Justice of the Court of Appeal for Ontario.¹ Madam Justice Abella continues that hard work, as of this writing, in her final year of serving on the Supreme Court of Canada. We dedicate this report to this hard worker of justice and the longest serving jurist in Canadian history.

The report represents the hard work of students from law schools across the country, who volunteered their time through Pro Bono Students Canada, including Farah Abbas, Emma Ashworth, Chris Boettcher, Frances Borgmann, Joshua Chmielewski, Samantha Clavette, Christopher Cook, Heather David, Émilie Grégoire, Luke Jeagal, Adèle Lemieux-Gaudreau, Maya Gunnarsson, Amanda Micallef, Caitlyn Quartarone, Amelia Radke, Marie-Michèle Simard, Sruthi Tadepalli, Carly Valentine, Patrick Webb and Jacob Williams. They researched ongoing issues impacting civil liberties and human rights during the COVID-19 pandemic, and conducted a media and issue scan up to 30 November 2020. CCLA is grateful for their assistance in monitoring these issues and compiling this summary.

¹ Honourable Rosalie Abella, “Justice And Rights: Looking Back To The Future,” Address by the 2004 Walter S. Tarnopolsky Award for Human Rights recipient, Canadian Bar Association/International Commission of Jurists (Canada) August 16, 2004, Winnipeg, Manitoba, online: <http://www.icjcanada.org/images/documents/tarnopolsky-winners/Address_by_Abella_2004.pdf> [Abella].

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Forward²

In 2020, a disease caused by a virus spread quickly across the globe. It was declared a pandemic in March 2020 and spread unceasingly throughout the year. Although most people who fell sick experienced flu-like symptoms and recovered without special treatment, both the quantity of cases (upwards of 20M globally in 2020) and severity of risk (1,792,251 deaths in 2020 worldwide and climbing by the thousands every day at year's end) made this public health threat a global emergency.

This report's focus cannot do justice to the impact of the infection on Canadians' health and mortality. Understandably, most Canadians focus on just that – how it has made over half a million Canadians sick, fatally so for over 15,378 in 2020 -- and the socioeconomic catastrophe it has wrought throughout Canada and the world.

Rather, this report focusses upon the impact of the emergency management response: how executive actions,³ authorized by legislatures, and theoretically subject to judicial review, limited Canadians' constitutionally protected human rights. The report focusses on the constitutional treatment of a disease by legal authorities in Canada. That treatment limited equality, freedom, privacy, and many human rights of Canadians. Many Canadians feared infection and many were, in fact, at risk of infection. But even more Canadians were (unavoidably) subject to legal orders that constrained our human rights, because in 2020 the main tool for sovereigns managing the pandemic was public health measures seeking to prevent infection. Those measures included advocacy by legal authorities, mixed with legal orders that prohibited or restricted individual and collective freedom. Those orders almost always included provisions for enforcement and penalties for non-compliance. Both the laws themselves (created by legislation and executive order) and their enforcement (by federal, provincial, and municipal police and by local enforcement officers) are the subject of this report – drawing primarily on legal discourse.

Who cares about laws and rights during a pandemic? We do at CCLA because the law becomes a shield for unintended consequences to the detriment of the marginalized. Plus the law lends legitimacy necessary for a critical ingredient to a successful public health pandemic response: public trust. The law offers a valuable discourse for the public, hungry for information and

² We are writing this report during an ongoing pandemic, which has to make it less reliable than one with greater hindsight. Patterns are emerging, in terms of executive, legislative, and judicial branches of Canada. But they are more latent than clear. On the other hand, the sense of what is happening in Canada during the pandemic is not lost by those living in it, as we all are. This caveat applies to some of our conclusions, no doubt.

³ Executive and cabinet are terms used interchangeably herein, signifying the 'efficient secret' of our democratic system, inherited from Great Britain, wherein First Minister-led Cabinets get their powers from legislatures, subject to constitutional limits, occasionally reviewed by the judiciary: W. Bagehot, *The English Constitution* (1867); P.J. Monahan, *Constitutional Law* (Irwin, 1997) at 50ff.

knowledge about the pandemic, wary of political commentary, but suddenly more reliant on political leaders than ever. Public health leaders and experts deservedly become rock stars, but especially in a crisis, the rule of law puts the civil in civilization. Amid the patchwork of decentralized responses to the pandemic and public dismay, the protection of universal human rights rightly becomes the domain of legal discourse.⁴

In a crisis, new leaders emerge begetting new powers, but all their power derives from our Constitution. Elected and unelected rescuers are revered in an emergency to the point of idolatry, but nobody gets to play King of Canada in this democracy. Words spoken from a leader's podium are not the last word. Only our constitution, statutes, executive orders, regulations and judicial orders give those words lawful authority. Canada is founded on principles recognizing the supremacy of the rule of law.

In this report we are interested in efficacy only insofar as it is relevant to a constitutional legal analysis of our human rights. Ours is not a scientific or political accounting of governments, but legal discourse on constitutional wrongs perpetrated upon Canadians. If epidemiologists seek to maximize population health, we herein seek to focus upon human rights limited by lawful authorities. It is trite to say that those lawful authorities are better guided by epidemiology than politics and fear. However, epidemiology is not the supreme law of Canada. Our constitution is that supreme law, and even well-meaning governments driven by leading science are not above the law.

This tension between protecting human rights and maximizing population health boils down to balancing the precautionary principle of epidemiology, on the one hand, with proportionality on the other hand. The precautionary principle comes from medical discourse: when in doubt, overdo the preventative measure, for the *purpose* of preventing infection, even if the effect may not yield the desired result. Proportionality, on the other hand, seeks to limit peoples' freedom as little as possible because that's what is required by our constitution.

As public health professionals have put it, if initially the precautionary principle overwhelmed emergency management of this pandemic, a more nuanced approach of greater specificity and proportionality should follow, as more information informs a better response:

to date, the COVID-19 response has appropriately been guided by the 'precautionary principle' in epidemiology which suggests that we must intervene swiftly and aggressively when faced with a new public health risk of uncertain proportions. As data

⁴ R Abella, "Justice and Peace," *The Walrus*, Reprint of convocation speech given by Hon Rosalie Abella at Yale Law School, delivered on May 23 2016 in New Haven, Connecticut, online: <https://thewalrus.ca/justice-and-peace/>: "In these frenetically fluid, intellectually sclerotic, economically narcissistic, ideologically polarized, and rhetorically tempestuous times — a world that too often feels like it's spinning out of control — we need a legal profession that worries about what the world looks and feels like to those who are vulnerable."

to inform a more strategic approach emerge, however, we must begin to move from a pre-cautionary position to one that also considers the proportionality and specificity of the public health response ...⁵

Even within epidemiology, the precautionary principle is supposed to be balanced against adverse impacts: “Nonspecific primary prevention approaches are known to increase disparities by further marginalizing those already at highest risk of severe outcomes including people living in congregate settings and people of disadvantaged communities who may also have poorer existing access to care and higher rates of comorbidities that increase risk of poor COVID-19-related outcomes.”⁶

We could not agree more with this perspective of science, but underscore that Canada’s democracy need not wait for our laws and their enforcement to evolve into something compliant with the constitution. Rather, the presumption of constitutionality is both aspirational and functional. Canadian governments must adhere to the constitution, replete with built-in qualifications, no matter what.

⁵ Stefan David Baral et al, "The public health response to COVID-19: balancing precaution and unintended consequences", online: (2020) 46 Ann Epidemiol 12 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7207121/pdf/main.pdf>>.

⁶ *Ibid.*

Background

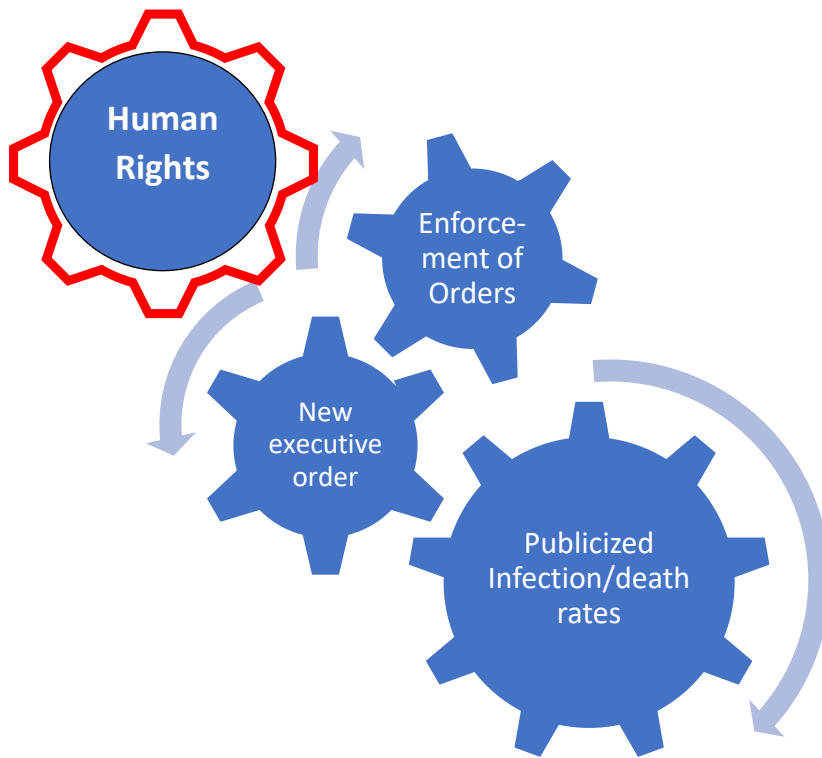


Figure 1 The Emergency Management Machine: every legal order passed in response to new epidemiological information impacts our human rights.

On January 30, 2020, the Director-General of the World Health Organization (“WHO”) declared the novel coronavirus outbreak (“COVID-19”) a public health emergency of international concern -- WHO's highest level of alarm. Thereafter were two waves, from both a public health perspective and a civil liberties or human rights perspective,⁷ with no doubt more to follow. In Canada, the first wave of the COVID-19 pandemic started not long after WHO’s January

⁷ These terms will be used interchangeably throughout the report. There is an important distinction between the two, however. For a discussion, see *Abella, supra*, at 2: “Civil liberties is a concept of rights that requires the state not to interfere with our liberties; human rights, on the other hand, cannot be realized without the state’s intervention. Civil liberties is about treating everyone the same regardless of differences; human rights is about acknowledging and accommodating people’s differences so they can be treated as equals. Civil liberties is only about the individual; human rights is about how individuals are treated because they are part of a group. Civil liberties seeks to assimilate; human rights seeks to integrate”.

announcement, even if it wasn't called the first wave until it subsided, and a second wave commenced,⁸ in September 2020.

Similarly, the first wave of Canada's emergency response to the pandemic commenced around March. Canadian emergency management has been primarily decentralized, with provincial and territorial governments, along with municipal governments, playing the primary role, in terms of impacting human rights.

Canada's federal government has played a subordinate role in its emergency management, because pandemics are matters for health care -- a constitutional responsibility primarily, though not explicitly, allocated to provinces and territories in the *Constitution Act, 1867*. Therefore, the federal role aligns with its jurisdiction – international relations, repatriation of Canadians abroad, controlling our sovereign border, air travel, federal prisons, and immigration/refugee policy, to name a few.

The federal government has also coordinated a national response to securing vaccinations, albeit the distribution and regulation of immunization continues to fall to the provinces and territories, because those jurisdictions are responsible for health care. And it coordinated a national digital contact tracing app – COVID Alert. The federal government also played the primary role in providing financial support to those in need.

The provincial/territorial emergency management was authorized by its own legislation, which varied across Canada. Most provinces had already passed modern emergency management legislation. Over time, some jurisdictions amended their governing public health statutes. The pandemic environment deeply coloured the debate and accountability by legislators, with greater pressure on Opposition legislators to defer to the executive branch – i.e., the governments.⁹

The legal authority for limiting human rights, therefore, changed over the course of the first two waves of the pandemic. Given that these laws were passed under extraordinary conditions, democratic accountability was limited. Three elections took place during the pandemic,¹⁰ but otherwise democratic accountability has been impaired both by pandemic conditions of

⁸ "Coronavirus Second Wave? Why Cases Increase", online: Johns Hopkins Medicine: <<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus>>.

⁹ See, for example: Penny Collette, "Opposition politicians walk a COVID-19 tightrope", *Toronto Star* (11 October 2020), online: <<https://www.thestar.com/opinion/contributors/2020/10/11/opposition-politicians-walk-a-covid-19-tightrope.html?rf>>.

¹⁰ Of the three 2020 elections, one was required by statute, with the incumbent majority government in Saskatchewan re-elected. The other two were minority governments re-elected with majorities, in BC and New Brunswick.

legislating and by parliamentary political risk aversion by Opposition parties across Canada.¹¹ All of which makes judicial review of these laws of paramount importance.

With emergency management legislation changed amid the pandemic, executive orders became the primary legal tool for authorizing public health measures. Daily reports publicizing new data on infection and death rates put political pressure on First Ministers and health ministers to respond; to do *something*. Sometimes they responded with words that amounted to political communications. Sometimes Cabinet got together to render new orders, or the chief medical officer exercised a new power. Then enforcement officials (police, bylaw officers, *eg.*) would either be dispatched like military troops to lay new charges, or they would be pulled back from overzealous execution. Or both. That has been the pattern of conduct throughout 2020 by way of emergency management response to COVID in Canada.

Preliminary Conclusions

In terms of balancing public health with human rights, emergency management governance in Canada at times broke down along regional lines. We graded Quebec and Atlantic provinces more poorly than the rest of Canada, when it comes to respecting rights and liberties. In terms of human rights performance, Canada's overall *trajectory* was more serpentine than linear. At times, the trajectory was in the direction of improvement, as from [first wave](#) to second wave of emergency management governance, with plenty of digressions. Governments across Canada took some steps toward a more measured approach to fighting the second wave of COVID-19 than they did during the first wave. Over time, public health measures limiting human rights were less untargeted, less imprecise, less disproportionate, and less unreasonable.

Nevertheless, it remains true that governments' responses to the pandemic too often discriminate against the vulnerable, by way of double jeopardy. Marginalized communities bear the brunt of both the virus and its management. Those communities were hit hardest by the pandemic, and hit hardest by government efforts to manage the virus. This report will first highlight the disparate impacts of COVID-19, which exacerbated pre-existing inequalities and vulnerabilities. It will then examine the ways in which some government actions unjustifiably limited our civil liberties.

¹¹ See, for example: Eric Genier, "As governments grapple with COVID-19, what's the role for the opposition?", *CBC News* (21 March 2020), online: <<https://www.cbc.ca/news/politics/grenier-covid19-opposition-parties-1.5503455>>. But see more recent Opposition efforts in federal minority parliament: Rachel Aiello, "Motion to study feds' COVID-19 response passes, despite Liberal objections", *CTV News* (26 October 2020), online: <<https://www.ctvnews.ca/politics/motion-to-study-feds-covid-19-response-passes-despite-liberal-objections-1.5160622>>.

Chapter 1: Impacts on People Who are Imprisoned

The situation in federal prisons across Canada is dire. By February 2021, there had been more than 1,200 positive cases of COVID-19 among people imprisoned in federal correctional facilities.¹² Cases skyrocketed over the course of 5 weeks in December and January. More people imprisoned across Canada tested positive for COVID-19 than in the previous 9 months combined.¹³ Certain demographics were found to have been disproportionately affected by COVID-19. For example, despite accounting for less than 1% of the total incarcerated population, as of June 2020, Inuit who are incarcerated made up 5% of all COVID-19 cases in federal prisons.¹⁴ The majority of the incarcerated in Canada are in provincial and territorial correctional facilities, where the situation is bad but not worse than federal prisons.

Wherever inequality punished racialized minorities pre-pandemic, that discrimination was compounded by COVID-19. It is well established that Black and Indigenous people are over-represented in both federal and provincial correctional systems.¹⁵ They are also more likely to suffer poor health,¹⁶ which increases risks of poor outcomes if infected behind bars.¹⁷ Increased representation of Black and Indigenous people in provincial systems also increases community exposure as these groups return to the community swiftly (eg., serving short sentences or being held for a period in remand).¹⁸

¹² “Testing of inmates in federal correctional institutions for COVID-19”, 6 January 2021, online: Statistics Canada <<https://www.csc-scc.gc.ca/001/006/001006-1014-en.shtml>>.

¹³ Before 1 December 2020, 1,424 incarcerated individuals had tested positive for COVID-19. From 1 December 2020 to 8 January 2021, 1,639 incarcerated individuals had tested positive for COVID-19. See: *CCLA Sounds Alarm as COVID in Prisons Reaches Unprecedented Levels*, 12 January 2021, online: <<https://ccla.org/ccla-covid-prisons/>>.

¹⁴ *Ibid.*

¹⁵ Owusu-Bempah, A. & Gabbidon, S. (2020). *Race, Ethnicity, Crime, and Justice: An International Dilemma*. New York: Routledge.

¹⁶ Veenstra, G., & Patterson, A. C. (2016). “Black–white health inequalities in Canada.” *Journal of immigrant and minority health*, 18(1), 51-57.

¹⁷ Wang, B., Li, R., Lu, Z., & Huang, Y. (2020). “Does comorbidity increase the risk of patients with COVID-19: evidence from meta-analysis.” *Aging (Albany NY)*, 12(7), 6049.

¹⁸ Wildeman, C., & Wang, E. A. (2017). Mass incarceration, public health, and widening inequality in the USA. *The Lancet*, 389(10077), 1464-1474.

Calls for Decarceration

Medical experts have clearly stated that physical distancing and avoiding crowded indoor spaces continue to be the most effective measure to prevent the spread of COVID-19. Jails and prisons, which are congregate settings, cannot provide effective physical distancing measures without significantly decreasing the incarcerated population. Although Canadian correctional authorities have taken some steps to move people into community supervision settings, the extent to which this has occurred varies significantly across the country.

Some correctional institutions (predominantly provincial and territorial jails) released some incarcerated people who were deemed to present a low risk to public safety.¹⁹ For example, in Ontario the incarcerated population was decreased by over 2,000 people at the beginning of the pandemic - although the majority of those releases were achieved through the operation of the courts and the bail system, not correctional authorities,²⁰ and since that time the incarcerated population has steadily risen.²¹

The second wave of COVID brought an explosion of cases in prisons and jails, prompting renewed calls for decarceration.²² A federal prison in Manitoba had 370 people who are

¹⁹ Jonathan Bradley, "Canada's correctional institutions released thousands of inmates in the early days of COVID-19", *National Post* (14 August 2020), online: <<https://nationalpost.com/news/canadas-correctional-institutions-released-thousands-of-inmates-in-the-early-days-of-covid-19>>; "Police-reported crime incidents down during the early months of the pandemic while domestic disturbance calls increase", 1 September 2020, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/daily-quotidien/200901/dq200901a-eng.htm>>; "After three months of unprecedented declines, monthly decreases in the adult custodial population in Canada slowed in June", 27 October 2020, online: Statistics Canada: <<https://www150.statcan.gc.ca/n1/daily-quotidien/201027/dq201027b-eng.htm>>.

²⁰ Alyshah Hasham, "Legal groups say Ontario misled public with claim it reduced inmate population by 20 per cent early in pandemic", *The Star* (17 December 2020), online: <<https://www.thestar.com/news/gta/2020/12/17/legal-groups-say-ontario-misled-public-with-claim-it-reduced-inmate-population-by-30-per-cent-early-in-pandemic.html>>.

²¹ "More than 2,000 inmates released, 6 COVID-19 cases confirmed inside Ontario jails", *CBC News* (9 April 2020), online: <<https://www.cbc.ca/news/canada/toronto/ontario-jails-coronavirus-1.5527677>>.

²² Global News, "Advocates say second COVID-19 wave has inmates locked down in 'atrocious' conditions as 5 test positive", *Global News* (11 November 2020), online: <<https://globalnews.ca/news/7456266/5-federal-inmates-test-positive-for-covid-19-as-case-counts-spike-across-canada/>>. [Inmates locked down in 'atrocious' conditions].

imprisoned test positive for COVID-19; one person died in late December.²³ At least 212 people who are imprisoned had tested positive for COVID at the Headingley Correctional Centre by mid-January,²⁴ while Calgary's Remand Centre had over 226 people who are imprisoned test positive for COVID 19 by mid-December.²⁵ Advocates continue to express concerns about inadequate care and the toxic relationship between correctional officers and people who are imprisoned that conflicts with guards' de facto role as caregivers during the pandemic.²⁶

Treating COVID-19 with Solitary Confinement

There have been disturbing reports that people imprisoned in institutions hit with COVID-19 lack personal protective equipment and cleaning supplies, are being subjected to prolonged solitary confinement and are generally facing inhumane conditions of confinement. In October, for example, several individuals being held in solitary confinement at the Calgary Correctional Centre spoke to the CBC.²⁷ At the time nearly two-thirds of the 175 people being held there had tested positive for COVID-19.²⁸ They described being forced to inhabit filthy conditions: the cells were dirty, toilets were malfunctioning and rarely cleaned, they had requested and been denied their own cleaning supplies, in some cells there was no functioning water, and some had

²³ "Testing of inmates in federal correctional institutions for COVID-19", 13 January 2021, accessed 13 January 2021, online: Correctional Service Canada <<https://www.csc-scc.gc.ca/001/006/001006-1014-en.shtml>>.

²⁴ Danton Unger, "Another outbreak declared at Manitoba jail among hardest hit by pandemic," *CTV News* (11 January 2021), online: <<https://winnipeg.ctvnews.ca/another-outbreak-declared-at-manitoba-jail-among-hardest-hit-by-pandemic-1.5262309>>.

²⁵ Tracy Nagai, "'It's mind-boggling': COVID-19 cases continue to climb at Calgary Remand Centre", *Global News* (11 December 2020), online: <<https://globalnews.ca/news/7517050/calgary-remand-centre-coronavirus-outbreak/>>.

²⁶ *Inmates locked down in 'atrocious' conditions, supra*.

²⁷ Joel Dryden, "Infected Calgary inmates say they have been crammed into disgusting, inhumane solitary confinement," *CBC News* (26 October 2020), online: <<https://www.cbc.ca/news/canada/calgary/calgary-correctional-centre-covid-19-tom-engel-outbreak-1.5776407>>.

²⁸ Jason Herring, "'I don't want anything to happen to my brother': Sister describes mistreatment at Calgary Correctional Centre as COVID-19 outbreak rages," *Calgary Herald* (1 November 2020), online: <<https://calgaryherald.com/news/local-news/sister-of-calgary-correctional-centre-inmate-infected-with-covid-19-speaks-out>>.

gone days without showers or outdoor time.²⁹ The sister of another ill man who had been placed in solitary confinement said he had not been receiving regular meals and that there was no heat.³⁰

People imprisoned in Manitoba institutions that have been struck by COVID-19 report facing similar conditions. Some incarcerated people have attested that they are reluctant to get tested out of fear of being forced into solitary confinement.³¹

An outbreak that began in November led to almost 160 people imprisoned at the Saskatoon Correctional Centre testing positive for COVID-19.³² Only weeks prior, there had been reports that the mental health of incarcerated people had been deteriorating as Corrections had been refusing visitation, had not reinstated programming, and had done little to alleviate concerns in relation to access to healthcare (i.e., wait times for psychiatrists and psychologists).³³ While the Minister of Corrections responded, stating that inmates have had the opportunity to access programming and receive visits from professionals, people imprisoned within correctional institutions dispute this claim.³⁴

By early January, over 200 people who are imprisoned tested positive in 13 of 17 detention facilities in Quebec.³⁵ Earlier in the fall, the regional public health unit responded to an outbreak by imposing a general confinement of the Hull prison in Gatineau, which led to a demonstration

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Peggy Lam, "Headingley inmate put in solitary confinement after positive COVID test being 'punished' for illness: mother," *CBC News* (11 November 2020), online: <<https://www.cbc.ca/news/canada/manitoba/covid-19-headingley-correctional-centre-solitary-confinement-1.5798397>>.

³² David Giles, "Corrections, fire department in talks to help fight COVID-19 at Saskatoon jail", *Global News* (18 December 2020), online: <<https://globalnews.ca/news/7531454/saskatoon-correctional-centre-covid19-fire-department-support/>>.

³³ Scott Larson, "Saskatoon Correctional Centre inmates say not enough being done to protect them against COVID-19", *CBC News* (15 November 2020), online: <<https://www.cbc.ca/news/canada/saskatoon/saskatoon-correctional-centre-covid-19-cardinal-maier-1.5802648>>.

³⁴ *Ibid.*

³⁵ "Situation of the coronavirus (COVID-19) in Québec", online: Government of Quebec <<https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/situation-coronavirus-in-quebec/>>.

for two consecutive nights.³⁶ The situation was further aggravated by a significant staff shortage.³⁷ People expressed concern about COVID spread, stating the facility “cannot completely isolate [them]” since they share washrooms and showers.³⁸

Prolonged solitary confinement (more than 15 consecutive days) constitutes cruel and unusual treatment under the *Charter*³⁹ and is considered torture or cruel, inhuman or degrading treatment under international law.⁴⁰ This has been confirmed in the United Nation’s Mandela Rules and by numerous court decisions in Canada.⁴¹ Even a few days in solitary confinement can have extremely harmful impacts on a person’s mental health, as well as on their ability to reintegrate into society.⁴² In a study of New York detention facilities, although only 7.3% of detainees admitted were subjected to solitary confinement, they accounted for 53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm.⁴³ After controlling for various factors including gender, age, race/ethnicity, serious mental illness, and length of stay, the study found self-harm to be associated significantly with being in solitary confinement at least once.⁴⁴

Although some isolation measures are being implemented with the aim of reducing COVID-19 transmission among people who are imprisoned and staff, effective medical isolation need not amount to punitive solitary confinement. Solitary confinement is a cruel form of treatment and

³⁶ Jadrino Huot, "Confinement obligatoire à la prison de Hull: des détenus font du grabuge pour une deuxième nuit de suite", *Journal de Montréal* (21 Oct. 2020), online: <<https://www.journaldemontreal.com/2020/10/21/confinement-obligatoire-a-la-prison-de-hull-des-detenus-font-du-grabuge-pour-une-deuxieme-nuit-de-suite>>.

³⁷ Cassandre Forcier-Martin, "COVID-19: Explosion de cas à la prison de Trois-Rivières", *Journal de Montréal* (23 Oct. 2020), online: <<https://www.journaldemontreal.com/2020/10/23/covid-19-explosion-de-cas-a-la-prison-de-trois-rivieres>>.

³⁸ *Ibid.*

³⁹ *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at 5 [CCLA v Canada].

⁴⁰ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015), Rule 43.

⁴¹ *Ibid*; See, for example: *CCLA v Canada*, *supra* and *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228.

⁴² Wildeman, C & Andersen, LH., “Long-term consequences of being placed in disciplinary segregation” (2020) 58:3 *Criminology* 423.

⁴³ Kaba, F et al, (2014), “Solitary confinement and risk of self-harm among jail inmates” (2014) 104:3 *Am J Pub Health* 442.

⁴⁴ *Ibid.*

can lead to devastating and permanent mental health impacts.⁴⁵ The use of solitary confinement for health purposes also undermines the public health efforts necessary to identify and control infection spread behind bars, as individuals fear disclosing symptoms or getting tested because they are concerned that they will be placed in solitary confinement as a result. Prisons need to find ways to protect the physical, mental and emotional health of people who are imprisoned. They must refrain from imposing intolerable cruel and inhuman measures.

Bail Proceedings

Although people arrested and charged with an offence are legally innocent until proven guilty, it has long been the case in Canada that the reverse is true, and no where was that more harmful than in the context of pre-trial detention.⁴⁶ Too many innocent people are incarcerated too quickly and for too long, under one of the three grounds for pre-trial detention: primary grounds (flight risk for trial); secondary grounds (public safety risk pre-trial); and tertiary grounds (shocking to public if not detained pre-trial).⁴⁷ The problem with the latter is that it amounts to mob rule; the former requires predicting the future, based on speculative risk analysis, rather than proving the past, based on evidence; the primary grounds are sensible but must require evidence of flight risk.

Courts factored COVID-19 into assessments of bail eligibility in different ways early on in the pandemic. Regarding the secondary ground (public safety), some courts elected to factor the pandemic into the assessment. In Ontario, for example, a judge found that the risk posed by COVID-19 to people incarcerated in detention centres awaiting trials is a valid factor when considering the secondary ground for detention.⁴⁸ Other courts, however, decided that the COVID-19 pandemic should play no role whatsoever in the court's analysis of the secondary ground. In a case in Alberta, the court reasoned that this secondary ground for bail relates only to the protection of the public and not to the person accused of a crime.⁴⁹ This line of reasoning

⁴⁵ Sharon Shalev, "Solitary confinement as a prison health issue" (18 November 2017) *WHO Guide to Prisons and Health*, online: World Health Organization <https://www.euro.who.int/__data/assets/pdf_file/0011/249194/Prisons-and-Health,-5-Solitary-confinement-as-a-prison-health-issue.pdf?ua=1>.

⁴⁶ See <https://www.thestar.com/opinion/commentary/2015/11/04/most-people-in-jail-today-are-innocent-michael-bryant.html>

⁴⁷ *Criminal Code*, RSC, 1985, c C-46, s 515(10). The following is considered when the decision to either release someone on bail or detain them is made: (a) whether detention is necessary to ensure the attendance of the person accused of a crime in court; (b) whether detention is necessary for public safety; and (c) whether detention is necessary to maintain public confidence in the administration of justice.

⁴⁸ *R v TK*, 2020 ONSC 1935 at para. 60.

⁴⁹ *R v CKT*, 2020 ABQB 261 at para. 19.

fails to give any consideration to the goal of protecting those who are already in custody inside of detention facilities. Do they not form a part of the “public” that is worthy of protection from the increased risk of COVID-19 transmission as the detention facility’s population grows?

Some courts took judicial notice of the pandemic when considering the third ground, which contemplates public confidence in the administration of justice. In so doing, these courts held that – because all detainees, regardless of their particular vulnerabilities to the virus, are subjected to an increased risk of COVID-19 while in custody – public confidence in the administration of justice *demand*s that the pandemic ought to weigh *strongly in favour* of bail being granted.⁵⁰ Other courts, however, held that the pandemic is relevant to the tertiary ground only when the person accused of a crime has presented medical evidence to indicate that they would be at risk of “severe health issues or even death” if infected with COVID-19.⁵¹ Furthermore, some courts even required a person accused of a crime to provide evidence that the institution in which they were to be detained would be incapable of managing the risks of COVID-19. This included evidence of past infections or outbreaks within the institution, which may be difficult to obtain, particularly for people who are self-represented.⁵²

In general, courts’ differential treatment of how to factor the COVID-19 pandemic into assessments for bail eligibility ended up rendering differential justice for defendants. Some, but not others, were met with a more onerous standard for demonstrating why they ought not to be detained pending trial or appeal. The onus for denying pre-trial release rests with the Crown, but courts ended up reversing that onus by requiring a defendant to establish, with evidence, their vulnerability to COVID, as if defendants were themselves epidemiologists or physicians. Moreover, some people with *no* underlying medical conditions, for instance, nevertheless had severe, prolonged detention after being infected with COVID-19.⁵³ As ever, where rights were systemically infringed pre-pandemic, matters got still worse during the pandemic.

Sentencing

Regarding sentencing, some courts did not require medical evidence demonstrating vulnerability or evidence of institutional risk (i.e., evidence of infections in detention centres) and noted that a person’s vulnerability may justify a lighter sentence.⁵⁴ Some courts released people from custody

⁵⁰ *R v Rajan*, 2020 ONSC 2118 at para. 69.

⁵¹ *R v Nelson*, 2020 ONSC 1728 at para 41.

⁵² *R v Sappleton*, 2020 ONSC 1871 at para. 22.

⁵³ *R v Budlakoti*, 2020 OJ No 1352 at para. 14.

⁵⁴ *R v Bell*, 2020 ONSC 2632 at paras. 43-49.

for time already served,⁵⁵ shortened sentences (combining them with longer periods of probation),⁵⁶ and deferred intermittent sentences to avoid heightened dangers of incarceration.⁵⁷

Put another way, case law from early on in the pandemic pointed “toward non-custodial punishments” and COVID-19 appeared to mitigate the severity of custodial sentences.⁵⁸ For example, a British Columbian court held that in light of concerns about the Province's ability to handle the influx of people coming into and out of correctional facilities, “the public would be better served” by ordering a non-custodial sentence.⁵⁹ However, it is important to be aware that, although COVID-19 became a significant factor to be considered during sentencing early on in the pandemic, it was not used to “[reduce] a sentence beyond what would otherwise be fit in the circumstances.”⁶⁰ For example, a court in Ontario rejected the argument that house arrest would be a sufficient punishment for an asthmatic who was sincerely worried about his susceptibility to COVID-19; it held that 30 months in custody would, despite the pandemic and his vulnerabilities, be just.⁶¹

⁵⁵ *R v Kandhai*, 2020 ONSC 1611 at paras. 7-8.

⁵⁶ *R v Wilson*, 2020 ONCJ 176 at paras 39, 47; *R v McConnell*, 2020 ONCJ 177 at para 40; *R v Hearn*, 2020 ONSC 2365 at para 2.

⁵⁷ *R v Savvateikin*, 2020 ONSC 2257 at paras 44-45.

⁵⁸ Skolnik, T, “Criminal Law During (and After) COVID-19” (2020) 43:4 Man LJ 145.

⁵⁹ *R v CJJ*, 2020 BCPC 201 at para. 87.

⁶⁰ *R v Barrett*, 2020 ONCJ 487 at para. 20.

⁶¹ *Ibid* at paras 21, 26.

Chapter 2: Impacts on People Experiencing Homelessness and Shelters

It is estimated that 235,000 Canadians experience homelessness in a given year, while the number of Canadians who experience homelessness on a given night is 35,000.⁶² Marginalized and vulnerable groups, including Black and Indigenous Peoples, individuals identifying as LGBTQ2S+, people with physical and mental health issues, and youth, are disproportionately represented among those experiencing homelessness.⁶³ The causes of homelessness in Canada include a lack of safe and affordable housing, failure of social support systems, as well as diverse individual issues such as physical or mental disabilities and domestic violence.⁶⁴ Ending homelessness will take collaboration between public, private and non-profit sectors, and requires upstream prevention as well as safe, appropriate, affordable housing.⁶⁵

The onset of emergency measures due to COVID-19 has exacerbated the housing and homelessness crises in many locations, and has affected other support systems, formal or informal that may have provided for food, sanitation, and other basic needs. Some measures, such as temporary closures of public and private services, disproportionately impact people experiencing homelessness. For example, when Quebec municipalities closed their libraries, their arrangement to check books out using online services⁶⁶ did not address the needs of people who rely on libraries for access to water, washrooms, internet, electricity and temporary shelter. Similarly, many charitable operations were affected. In response, community groups and municipalities have called on provincial governments for increased support in the wake of COVID-19.⁶⁷

⁶² “About Homelessness”, online: Homeless Hub <www.homelesshub.ca/about-homelessness/homelessness-101/how-many-people-are-homeless-canada>.

⁶³ “Guidance for providers of service people experiencing homelessness (in the context of COVID-19)” (29 June 2020), online: Government of Canada <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/homelessness.html#a1>.

⁶⁴ “About Homelessness: Causes of Homelessness”, online: Homeless Hub <<https://www.homelesshub.ca/about-homelessness/homelessness-101/causes-homelessness>>.

⁶⁵ Stephen Gaetz, et al, “The State of Homelessness in Canada” (2016) *The Canadian Observatory on Homelessness*, Research Paper 12, online: Homeless Hub <https://homelesshub.ca/sites/default/files/SOHC16_final_20Oct2016.pdf>.

⁶⁶ “Mesures liées à la pandémie de COVID-19” online: Trois-Rivières <<https://www.v3r.net/services-aucitoyen/covid-19#bibliotheques-municipales>>.

⁶⁷ See, for example: Mickey Djuric, “Community groups ‘extremely disappointed’ with Saskatchewan’s response to COVID-19”, *Global News* (1 April 2020), online: <globalnews.ca/news/6765688/community-groups-disappointed-saskatchewan-covid-19-response> [Community groups ‘extremely disappointed’];

Across Canada, 392 emergency shelters operate with 15,859 permanent beds across emergency shelters and transitional housing facilities.⁶⁸ Unfortunately, many of the services provided involve congregate shelter settings, where physical distancing is difficult and sometimes not possible. Self-isolation, an additional strategy recommended in some circumstances by public health officials to reduce the spread of COVID-19, is also challenging, if not impossible, in congregate shelter settings.⁶⁹

Physical distancing, in addition to masking, is one of the most effective methods to reduce the spread of COVID-19.⁷⁰ It involves minimizing close contact and keeping at least 2 metres from those not in your household or social bubble. These measures have forced provincial and municipal governments across the country to re-evaluate emergency and transitional housing frameworks for homeless populations. In Alberta, for example, enhanced prevention strategies for shelters included the discouraging of movement of clients between shelter sites and within shelter sites, and “cohorting” clients who do not show signs of COVID-19 to more easily trace outbreaks.⁷¹

In implementing these measures, however, a disconnect persists between the critical need for shelter in the absence of permanent housing options, and the increased vulnerability to which these same shelters expose homeless populations. The government of Manitoba, for example, initially implemented physical distancing bylaws, delineating that public gatherings were limited

Nathaniel Dove, “More help needed for Saskatoon homeless before second COVID-19 wave: advocate,” Global News (27 July 2020), online: <globalnews.ca/news/7220210/coronavirus-saskatoon-homeless-advocate/>; Manitoba, Legislative Assembly, 42-2, 27A (15 April 2020) (Mr. Dougals Lamont (St. Boniface)).

⁶⁸ Emergency shelters provide temporary short-term accommodation, while transitional housing facilities provide temporary or longer-term shelter for those experiencing homelessness in Canada. See Employment and Social Development Canada, “Homelessness Partnering Strategy: 2018 Shelter Capacity Report” (2019), online (pdf): Homeless Hub <www.homelesshub.ca/sites/default/files/attachments/Shelter_Capacity_Report_2018-EN%20%281%29.pdf>.

⁶⁹ *Community groups ‘extremely disappointed’, supra.*

⁷⁰ “Coronavirus disease (COVID-19): Prevention and Risks,” online: Government of Canada <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html#p>.

⁷¹ “Shelter Guidance: Preventing, Controlling and Managing COVID-19” (6 July 2020), online (pdf): Alberta Health Services <www.albertahealthservices.ca/assets/info/ppih/if-ppih-covid-19-outbreak-shelter.pdf>

to no more than 10 people at any indoor or outdoor premises, including places of worship, gatherings, and family events such as weddings and funerals. However, they did not apply this rule to a facility where health care or social services are provided, including child-care centres and homeless shelters.⁷² While ameliorative measures have been taken to expand shelter services, erect barriers, or increase bed spacing,⁷³ these have been inadequate.

The use of hotel rooms for families and individuals allowed for better distancing and isolation than shelters provided, leading some to suggest that the use of hotels could be the first step in dismantling the “emergency” shelter system and replacing it with real homes, privacy, community and support.⁷⁴ However, in some instances the hotels were far removed from the services and support networks that people access by foot.⁷⁵ Despite the City of Toronto’s official commitment to harm reduction within the shelter system, many hotels were far removed from overdose prevention sites and prescribed safe supply, and multiple people have died from overdose both within the shelter and hotel systems.⁷⁶

It is critical that plans to address the challenges faced by people experiencing homelessness are made in partnership with these individuals and the organizations that support them. In Victoria, British Columbia, for example, the provincial government enacted a public safety order to dismantle tent encampments while officials worked to transfer those living in encampments into hotel and community space accommodations.⁷⁷ Transfers to government supported

⁷² Manitoba, Media Bulletin, 35, “COVID Bulletin” (29 March 2020), online: *Manitoba News* <news.gov.mb.ca/news/?archive=&item=47317>; “Masks to be mandatory in Toronto’s homeless shelters due to COVID-19” (4 September 2020), online: *CBC News* <www.cbc.ca/news/canada/toronto/masks-to-be-mandatory-in-toronto-s-homeless-shelters-due-to-covid-19-1.5713335>.

⁷³ Manitoba, News Release, “Manitoba Expands Support for Homeless Shelters in Response to Pandemic” (26 June 2020), online: <news.gov.mb.ca/news/index.html?item=48517&posted=2020-06-26> (gov pledging \$242k for this purpose); Demi Knight, “Coronavirus: Alberta commits additional \$48M to homelessness supports” (5 August 2020), online: *Global News* <globalnews.ca/news/7252021/alberta-48-million-dollars-for-homeless-supports-coronavirus> (pledging \$48M to expand current sites and ensure distancing and isolation capacities).

⁷⁴ Carlyn Zwarenstein, “The Cost of a Stay at a Shelter Hotel”, *The Local* (23 November 2020), online: <<https://thelocal.to/the-cost-of-a-stay-at-a-shelter-hotel/>>.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Michelle Ghossoub, “BC enacts order to move tent city residents into hotels amid COVID-19 pandemic”, *CBC News* (25 April 2020), online: <www.cbc.ca/news/canada/british-columbia/b-c-enacts-order-to-move-tent-city-residents-into-hotels-amid-covid-19-pandemic-1.5545146>.

accommodations should only be implemented after consultation with the residents of tent encampments, who must be included in both discussions and decisions. Some residents of encampments have safety concerns respecting shelters or do not want to be disconnected from services they need and their communities.⁷⁸ The Toronto encampment case study below highlights some concerns.⁷⁹ Residents of encampments and advocates for unhoused people have called for moratoriums on evictions of people living in encampments, noting that they cause stress, fear and are very destabilizing,⁸⁰ and all the more so at a time when there is nowhere safe to go.

CCLA and Coalition Partners Sue Toronto Over Shelter Crisis

As the country's largest city, Toronto has the largest unhoused population as well as the largest shelter system.⁸¹ The unhoused population in Toronto in 2018 was estimated to be 8,715, 82% of which were staying in one of many of Toronto's City-administered shelters and sites.⁸² Toronto is home to 75 shelters, respite sites, and drop-in locations that shelter approximately 7,000 people on a given night. Eleven locations that house people experiencing homelessness in Toronto are operated directly by the City, while sixty-four additional programs are operated concurrently by community non-profit agencies.⁸³

The onset of the COVID-19 pandemic put Toronto's already overcrowded homeless shelter system to the test. The occupancy rates of these shelters regularly reached 100%, and program officers described the conditions as involving people, "Sleeping and eating almost on top of each

⁷⁸ "Advocates for unhoused people demand that Toronto stop clearing encampments in parks", *CBC News* (7 December 2020), online: <<https://www.cbc.ca/news/canada/toronto/homeless-advocates-moratorium-evictions-encampments-city-parks-1.5831855>> [Advocates for unhoused people].

⁷⁹ *Sanctuary Ministries of Toronto et al v Toronto (City)*, 2020 ONSC 6207 (Notice of Application, CV-20-640061).

⁸⁰ *Advocates for unhoused people, supra*.

⁸¹ Tanya Gulliver-Garcia, "Which city in Canada has the most homeless people per capita and why?" (2014), online: Homeless Hub [www.homelesshub.ca/resource/which-city-canada-has-most-homeless-people-capita-and-why#:~:text=Obviously%2C%20as%20Canada's%20largest%20city,sexual%20orientation%20identity%20as%20well.](http://www.homelesshub.ca/resource/which-city-canada-has-most-homeless-people-capita-and-why#:~:text=Obviously%2C%20as%20Canada's%20largest%20city,sexual%20orientation%20identity%20as%20well.;); Toronto, "City of Toronto COVID-19 Response for People Experiencing Homelessness" (14 October 2020), online: City of Toronto <www.toronto.ca/news/city-of-toronto-covid-19-response-for-people-experiencing-homelessness> [Toronto's COVID-19 Response for Homelessness].

⁸² Toronto, *Street Needs Assessment*, (October 2018), online (pdf): <www.toronto.ca/wp-content/uploads/2018/11/99be-2018-SNA-Results-Report.pdf>.

⁸³ *Toronto's COVID-19 Response for Homelessness, supra*.

other."⁸⁴ In March 2020, the CCLA wrote to the City asking for various measures to alleviate the homeless crisis during the pandemic, emphasizing the need for permanent housing as well as hotel rooms as a temporary measure, as had been done in other locations.⁸⁵ On April 24, 2020, CCLA, together with a coalition of non-profit organizations brought a Charter application against the City.⁸⁶ It challenged Toronto's Shelter Standards and the 24-Hour Respite Site Standards as unconstitutional in the context of the COVID-19 pandemic for a lack of compliance with public health requirements, including physical distancing.⁸⁷ On May 19, 2020, the City reached a settlement with the Coalition and committed to maintaining physical distancing between beds in its shelter system and providing sufficient beds to shelter clients.

Despite agreeing to these basic health measures, Toronto did not meet its commitment. There had been 45 COVID-19 outbreaks in the shelter system, with 649 people who had used the shelters contracting COVID-19.⁸⁸ Tragically, four people died.⁸⁹ The coalition went back to court to enforce the agreement to provide for bed spacing and bed capacity, as well as ongoing monitoring measures, ultimately forcing the court to recognize that Toronto City officials were still not adequately meeting the needs of the city's homeless population.⁹⁰ Justice Sossin of the Ontario Superior Court of Justice in his decision held that the City, as of October 2020, had not done enough to reduce the risks of COVID transmission within Toronto's shelter system and the City's assertion that they had was premature.⁹¹

⁸⁴ Shanifa Nasser, "'Like a petri dish': Advocates worry Toronto's homeless shelters are ill-prepared for COVID-19", *CBC News* (11 March 2020), online: <www.cbc.ca/news/canada/toronto/homeless-coronavirus-canada-toronto-covid19-1.5492322>.

⁸⁵ CCLA, "Letter to John Tory on Homelessness in Toronto" (29 March 2020), online: Canadian Civil Liberties Association <<https://ccla.org/coronavirus-update-toronto-homeless/>>; *Sanctuary et al v Toronto (City) et al*, 2020 ONSC 6207 at para 1-7 [*Sanctuary et al v Toronto City*]. The coalition included: CCLA, the Sanctuary Ministries of Toronto, Aboriginal Legal Services, Advocacy Centre for Tenants Ontario, Black Legal Action Centre, and HIV & AIDS Legal Clinic Ontario.

⁸⁶ "CCLA Defends Toronto's Homeless Population", online: Canadian Civil Liberties Association <<https://ccla.org/coronavirus-update-ccla-defends-homeless/>>.

⁸⁷ *Ibid.*

⁸⁸ "The City of Toronto breached the agreement to protect those experiencing homelessness", 30 September 2020, online: Canadian Civil Liberties Association <<https://ccla.org/city-breaches-agreement/>>.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Sanctuary et al v Toronto (City) et al, supra.*

Toronto Faces More Litigation – Addressing the Needs of People who Live in Encampments

Fourteen people in Toronto experiencing COVID-19 related homelessness and living in encampments took the city to court over the dismantling and prohibition of encampments during COVID-19.⁹² They asked for a temporary suspension of a bylaw that prohibited camping and the erection of tents or other structures in City parks after 12:00am, arguing that dismantling encampments would force people to go to the shelter system, which has serious safety concerns.⁹³

The court rejected their arguments, despite noting that concerns regarding the shelter system clearly engaged *Charter* rights to ‘security of the person’.⁹⁴ In deciding that the bylaw should not be suspended, the court stated that fears respecting the shelters system had been addressed by the city.⁹⁵ It also suggested that suspending the bylaw to allow for encampments would limit the use of parks by others.⁹⁶

While the idea of ensuring enjoyment for all in public parks may seem compelling, the severe impacts of being displaced from one’s home should be weighed against any negative impacts of people having reduced park access. In the context of a pandemic, and in light of the health and safety concerns respecting shelters, the goal of ensuring that parks can be enjoyed by all seems far less important than enabling people to choose the option of a place they feel less at risk.

With the bylaw still in effect, people may be forced to leave the place they feel safe to move to a shelter or to another location, which can cause serious anxiety, physical and psychological stress.⁹⁷ While the court was clear to say that the ruling did not direct the City to enforce its bylaws and remove encampments in City parks,⁹⁸ eviction notices have been placed on tents.⁹⁹

⁹² *Black v City of Toronto*, 2020 ONSC 6398 para 1 [Black].

⁹³ *Ibid* at para 4.

⁹⁴ *Ibid* at para 46.

⁹⁵ *Ibid* at paras 149.

⁹⁶ *Ibid* at paras 150.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* at para 8.

⁹⁹ “Advocates for unhoused people demand that Toronto stop clearing encampments in parks”, *CBC News* (7 December 2020), online: <<https://www.cbc.ca/news/canada/toronto/homeless-advocates-moratorium-evictions-encampments-city-parks-1.5831855>>.

Such a progression will inevitably draw out new challenges that people experiencing homelessness have to face during the winter. Cities, such as Toronto, have “expressed concern about the situation worsening as cold weather sets in, noting that it becomes harder to provide services to encampments in the winter, and that helping people move to warm spaces takes time and is best done well in advance of the colder weather.”¹⁰⁰ These concerns should have enhanced the incentive of municipalities and provinces across the country to focus attention towards working with people experiencing homelessness to ensure access to safer spaces indoors, which do not displace encampment residents from their communities and support systems.

In contrast to Toronto’s approach to public space regulation, the Vancouver Board of Parks and Recreation made a recommendation to update park bylaws to recognize the needs of park users experiencing homelessness.¹⁰¹ They noted a court ruling that held that “preventing a person experiencing homelessness from erecting a temporary structure to provide overnight shelter is a breach of their constitutional rights.”¹⁰² The recommendation was subsequently confirmed in a narrow vote by the Vancouver Park Board, who recognized that the pandemic has reduced access to indoor supports for people experiencing homelessness.¹⁰³

Moving forward

Governments need to move past the *status quo* when working with people experiencing homelessness to craft solutions that result in permanent housing. For example, a study by Foundation for Social Change in partnership with the University of British Columbia launched a direct cash transfer of \$7,500 to those experiencing homelessness in Vancouver in an effort to “empower people to move beyond homelessness”.¹⁰⁴ Twelve months after the first cash transfer, recipients spent fewer days homeless than those in the control group and had moved into housing

¹⁰⁰ *Ibid* at para 110.

¹⁰¹ Vancouver Board of Parks and Recreation “Parks Control By-law Updates – Temporary Shelter in Parks” (7 July 2020), online (pdf): <parkboardmeetings.vancouver.ca/2020/20200713/REPORT-ParksControlBylaws-TemporaryShelter-20200713.pdf> at 5.

¹⁰² *Ibid* at 5.

¹⁰³ “Vancouver Park Board votes in favour of allowing overnight camping in parks”, *CBC News* (15 July 2020), online: <[¹⁰⁴ New Leaf Project, “About the New Leaf Project” \(2020\), online: <\[forsocialchange.org/new-leaf-project-overview\]\(http://forsocialchange.org/new-leaf-project-overview\)>.](http://www.cbc.ca/news/canada/british-columbia/parks-board-overnight-camping-by-law-1.5650193#:~:text=The%20Vancouver%20Park%20Board%20has,camp%20overnight%20in%20city%20parks.&text=The%20amended%20bylaw%20allows%20people,7%20a.m.%20the%20next%20morning.>>.</p></div><div data-bbox=)

after an average of three months.¹⁰⁵ Further results show that 70 per cent of participants were “food secure” after one month.¹⁰⁶ While this project limited participants to those experiencing homelessness in the Vancouver area with a “low risk of mental health challenges and substance abuse”, funds transfer has helped to address the needs of some people who are currently unhoused.¹⁰⁷

Pandemic plans often fail to engage community groups early in the planning, which leads to plans that are too generic and fail to address the needs of marginalized groups.”¹⁰⁸ Stereotypes of people experiencing homelessness are pervasive and often compounded by the stereotypes faced by Indigenous Peoples, racialized people, and people with disabilities.¹⁰⁹ The lack of understanding of the experiences of those facing homelessness was prevalent in the case on tent encampments, where those living in tent encampments felt unsafe moving to the shelter system where distancing was limited. This feeling has, sadly, been justified far too many times

While COVID-19 exacerbated some of the challenges faced by people experiencing homelessness, these issues are not new. Plans to address homelessness, both during the pandemic and after, must ensure that people are not isolated from their safe and supportive networks or moved away from the communities they call home. They must include upstream solutions, permanent housing, and supports, instead of focusing only on temporary shelter.¹¹⁰ Most importantly, they must be made in partnership with people experiencing homelessness, who are best positioned to know their own needs.

¹⁰⁵ Brigette Watson, “A B.C. research project gave homeless people \$7,500 each—the results were ‘beautifully surprising’”, *CBC News* (7 October 2020), online: <www.cbc.ca/news/canada/british-columbia/new-leaf-project-results-1.5752714>.

¹⁰⁶ *Ibid.*

¹⁰⁷ New Leaf Project, “Eligibility” (2020), online: <forsocialchange.org/the-research>.

¹⁰⁸ Janet Mosher, “Accessing Justice Amid Threats of Contagion” (2014) 51:3 *Osgood Hall LJ* 919 at 945.

¹⁰⁹ *Ibid* at 953.

¹¹⁰ Melissa Perri, Naheed Dosani, Stephen W Hwang, “COVID-19 and people experiencing homelessness: challenges and mitigation strategies” (2020) 192:26 *CMAJ* E716 at E718.

Chapter 3: Impacts on Mental Health and Well Being

Although the physical impacts of the pandemic have resulted in the implementation of many measures, the impacts of COVID on the mental health of Canadians, which have been likened to an echo pandemic, have not been addressed as fulsomely. Not only is substance use on the rise,¹¹¹ but the culmination of financial, social, and personal stressors have caused significant hardship, which provincial health systems cannot handle alone.¹¹² Despite the efforts of health care providers, the Mental Health Commission of Canada expressed concern that available services, which were already inadequate prior to the pandemic, are not sufficient for everyone, notably those with more severe mental health conditions.¹¹³

Authorities at all government levels have started creating resources dedicated to mitigating mental health concerns. For example, the Province of Alberta released public service announcements about the ways to cope with one's mental health during the pandemic, while the federal government has created a wellness portal. Prince Edward Island has a toll-free information service for mental health and addictions, along with a psychiatric urgent care clinic in two cities to help with the repercussions of the pandemic.¹¹⁴ The City of Ottawa has stated that it is able to provide to many of its residents same or next day mental health support, through a support system that includes a mobile network for those in need of face-to-face support.¹¹⁵ There have also been efforts made to provide safe drug supplies to users in order to decrease the rate of overdoses.¹¹⁶

Despite these efforts, many have criticized governments for not doing enough to support mental health. For example, there is a clear disconnect between the Ontario provincial government and a

¹¹¹ Canadian Centre on Substance Use and Addiction, "The Implication of COVID-19 for Substance Use and Mental Health – A Public Health Perspective" (1 October 2020), online (video): *Youtube* <<https://youtu.be/jXWWRSU933A>>, at 11:00 [CCSA/CCDUS Implication of COVID].

¹¹² Centre for Addiction and Mental Health, "Mental Health in Canada: Covid-19 and Beyond" (2020), online (pdf): *Centre for Addiction and Mental Health* <<http://www.camh.ca/-/media/files/pdfs---public-policy-submissions/covid-and-mh-policy-paper-pdf.pdf>>.

¹¹³ Mental Health Commission of Canada, "COVID-19 and Mental Health: Policy Responses and Emerging Issues" (2020), online (pdf): *Mental Health Commission of Canada* <https://www.mentalhealthcommission.ca/sites/default/files/2020-06/COVID_19_policy_responses_emerging_issues_eng.pdf>.

¹¹⁴ Prince Edward Island, "Mental Health and Addictions Services", Health PEI, online: <<https://www.princeedwardisland.ca/en/information/health-pe/mental-health-and-addictions-services>>.

¹¹⁵ *CCSA/CCDUS Implication of COVID, supra* at 11:00, at 38:00, 39:30.

¹¹⁶ *Ibid* at 40:00.

large group of the province's leading mental health professionals, as stated in a press release by the Centre for Addiction and Mental health.¹¹⁷ This release detailed that a response package valued at \$100 million was necessary to respond to the mental health and addiction crises gripping the province¹¹⁸. The package would only constitute 2.5% of the province's mental health budget, but would result in a plethora of mental health social services that are desperately needed, such as clinic workers, investments in social housing, resources to manage the opioid crisis, and technology improvements for remote counselling and therapy.¹¹⁹ Before the pandemic, receiving efficient and effective mental health assistance in Ontario was already a long, sluggish process, and without the necessary funding, it will become even longer as Canadians now attempt to cope with rising stress and uncertainties stemming from the pandemic.¹²⁰

In places where cases have remained low, like the Northwest Territories, governments have been criticized for implementing strict restrictions that are detrimental to mental health. The NWT Medical Association called into question the proportionality of distancing restrictions in July, arguing that “it is unlikely that social distancing restrictions within the NWT have prevented one case of COVID-19”¹²¹.

Substance Use

While the pandemic has increased rates of substance use, it has also exacerbated challenges faced by many people already struggling with substance use. The opioid crisis continues to be one of the most severe public health crises in Canada and continues to kill Canadians at staggering rates.¹²² The lack of access to harm reduction resources, community supports, and community resources that provide places to sleep, maintain hygiene and interact with others has been devastating for many people who use opioids.¹²³ While social distancing requirements, where attainable, can help

¹¹⁷ Centre for Addiction and Mental Health, News Release, “Mental health and addictions organizations call on province for \$100 million COVID-19 emergency response package” (31 July 2020), online: <<https://www.camh.ca/en/camh-news-and-stories/organizations-call-on-province-for-100-million-covid-19-emergency-response-package>>.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Sara Minogue, “N.W.T. doctors call for end to 'harmful' COVID-19 social restrictions”, *CBC* (July 2, 2020), online: <<https://www.cbc.ca/news/canada/north/nwtma-no-social-distancing-1.5634976>>.

¹²² *Ibid.*

¹²³ *Ibid.*

to flatten the curve, they create dangers for individuals who use opioids: a person may overdose without anyone there to call for medical attention.¹²⁴

A Tale of Two Crises in British Columbia: COVID-19 and the Overdose Emergency

COVID-19 is not the only active Public Health Emergency in British Columbia. In fact, the Government of British Columbia had declared a Public Health Emergency almost four years prior, in April 2016, due to the province's drug overdose crisis that resulted from the prevalence of legally and illegally obtained opioids and related drugs in the province.¹²⁵ Government responses to the COVID-19 pandemic have interacted with this pre-existing emergency in ways that have had profound effects on those affected by drug use and drug addiction.

Data on “illicit drug toxicity” deaths show a significant increase in overdose deaths from March 2020 onward. While there were an average of 82 illicit drug toxicity deaths per month in 2019, which is an already staggering rate, the average for March – October of 2020 was 154 deaths per month.¹²⁶ From January to March, B.C. was the only province to have "total apparent opioid-related deaths" exceed a rate of 20 per 100,000 people, and this rate has gotten worse since COVID.¹²⁷

Drug users were affected in many unique ways by the COVID-19 pandemic. A study from the Canadian Centre on Substance Abuse and Addiction found that many of the problems that COVID-19 causes for the general population are exacerbated for those suffering with addiction.¹²⁸ For instance, this population is more vulnerable to the health, emotional, and psychological effects of COVID-19 health measures, such as self-isolation or social distancing and decreased access to healthcare and social services. Substance users may require additional services, such as access to supervised injection sites or support services. In addition to this,

¹²⁴ *Ibid.*

¹²⁵ British Columbia Government, *Provincial health officer declares public emergency* (14 April 2016), online: (News Release) BC Gov News <<https://news.gov.bc.ca/releases/2016HLTH0026-000568>>.

¹²⁶ Ministry of Public Safety & Solicitor General, *Illicit Drug Toxicity Deaths in BC: January 1, 2010 - September 30, 2020* (Report) (British Columbia: Coroners Service, 2020) 4, online: <<https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/illicit-drug.pdf>>.

¹²⁷ Public Health Infobase, "Opioid-related harms in Canada" (2020), online: Government of Canada <<https://health-infobase.canada.ca/substance-related-harms/opioids/maps?index=1>>.

¹²⁸ Canadian Centre on Substance Use and Addiction, "Impacts of the COVID-19 Pandemic on People Who Use Substances: What We Heard", *Canadian Centre on Substance Use and Addiction* (June 2020), online: <<https://www.ccsa.ca/sites/default/files/2020-07/CCSA-COVID-19-Impacts-on-People-Who-Use-Substances-Report-2020-en.pdf>>.

many of the people who suffer from drug addiction have concerns related to their substance use that are intensified by the pandemic —such as access to uncontaminated substances and avoiding going through withdrawal.¹²⁹

The Government of British Columbia has been more active than many other provinces in attempting to address the effects that COVID-19, and related measures such as isolating and closures, have on those who are affected by drug use. In September 2020, the Provincial Health Officer released an order to allow registered nurses to provide more extensive services than usual, including prescribing certain drugs, initiating diagnostic tests and other examinations, making a diagnosis of a substance use disorder or condition, and making referrals.¹³⁰ Notably, nurses in British Columbia are able to administer pharmaceutical alternatives to opioids purchased on the street, including the distribution of fentanyl patches and hydromorphone¹³¹.

Mental Health Impacts on Front Line Workers

The pandemic has significant mental health consequences for many individuals. People experience stress and anxiety when they or their loved ones are diagnosed with COVID. There are restrictions on the way that people can grieve or receive emotional support when loved ones die.

Health care workers are one group whose mental health has been particularly impacted by rising COVID-19 infections. Frontline health care workers are able to see the direct consequences of the virus on patients, families, and are acutely aware of the stretched health care resources. They are often also responsible for updating families who may not be able to visit their loved ones due to hospital restrictions.¹³² It is unsurprising that health care workers are expressing signs of anxiety, depression, sleeplessness, moral distress, suicidal ideation and are moving onto PTSD.¹³³

¹²⁹ *Ibid.*

¹³⁰ Office of the Provincial Health Officer, *Registered Nurse and Registered Psychiatric Nurse Public Health Pharmacotherapy - September 16, 2020 (Order)* (British Columbia: Office of the Provincial Health Officer, 2020).

¹³¹ *Ibid.*

¹³² Perlita Stroh, “Fear, frustration, compassion and shame: What nurses are dealing with during the pandemic”, *CBC News* (9 December 2020), online: <<https://www.cbc.ca/news/health/nurses-pandemic-the-national-1.5821815>>.

¹³³ “Long hours, mounting stress: behind the curtain of COVID-19 red zone in St. Paul’s Hospital”, *CBC News* (9 December 2020), online <https://www.cbc.ca/news/canada/british-columbia/stpauls-covid-red->

Chapter 4: Impacts on Women

Women have been disproportionately impacted by COVID-19 in a number of ways. During the first wave, women lost more jobs and returned to work more slowly than their male counterparts.¹³⁴ Only two months into the pandemic, women's participation in the labour force went from a historic high to its lowest in over 30 years, dipping to 55%.¹³⁵ The majority of job losses during the first wave took place in female-dominated industries, including accommodation and food services, education, and social assistance. In May and June 2020, women lost more jobs and returned to work more slowly than their male counterparts. Parenting responsibilities – of which women shoulder a disproportionate amount – and earnings disparities are both critical factors in determining why women are dropping out of the labour force.¹³⁶ Plans for economic recovery must address the challenges caused by a patriarchal system.

A recent study suggests that the time spent on childcare by both men and women increased by 39% during stay-at-home orders. Before COVID-19, women spent 68 hours per week on childcare while men only spent 33 hours per week.¹³⁷ During the early months of the pandemic, that number increased to 95 hours per week, or 13.5 hours per day, a number that makes a full-time job next to impossible, unless women with children only sleep for 2.5 hours per night.¹³⁸ While the re-opening of schools and daycares has relieved some childcare burdens, parents, particularly mothers, are essentially always on call; with no notice, their child might be back at home for days or weeks, if they have COVID-19 or symptoms, are exposed to a positive case or if the school/daycare is closed due to an outbreak or other closure order.

Domestic Violence

Domestic violence against women has increased at a startling rate. According to the Ontario Association of Interval and Transition Houses, their shelters have reported a significant increase

zone-1.5835414; Mental Health Commission of Canada, "COVID-19 and Mental Health: Policy Responses and Emerging Issues" (2020), online (pdf): *Mental Health Commission of Canada* <https://www.mentalhealthcommission.ca/sites/default/files/2020-06/COVID_19_policy_responses_emerging_issues_eng.pdf>.

¹³⁴ RBC Economics, "Pandemic Threatens Decades of Women's Labour Force Gains" (October 10, 2020), online: <<https://thoughtleadership.rbc.com/pandemic-threatens-decades-of-womens-labour-force-gains/>>.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ The Conversation, "The moms are not alright: How coronavirus pandemic policies penalize mothers", (7 October 2020), online: <<https://theconversation.com/the-moms-are-not-alright-how-coronavirus-pandemic-policies-penalize-mothers-144713>>.

¹³⁸ *Ibid.*

in women reporting domestic violence.¹³⁹ Similar stories are echoed throughout Canada. The executive director of Battered Women's Support Services of Vancouver says their program is also experiencing a much higher number of calls from victims, and the intensity and severity of their users' situations have also increased.¹⁴⁰

During the first wave, the issues and challenges experienced by those facing domestic violence intensified due to closures and reduction of services that might have otherwise provided an escape from abusers. Canadian Victim Services providers were surveyed by Statistics Canada in Summer 2020 to gain greater insight into how COVID-19, and subsequent government actions, had affected their ability to deliver services as well as the number of victims served.¹⁴¹ Service delivery became more difficult for respondents as 76% indicated that access to resources such as food, legal aid, housing, medical care, and mental health supports were impacted "to a moderate or great extent".¹⁴²

¹³⁹ Public Service Alliance of Canada, "Women & Covid-19: Effects will linger long after the pandemic ends", online: PSAC <<http://psacunion.ca/women-covid-19-violence>>.

¹⁴⁰ Brenna Owen, "Calls to Domestic Abuse Helplines Surge As Women Face 'Shadow Pandemic'", *Huff Post* (15 October 2020), online: <https://www.huffingtonpost.ca/entry/domestic-abuse-women-pandemic-canada_ca_5f8848fec5b6e9e76fbade2e>.

¹⁴¹ Mary Allen and Brianna Jaffray, "The COVID-19 pandemic and its impacts on Canadian victim services" (October 4, 2020), online: StatCan <<https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00065-eng.htm>> [COVID-19 Impacts on Canadian Victim Services].

¹⁴² *Ibid.*

Chapter 5: Impacts on Older Adults

The first wave of COVID-19 provided a stark reminder of the critical failures in Canada's long-term care sector, shining a light on longstanding issues in the treatment and care of aging populations. In May, as COVID cases exploded throughout long-term care facilities, many of which are privately run, the Canadian military was dispatched to provide additional support to residents. Some troops found "neglected and malnourished residents, rotten food and insect infestations, and a blatant disregard for critical safety protocol."¹⁴³ At one facility, residents had not been bathed in weeks and at another, staff members made derogatory and inappropriate comments to residents.¹⁴⁴ Neglect of resident hygiene and health, often leading to infection, was documented at all facilities.¹⁴⁵

These horrific accounts highlighted the pressing need to improve care for residents in long term care homes. The Executive Director of Health and Social Policy for Toronto's University Health Network called what took place during the first wave in long term care homes one of the most damning failures of the pandemic, saying "if we were going to be judged by how we protected our most susceptible and people who are structurally vulnerable – we failed them." People within the long-term care system expressed concerns about facilities' inability to handle the second wave without immediate government action.¹⁴⁶ Sadly, these fears have become a reality as care homes are again struggling with outbreaks among staff and residents. For example, as of mid-December at a care home in Etobicoke, Ontario, almost half of the residents were infected, 20 people had died, and 73 staff members remain infected.¹⁴⁷

Strict lockdown measures take a significant toll on residents of long-term care facilities. Residents who are socially isolated are more likely to become inactive, grow frail, become

¹⁴³ Daina Goldfinger, Brian Hill & Mike De Souza, "Inspection reports found mouse feces, neglect, abuse at Ontario long-term care homes before COVID-19", *Global News* (29 May 2020), online: <<https://globalnews.ca/news/6999859/past-inspection-report-ontario-long-term-care-coronavirus-covid-19/>>.

¹⁴⁴ *Ibid.*

¹⁴⁵ Leyland Cecco, "Canada: neglected residents and rotten food found at care homes hit by Covid-19", *The Guardian* (26 May 2020), online: <<https://www.theguardian.com/world/2020/may/26/canada-care-homes-military-report-coronavirus>>.

¹⁴⁶ Adam Miller, "Canada failed to protect elderly in 1st wave of COVID-19 – will the same mistake be made again?", *CBC News* (26 September 2020), online: <<https://www.cbc.ca/news/health/covid-long-term-care-canada-1.5739798>>.

¹⁴⁷ Bryann Aguilar, "20 residents dead at Etobicoke long-term care home amid COVID-19 outbreak", *CTV News* (12 December 2020), online: <<https://toronto.ctvnews.ca/20-residents-dead-at-etobicoke-long-term-care-home-amid-covid-19-outbreak-1.5228930>>.

depressed, experience advancing dementia or eat poorly, consequences which can be irreversible or even fatal.¹⁴⁸ The loss of loving interaction with, and sense of connection to, families and other loved ones is devastating, and some residents have suggested that the value of family visits overrides their worries about getting COVID-19.¹⁴⁹ For facilities that have allowed one designated family caregiver to visit, they provide much needed emotional support and help to fill gaps in understaffed homes. However, this places a lot of stress and responsibility on a single person, who may have previously shared care duties with other family members. And for those who are not the designated caregiver, they may be unable to spend time with their loved ones who are in long term care.

As with many other COVID-related issues, there is no simple solution or answer. The rights of individuals to decide what risks they are willing to accept are in tension with the right of the collective in homes to do everything within their power to reduce the transmission of COVID-19. What is clear, however, is that there are many shortcomings with the ways that we treat and care for our elderly populations, which will continue long after the pandemic ends.

¹⁴⁸ Christina Frangou, "Strict COVID-19 protocols are leaving seniors lonely, depressed and wondering: Is it worth it?", *Maclean's* (12 November 2020), online: <<https://www.macleans.ca/society/health/seniors-covid-19-loneliness-long-term/>>.

¹⁴⁹ Nicole Ireland, "As COVID-19 cases climb in long-term care homes, experts hope to avoid locking down", *CBC* (14 October 2020), online: <<https://www.cbc.ca/radio/whitecoat/the-dose-covid-19-cases-climb-in-long-term-care-1.5761136>>.

Chapter 6: Impacts on Indigenous Peoples

During the first wave and the fall of the second wave, Indigenous communities on reserve fared better against COVID-19 and flattened the curve more effectively. As recently as mid-December, the rate of reported cases of COVID-19 for First Nations individuals living on reserve was approximately one-half the rate in general Canadian population, while the COVID-19 fatality rate was about one-fifth of the rate in the general Canadian population¹⁵⁰

Health officials attributed the low numbers of cases among Indigenous Peoples living on reserves in Canada to the effective public health measures taken by Indigenous communities.¹⁵¹ In particular, Robert Bonspiel, the director of First Nations Pandemics, stated that these low numbers were likely a result of the proactive approach taken by Indigenous communities to the pandemic.¹⁵² This was reiterated by health officials and other professionals, who recognized the strategies employed and sacrifices made by Indigenous communities during the lockdown.¹⁵³ The Navajo Nation, for example, stabilized rates of COVID-19 by swiftly securing funding for water stations, food delivery, personal protective equipment, and access to testing. Further, once alerted of the threat of COVID-19, many Indigenous leaders responded by updating emergency response plans and immediately closing their borders, in accordance with the right to self-determination.¹⁵⁴

Sadly, concerns that the second wave would hit Indigenous Communities harder came to fruition;¹⁵⁵ by mid-January, the rate of reported cases of COVID-19 for First Nations individuals living on reserve was 40% higher than the rate in the general Canadian population.¹⁵⁶

¹⁵⁰ Indigenous Services Canada, "Coronavirus (COVID-19) and Indigenous communities" (modified 8 December 2020 and accessed 14 December 2020), online: Government of Canada <www.sac-isc.gc.ca/eng/1581964230816/1581964277298>.

¹⁵¹ Jolene Banning, "Why are Indigenous communities seeing so few cases of COVID-19?" (24 August 2020), online: cmajGROUP <<https://www.cmaj.ca/content/192/34/E993>>.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Lisa Richardson & Allison Crawford, "How Indigenous Communities in Canada Organized an Exemplary Public Health Response to COVID" (27 October 2020), online: *Scientific American* <<https://www.scientificamerican.com/article/how-indigenous-communities-in-canada-organized-an-exemplary-public-health-response-to-covid/>>.

¹⁵⁵ *First Nations reserves avoided first-wave crisis, supra.*

¹⁵⁶ Indigenous Services Canada, "Coronavirus (COVID-19) and Indigenous communities" (modified 2 February 2021 and accessed 5 February 2021), online: Government of Canada <www.sac-isc.gc.ca/eng/1581964230816/1581964277298>.

Indigenous Peoples in Canada are at a greater risk of contracting COVID-19 due to systemic inequality, discrimination and other factors. For example, many Indigenous communities lack access to clean water and adequate funding for housing, making effective hand washing and social distancing more difficult.¹⁵⁷ 36.8% of First Nations people living on a reserve live in unsuitable and crowded households, compared to 8.5% of non-Indigenous people.¹⁵⁸ Multigenerational households are also more common among First Nations people living on reserve (25.4% versus 6.1% for non-Indigenous people), which can help to reduce social isolation for the elderly but may increase the risk of contracting COVID-19, particularly in crowded households.¹⁵⁹

As a result of colonialism and discriminatory policies and practices, Indigenous Peoples are often over-represented in populations that are more at risk for COVID-19, such as people living in poverty, people experiencing homelessness, and prison populations.

Indigenous Peoples also have higher rates of health conditions associated with poverty, such as tuberculosis and diabetes, diseases which put people at higher risk for severe illness from COVID-19.¹⁶⁰ Finally, compared to white people born in Canada, Indigenous Peoples in Canada are approximately twice as likely to have three or more pre-existing health conditions that leave them more vulnerable to COVID-19.¹⁶¹

Access to PPE and health care services have also been an issue for some Indigenous communities during the pandemic. In particular, Indigenous communities located in remote areas

¹⁵⁷ Amanda Carling & Insiya Mankani, "Systemic Inequalities Increase COVID-19 Risk for Indigenous People in Canada" (9 June 2020), online: Human Rights Watch <<https://www.hrw.org/news/2020/06/09/systemic-inequities-increase-covid-19-risk-indigenous-people-canada>>.

¹⁵⁸ The Daily, "First Nation people, Métis and Inuit and COVID-19: Health and social characteristics", (17 April 2020), online: StatCan <<https://www150.statcan.gc.ca/n1/en/daily-quotidien/200417/dq200417b-eng.pdf?st=aDfECZC5>>.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Graham Slaughter, "First Nations reserves avoided first-wave crisis, but officials warn of troubling new surge", *CTV News* (22 October 2020), online: <https://www.ctvnews.ca/health/coronavirus/first-nations-reserves-avoided-first-wave-crisis-but-officials-warn-of-troubling-new-surge-1.5156978?cid=sm%3Atrueanthem%3Aactvnews%3Apost&utm_campaign=trueAnthem%3A+Trending+Content&utm_medium=trueAnthem&utm_source=facebook&fbclid=IwAR1rPZyMMYwTCuJQXMIaMQMuxneUqanuQHU0Im6Qf1rCp-4Nxi4zuHiuApQ> [First Nations reserves avoided first-wave crisis].

of Canada may not have access to essential medical services and supplies.¹⁶² Items such as gloves, masks, soap, hand sanitizer, and nutritious food are often very costly or not readily available in remote communities, leaving these communities more vulnerable to COVID-19.¹⁶³

In response to the challenges and risks facing Indigenous Peoples, the government of Canada announced an Indigenous Community support fund, which can be used for measures to address food insecurity; supports for Elders and vulnerable community members; support for children such as education; prevention of COVID-19; and mental health assistance and emergency response services.¹⁶⁴ An additional fund was set up to target childcare, education, and infrastructure in Indigenous communities.¹⁶⁵ While the funds claim to provide Indigenous leadership with the flexibility needed to design and implement community-based solutions to prevent, prepare and respond to COVID-19,¹⁶⁶ it has been suggested that the pandemic will plunge some Indigenous communities into extended poverty, due to a longstanding lack of financial autonomy and control over economic development.¹⁶⁷

Some other pre-existing inequalities make challenges associated with COVID-19 more difficult for Indigenous Nations, as government services for Indigenous communities often fall far short of what is needed.¹⁶⁸ For example, according to the Federation of Sovereign Indigenous Nations,

¹⁶² Ann M Seymour, "Canada's unequal health system may make remote Indigenous communities more vulnerable to the coronavirus", *The Conversation* (22 April 2020), online: <<https://theconversation.com/canadas-unequal-health-system-may-make-remote-indigenous-communities-more-vulnerable-to-the-coronavirus-134963>>.

¹⁶³ *Ibid.*

¹⁶⁴ "Feds add \$204M for anti pandemic measures in Indigenous communities and institutions", *APTN National News* (30 October 2020), online: <<https://www.aptnnews.ca/national-news/feds-add-204m-for-anti-pandemic-measures-in-indigenous-communities-and-institutions/>>.

¹⁶⁵ Indigenous Services Canada, "Indigenous Community Support Fund" (last modified 30 October 2020), online: Government of Canada <<https://www.sac-isc.gc.ca/eng/1585189335380/1585189357198>>.

¹⁶⁶ *Ibid.*

¹⁶⁷ Carol Audet, "COVID-19 will plunge some First Nations further into debt and tis people into poverty. The underlying solution is control of our resources and land", *Policy Options* (September 24, 2020), online: <<https://policyoptions.irpp.org/magazines/september-2020/first-nations-face-overlapping-crises-and-inadequate-support-during-pandemic/>>.

¹⁶⁸ Christy Somos, "A year later, Indigenous communities are fighting twin crises: COVID-19 and inequality", *CTV News* (25 January 2021), online: <<https://www.ctvnews.ca/health/coronavirus/a-year-later-indigenous-communities-are-fighting-twin-crises-covid-19-and-inequality-1.5280843>>.

the pandemic caused the closure of at least 20 schools on Saskatchewan First Nations.¹⁶⁹ While teachers and parents have tried their best to help students learn at home, poor internet service and lower overall funding than provincial schools make at home learning even more challenging than it is for public schools in the rest of the province.¹⁷⁰

¹⁶⁹ Jason Warick, “More than 20 Sask First Nations schools closed due to COVID-19 fears”, *CBC News* (30 October 2020), online: <<https://www.cbc.ca/news/canada/saskatoon/more-than-20-sask-first-nations-schools-closed-due-to-covid-19-fears-1.5782978>>.

¹⁷⁰ *Ibid.*

Chapter 7: Impacts on Workers

COVID-19 continues to have a devastating impact on workers in Canada. Unemployment skyrocketed.¹⁷¹ Employment laws were changed to allow for extended temporary layoffs, protecting employers from having to provide termination pay and leaving many without work and limited recourse.¹⁷² As is the case with so many other impacts of COVID-19 and the associated public health restrictions, individuals from marginalized communities have been disproportionately impacted. For example, the unadjusted national unemployment rate for people aged 15 to 69 in July was 11.3% overall, but was 17.8% for South Asian Canadians, 17.3% for Arab Canadians and 16.8% for Black Canadians.¹⁷³ Intersecting factors made unemployment rates higher for racialized women than for racialized men.¹⁷⁴

Racialized and vulnerable essential workers

While some people have been working from home since the pandemic first started, this has not been an option for essential workers, including janitors, long-term care workers, grocery store workers and transit operators. Many of these workers are racialized, new immigrants, work in lower wage jobs and/or are more likely to suffer with pre-existing conditions that lead to worse COVID outcomes.¹⁷⁵ Quantitative data from Toronto revealed that racialized people had approximately three times the number of cases of COVID and more than twice the rate of hospital admissions compared to non-racialized people, while low-income earners had twice the

¹⁷¹ Statistics Canada, “Labour force characteristics, monthly, seasonally adjusted and trend-cycle, last 5 months” (accessed: 16 October 2020), online: *Statistics Canada* <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410028701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=3.2&pickMembers%5B2%5D=4.1&pickMembers%5B3%5D=5.1&cubeTimeFrame.startMonth=02&cubeTimeFrame.startYear=2020&cubeTimeFrame.endMonth=10&cubeTimeFrame.endYear=2020&referencePeriods=20200201%2C20201001>>.

¹⁷² See, for example: *Employment Standards Code*, RSA 2000, c E-9, s 63.1; *Infectious Disease Emergency Leave*, O Reg 228/20, s 7(1).

¹⁷³ *Labour force characteristics*, *supra*.

¹⁷⁴ *Ibid*.

¹⁷⁵ Dakshana Bascaramurty, Carly Weeks & Eric Andrew-Gee, “New data show that immigrant and low-income earners are more susceptible to COVID-19”, *Globe and Mail* (25 May 2020), online: <<https://www.theglobeandmail.com/canada/article-how-covid-19-is-exposing-canadas-socioeconomic-inequalities/>>.

rates of COVID infection and hospitalization compared to those not living in low-income households.¹⁷⁶

The COVID-19 outbreak at a Cargill meat processing facility in High River, Alberta, which led to 1,500 cases and 3 deaths, provides a sobering example of the deadly risks that vulnerable essential workers have been exposed to.¹⁷⁷ Racialized people are overrepresented in the meat processing industry in Canada.¹⁷⁸ Indeed, it was estimated that 60-80% of the Cargill plant's roughly 2,000 workers were members of the Filipino community.¹⁷⁹ Many of these workers are also recent arrivals in Canada working under Canada's temporary worker program.¹⁸⁰ Canada relies heavily on these workers and considers them “essential”, yet meat processing workers earn 20% less than the average industrial wage.¹⁸¹

After the first COVID case at the plant, workers, who reported working “elbow to elbow” with one another, called for the plant to close.¹⁸² However, the plant remained open, and workers who went home to quarantine felt like they were being pressured to return to work early.¹⁸³ One person who had tested positive reported being told that as long as they had no symptoms, they could return to work.¹⁸⁴ Cargill even began offering bonuses during the outbreak. For financially

¹⁷⁶ City of Toronto, “COVID-19 infection in Toronto: Ethno-racial identity and income”, online: *City of Toronto* <<https://www.toronto.ca/home/covid-19/covid-19-latest-city-of-toronto-news/covid-19-status-of-cases-in-toronto/>>.

¹⁷⁷ Joel Dryden, “Class-action lawsuit filed against Cargill meat-packing plant”, *CBC News* (10 July 2020), online: <<https://www.cbc.ca/news/canada/calgary/cargill-high-river-guardian-law-group-calgary-alberta-1.5645394>> [Class Action].

¹⁷⁸ Joel Dryden, “What led to Alberta’s biggest outbreak? Cargill meat plant’s hundreds of COVID-19 cases”, *CBC News* (19 April 2020), online: <<https://www.cbc.ca/news/canada/calgary/cargill-alberta-covid-19-deena-hinshaw-1.5537377>> [Cargill Outbreak].

¹⁷⁹ *Ibid.*

¹⁸⁰ *Class Action, supra.*

¹⁸¹ *Cargill Outbreak, supra.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

vulnerable workers, it was difficult to stay home. Compounding the issue, many workers live in households that do not provide enough space to isolate.¹⁸⁵

The Cargill plant outbreak highlights a concerning trend that has emerged in the wake of COVID-19. The essential workers that are asked to continue working during the pandemic are often more vulnerable to COVID. Vulnerable workers in essential positions are faced with the painful choice between braving the virus and earning a living or staying home and risking their and their families' economic wellbeing. Although the Canada Emergency Response Benefit (more commonly known as CERB) and the new benefits available may help to ease some economic distress, people may not be able to forego their wages and rely only on government support; others may fear giving up a job when unemployment rates are high, and others may fear the immigration consequences if their status is tied to their work. Vulnerable front-line workers face impossible decisions and extreme risks from COVID-19.

Delays prevent immigrants and refugees from working

People within Canada's immigration and refugee system are also uniquely impacted by COVID-19. While Canada's immigration system has remained operational, Immigration, Refugees and Citizenship Canada ("IRCC") halted eligibility interviews for refugees in March 2020 due to COVID-19.¹⁸⁶ The interview is the first step in the process of claiming refugee status and passing it is a requirement to be allowed to work or study while awaiting a full hearing. As a result, applicants have been left in limbo, unable to work or study. One immigration lawyer explained that these delays have profound psychological impacts and are an added layer of disadvantage faced by refugees when it comes to employment, in addition to having foreign qualifications or credentials, adapting to a new country and adjusting to language barriers.¹⁸⁷

For one woman, a 32-year-old Syrian refugee, mother and physicist, her dreams of becoming a pilot or continuing her education with a PhD have been placed in limbo.¹⁸⁸ Due to the government delays for interviews and the resultant inability to obtain a work permit, she has been forced to turn down multiple job offers. She talked about the anxiety she feels because she cannot support herself and her frustration of being in limbo, saying "I have the skills. I have the

¹⁸⁵ Joel Dryden, "Filipino workers at meatpacking plant feel unfairly blamed for Canada's biggest COVID-19 outbreak", *CBC News* (26 April 2020), online: <<https://www.cbc.ca/news/canada/calgary/cargill-high-river-jbs-brooks-deena-hinshaw-1.5545113>>.

¹⁸⁶ Blair Crawford "Lives in Limbo as COVID stalls refugee interview process", *Ottawa Citizen* (October 31, 2020) online: <<https://ottawacitizen.com/news/local-news/lives-in-limbo-as-covid-stalls-refugee-interview-process>>.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

energy. I have the health. ... I feel I can do many things. I can add to the community. But I'm not allowed to do anything."¹⁸⁹ While IRCC reported in the fall that they started to reach out to claimants to book interviews, it is unclear when normal operations will resume.¹⁹⁰

Without a work permit, refugee claimants are also unable to take advantage of the government's decision to accept applications for permanent residence from refugee claimants who work in Canada's healthcare sector.¹⁹¹ While this program is a welcome step in recognizing the significant contribution of many refugees who provided healthcare services, it is unfortunate that refugee claimants awaiting interviews will be excluded from this.

Individuals in the immigration process have also been impacted by COVID-19. One man, who has lived in Halifax since 2011 and was working with the health authority, applied for permanent residency in May – an application which requires a medical certificate. Unfortunately, his medical certificate was expired, as he was unable to get an appointment with a doctor due to the COVID crisis.¹⁹² Although the government of Canada declared that it will not close or refuse any applications in progress because someone is missing documents, this individual's application was cancelled and his work permit was revoked.¹⁹³ He had to restart his application and live off of his savings, as he cannot work until his application is decided.¹⁹⁴

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Immigration, Refugees and Citizenship Canada, "IRCC announces opening date of special measures for refugee claimants working in health care during the pandemic" (9 December 2020), online: Government of Canada (News Release) <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/12/ircc-announces-opening-date-of-special-measures-for-refugee-claimants-working-in-health-care-during-the-pandemic.html>>.

¹⁹² "Halifax man's permanent residency application derailed by COVID-19", *CBC News* (9 October 2020), online: <<https://www.cbc.ca/news/canada/nova-scotia/murat-van-den-born-permanent-residency-nova-scotia-health-authority-ircc-covid-19-1.5757531>> [Halifax man's permanent residency application derailed].

¹⁹³ "Coronavirus disease (COVID-19): Immigration Applicants" (October 23, 2020) online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/immigration-applicants.html>>

¹⁹⁴ *Halifax man's permanent residency application derailed, supra.*

Chapter 8: Impacts on Persons with Disabilities

Prior to the COVID-19 pandemic, people living with disabilities already faced many unnecessary barriers to participating fully in society, due to a lack of accessibility. According to the Canadian Human Rights Commission, individuals with disabilities had "unequal access to health care, education, employment and community participation."¹⁹⁵ Furthermore, people living with disabilities were already more likely to live in poverty, experience violence and face marginalization and discrimination.¹⁹⁶ The pandemic has exacerbated these existing barriers as well as created new ones, with many pandemic-related measures having a disproportionate impact on persons with disabilities.

Federal Governmental Response

The Government of Canada has recognized that people with disabilities face an increased risk of being impacted directly and indirectly by COVID-19, due to a number of factors, including: the nature of some disabilities, the increased prevalence of persons with disabilities living in long-term care homes or interacting with multiple support people each day, the exacerbation of pre-existing barriers, the limiting of services and medical appointments in order to prioritize COVID-19, and an increased risk of exposure to COVID-19 due to treatment of unrelated health conditions.¹⁹⁷

In recognition of this, and in considering its human rights obligations to persons with disabilities, the federal government formed the COVID-19 Disability Advisory Group (CDAG) of experts from the disability community in April.¹⁹⁸ CDAG was formed to “advise the Minister on the real-time lived experiences of persons with disabilities during this crisis on disability-specific issues, challenges and systemic gaps and on strategies, measures and steps to be taken.”¹⁹⁹ The CDAG’s advice is supposed to inform all federal government actions in relation to COVID-19.

¹⁹⁵ “Statement - COVID-19 putting disability rights at risk”, (15 September 2020), online: Canadian Human Rights Commission <www.chrc-ccdp.gc.ca/eng/content/statement-covid-19-putting-disability-rights-risk> [Statement – COVID-19 putting disability rights at risk].

¹⁹⁶ *Ibid.*

¹⁹⁷ Dr. Marianna Ofner, Dr. Marina Salvadori, Aidan Pucchio, Yung-En Chung, Althea House and the PHAC COVID-19 Clinical Issues Task Group, “COVID-19 and people with disabilities in Canada” (17 August 2020), online: Government of Canada <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/people-with-disabilities.html>.

¹⁹⁸ Employment and Social Development Canada, “Backgrounder: COVID-19 Disability Advisory Group”, (10 April 2020), online: Government of Canada <www.canada.ca/en/employment-social-development/news/2020/04/backgrounder--covid-19-disability-advisory-group.html>.

¹⁹⁹ *Ibid.*

In July 2020 the federal government announced the creation of an automatic one-time payment of \$600 to eligible Canadians with disabilities, in recognition of the increased financial burden people with disabilities are facing due to the pandemic.²⁰⁰ However, some have criticized the outdated eligibility criteria used by the government for this benefit, resulting in only a portion of Canadians with disabilities being eligible.²⁰¹ The federal government anticipates that 1.6 million Canadians will be eligible for the payment; however, according to Statistics Canada, over 6 million Canadians live with a disability that limits their daily activities, including over 2.5 million people having a severe or very severe disability.²⁰² In addition to criticisms over the

²⁰⁰ Department of Finance Canada, "Government introduces legislation to support Canadian workers, businesses and persons with disabilities" (20 July 2020), online: Government of Canada <www.canada.ca/en/department-finance/news/2020/07/government-introduces-legislation-to-support-canadian-workers-businesses-and-persons-with-disabilities.html>.

²⁰¹ In order to qualify for the payment, Canadians must have a Disability Tax Credit (DTC) certificate or be a beneficiary of the Canada Pension Plan Disability, the Quebec Pension Plan Disability Pension, or one of the disability supports provided by Veterans Affairs Canada. However, in previous years, only 40% of working age adults with qualifying disabilities have applied for and received the DTC. This is due to a number of factors, including a burdensome application procedure and that the DTC is a tax relief measure, meaning those who do not earn taxable income do not benefit from it. While the Federal government has extended the deadline to apply for the DTC this year so that Canadians with disabilities who had not previously received a DTC certificate could qualify for the COVID-19 payment, many Canadians with mental impairments are still left ineligible based on the DTC criteria. See Carolyn Abel and Jonathan Lai, "Disabled Canadians Ignored in Policies on COVID-19", *Policy Options* (2 October 2020), online: <policyoptions.irpp.org/magazines/october-2020/disabled-canadians-ignored-in-policies-on-covid-19/>; Stephanie Dunn and Jennifer Zwicker, "Policy Brief - Why is Uptake of the Disability Tax Credit Low in Canada? Exploring Possible Barriers to Access", *Univ Calgary The School of Public Policy* (January 2018), online (pdf): <www.policyschool.ca/wp-content/uploads/2018/01/Disability-Tax-Credit-Dunn-Zwicker.pdf>; Employment and Social Development Canada, "Government of Canada extends deadline to apply for the Disability Tax Credit to receive the COVID-19 one-time payment for persons with disabilities" (23 October 2020), online: Government of Canada <www.canada.ca/en/employment-social-development/news/2020/10/government-of-canada-extends-deadline-to-apply-for-the-disability-tax-credit-to-receive-the-covid-19-one-time-payment-for-persons-with-disabilities.html>.

²⁰² Sean Boynton, "Ottawa says coronavirus disability grant will be paid Friday after months-long delay", *Global News* (29 October 2020), online: <globalnews.ca/news/7431851/coronavirus-disability-payment-friday/>; "Canadian Survey on Disability, 2017", *Statistics Canada* (28 November 2018), online: <www150.statcan.gc.ca/n1/daily-quotidien/181128/dq181128a-eng.htm>.

eligibility criteria, many have criticized the delay in administering this payment: although it was announced in July, the funds only began to be distributed on October 30.²⁰³

Impacts of Sanitary Measures

In addition to worsening pre-existing barriers, COVID-19 related safety protocols are creating new barriers for persons with disabilities. For example, people with visual impairments rely on touching objects and surfaces around them; however, these surfaces are often not regularly sanitized, thereby putting them at higher risk of contracting the coronavirus.²⁰⁴ Furthermore, many pathways have been obstructed and known environments have been changed, making it harder for persons with disabilities to navigate.²⁰⁵ The changed environments are also creating barriers for those who use mobility devices. With many buildings creating unidirectional indications, some barrier-free entrances have been designated as “entrance-only” or “exit-only,” thereby forcing those who require the barrier-free access points to disobey the building protocols.²⁰⁶

The impact of mandatory mask policies is also being felt disproportionately by people with disabilities. Some people with hearing impairments rely on reading lips and looking at facial gestures to communicate. Mandatory mask policies therefore severely limit their ability to communicate effectively.²⁰⁷ Chief Public Health Officer, Dr. Theresa Tam has highlighted the need to consider how masks may affect persons with disabilities, and it seems that most jurisdictions have heeded that warning.²⁰⁸ Many of the laws and bylaws that mandate mask usage

²⁰³ See, for example: Sarah Turnbull, “Long-awaited one-time disability payment to be distributed Friday”, *CTV News* (29 October 2020), online: <www.ctvnews.ca/politics/long-awaited-one-time-disability-payment-to-be-distributed-friday-1.5163650>.

²⁰⁴ *Statement – COVID-19 putting disability rights at risk, supra*.

²⁰⁵ See Shane Ross, “COVID-19 presents different challenges for people with disabilities, advocate says”, *CBC* (7 October 2020), online: <www.cbc.ca/news/canada/prince-edward-island/pei-covid-people-with-disabilities-1.5753748> [COVID-19 presents different challenges].

²⁰⁶ *Ibid*.

²⁰⁷ *Statement – COVID-19 putting disability rights at risk, supra*.

²⁰⁸ In May, accompanying her recommendation that all Canadians wear masks, Dr. Tam stated “Be very aware of those with different types of cognitive, intellectual disabilities, those who are hearing impaired and others. [...] Don’t assume that someone who isn’t wearing a mask or is wearing something different doesn’t have an actual reason for it.” See Donna Spencer, “Face masks can be problematic, dangerous to health of some Canadians: advocates,” *Global News* (21 May 2020), online: <globalnews.ca/news/6967625/coronavirus-canada-face-masks-disabilities/>. The Government of Canada website continues to have similar messaging as of mid-November, 2020, see “Non-medical

in public places have exceptions for people who cannot wear one for medical reasons or due to a disability.²⁰⁹ Furthermore, some jurisdictions are trying to mitigate the impact of mask mandates on those who require visual cues to communicate. For example, the Quebec government's Ministry of Health website has included instructions on how to make a face mask with a clear window.²¹⁰

Masks are not the only thing impairing persons with disability's ability to communicate. According to the P.E.I. Council of People with Disabilities, the lack of an interpreter during the government's COVID-19 press briefings means that those with hearing impairments may be denied real-time information.²¹¹ The P.E.I. government responded to these criticisms, saying that they have been trying to address this challenge, but have faced difficulty in finding a sign language interpreter for all the briefings. They have, however, added closed captions to the briefings on YouTube and Facebook. In Ontario, there have been reports that some of the information on the Ministry of Health website is not compatible with screen-reading technologies.²¹² The Ministry of Health, however, responded that all COVID-19 messaging has been compliant with accessibility legislation. Given the frequency with which government directives have been changing, the barriers to accessing vital information is especially pertinent.

Impacts of Lockdowns

The stay-at-home orders may also have a disproportionate impact on some people with disabilities. For example, people who have a disability limiting how they can use technology may experience the effects of isolation to a much higher degree than people who can easily use technology to socialize.²¹³ As of 2017, almost one fifth of Canadians living with a disability reported that they did not use the internet, while 21% of Canadians with disabilities reported

masks and face coverings: About", *Government of Canada*, (3 Nov 2020), online: <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/about-non-medical-masks-face-coverings.html>.

²⁰⁹ See, for example: Quebec, Order in Council No 810-2020; Ontario, O. Reg. 364/20: RULES FOR AREAS IN STAGE 3, Sched 1, s 2(4)(g); British Columbia, Ministerial Order No M425 at s 4(b).

²¹⁰ "Wearing a mask or a face covering in public settings in the context of the COVID-19 pandemic", *Official website of the Gouvernement du Québec* (2020), online: <www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/wearing-a-face-covering-in-public-settings-in-the-context-of-the-covid-19-pandemic/#c60636>.

²¹¹ *COVID-19 presents different challenges, supra.*

²¹² Michelle McQuigge, "Disabled Canadians feel excluded from COVID-19 messaging", *The Star* (18 March 2020), online: <www.thestar.com/news/canada/2020/03/18/disabled-canadians-feel-excluded-from-covid-19-messaging.html>.

²¹³ *Statement – COVID-19 putting disability rights at risk, supra.*

living alone.²¹⁴ For those that fall into both of these categories, the effects of isolation are extreme. Some people with intellectual disabilities may also experience the effects of social isolation to a higher degree, in addition to struggling to adapt to the change in routine that COVID-19 protocols necessitate.²¹⁵

Persons with disabilities who are in institutionalized care may be impacted even further by lockdown measures, with months-long visitation bans in many long-term care facilities.²¹⁶ For example, one family has filed an application with the Human Rights Tribunal of Ontario (HRTO) to be allowed to visit their 14-year old son who lives in a group home due to his disability.²¹⁷ They allege that the company that runs the group home is discriminating against their son due to his disability and is violating his human rights for failing to accommodate his disability. Their son is unable to comprehend the complexities of the pandemic and does not understand why his family stopped visiting him. He is nonverbal and was confused by the family's attempt to communicate with him via video call towards the start of the pandemic. The family was finally able to visit their son in August, for the first time in months; however, they are continuing to pursue their case at the HRTO.²¹⁸ The Tribunal has yet to release a final decision in this case.²¹⁹

Workplace Accommodations

While some people with disabilities have been adversely affected by stay-at-home orders and social isolation, others wish to work from home specifically because of their increased risk of COVID-19. The Human Rights Tribunal of Ontario has heard at least two cases alleging discrimination on the basis of disability under the Human Rights Code due to employers

²¹⁴ "Persons with disabilities and COVID-19", *Statistics Canada* (6 July 2020), online: <www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2020040-eng.htm>.

²¹⁵ *COVID-19 presents different challenges, supra*.

²¹⁶ Alan Santinele, Ann Fudge Schormans & Margaret Campbell, "COVID-19 has isolated people with disabilities from family, love, sex", *Brighter World* (7 August 2020), online: <brighterworld.mcmaster.ca/articles/covid-19-has-isolated-people-with-disabilities-from-family-love-sex/>.

²¹⁷ Liam Casey, "Coronavirus: Ontario family files human rights application to visit son, 14, in group home", *Global News* (3 July 2020), online: <globalnews.ca/news/7133577/coronavirus-ontario-family-files-human-rights-application-to-visit-son-in-group-home/>.

²¹⁸ The Canadian Press, "Ontario teen in group home reunites with family for first time in six months", *National Post* (31 August 2020), online: <nationalpost.com/pmnl/news-pmn/canada-news-pmn/ontario-group-home-residents-can-now-leave-for-day-overnight-trips>.

²¹⁹ The HRTO has released three interim decisions in the case on procedural grounds. See *JL v Empower Simcoe*, 2020 HRTO 641; *JL v Empower Simcoe*, 2020 HRTO 867; *JL v Empower Simcoe*, 2020 HRTO 880.

allegedly failing to allow employees with disabilities or employees who have family members with disabilities to work from home to reduce their risk of exposure.²²⁰ It appears that a final decision has not yet been released in either case.

Those who cannot wear masks in the workplace due to their disability are protected by human rights legislation. With respect to the *Occupational Health and Safety Act* requirement to wear a mask if employees cannot maintain 2 meters of distance, the Ontario Labour Relations Board confirmed that if a worker has a disability that prevents them from wearing a mask, they would be entitled to accommodation under the *Human Rights Code*²²¹ This means that the employer would legally be required to use alternative precautionary measures to protect the worker.

²²⁰ *CR v Strathroy-Caradoc Police Services Board*, 2020 HRTO 635; *Taylor v Donna Cona Inc*, 2020 HRTO 734.

²²¹ *Ste Anne's Country Inn and Spa v A Director under the Occupational Health and Safety Act*, 2020 CanLII 64749 (ON LRB).

Chapter 9: Law enforcement and fines

All Canadian jurisdictions have, to some extent, relied on police and other law enforcement officers to issue tickets to individuals and businesses alleged to have violated COVID-related legal orders. The extent to which governments have relied on this punitive tool, however, has varied widely across the country and there is little evidence to suggest that fines are an effective public health measure.²²² To the contrary, many legal and public health experts have expressed concern that a heavy reliance on fines is counterproductive, disproportionately impacts marginalized populations, and undermines necessary public health efforts such as testing and contact tracing.

Canada's use of fines during the first wave of COVID-19, and the significant concerns that accompanied the over-reliance on police and law enforcement in some provinces, were outlined in a June report by the CCLA and the Policing the Pandemic Mapping Project.²²³ That report found that while some provinces effectively 'flattened the curve' by relying on public health recommendations and education, others turned to overzealous and punitive enforcement.

People across the country shared their experiences of being stopped, questioned, and ticketed with the CCLA, which are highlighted in the report. Some people were given substantial fines for minor technical violations of orders, such as having a child run ahead and jump on a park bench for a few seconds or standing three feet inside of an unmarked and unfenced soccer field. Others seemed to be ticketed for actions that were not contrary to any emergency order, for example, for walking alone through an open park. The report also found numerous indications that the arbitrary rules, increased enforcement powers, and significant fines disproportionately impacted specific communities, including Black, Indigenous and other racialized groups; people with precarious housing; recent immigrants; youth; members of the LGBTQ2S community; and certain religious minorities.

Unfortunately, the second wave of COVID-19 appears to have resulted in a return to heavy-handed enforcement efforts in at least some parts of the country. In the first week of November

²²² Alex Luscombe and Alexander McClelland, "'An extreme last resort': Monetary Penalties and the Policing of COVID-19 in Canada", (November 2020), *Centre for Media, Technology and Democracy*, online: <<https://www.mediatechdemocracy.com/work/extreme-last-resort-monetary-penalties-and-the-policing-of-covid19-in-canada>> [An extreme last resort].

²²³ Abby Deshman, Alex Luscombe & Alexander McClelland, "Stay Off the Grass: COVID-19 and Law Enforcement in Canada" (June 2020), *Canadian Civil Liberties Association & Policing the Pandemic Mapping Project*, online: <<https://ccla.org/cclanewsites/wp-content/uploads/2020/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada1.pdf>>.

alone, Montreal police handed out almost 180 tickets.²²⁴ These numbers are likely to increase as governments continue to grapple with rising COVID case numbers. In December, for example, Quebec Premier Legault “ordered” the police to issue more fines to Quebecers who are not complying with the COVID-19 rules.²²⁵ At a time when many are struggling financially, each person fined in Quebec will be set back at least \$1,500 which is more than the average Montrealer pays in rent each month.²²⁶ Fines can go up to \$6,000.²²⁷

In Ontario, fines are even more draconian. Failure to comply with COVID-19 restrictions can lead to fines of up to \$100,000 and imprisonment of up to a year, with even more severe penalties for corporations and their directors.²²⁸ Municipal bylaws add an additional layer of restrictions and potential fines. For example, a Toronto city bylaw requires people who are not from the same household to remain two meters apart in a park, beach or public square; those failing to do so can be subject to fines of \$1,000 to \$5,000.²²⁹ Similar restrictions exist in other municipalities.²³⁰

There is a real concern that the enforcement of COVID measures through fines will continue to be applied unequally. Enforcement powers are discretionary by nature, and we know that discretionary policing practices disproportionately impact Black, Indigenous and other racialized and marginalized people. The enforcement of COVID measures through fines is unlikely to be any different. Perhaps unsurprisingly, by June, the CCLA had already received multiple reports of people who felt they were targeted by COVID enforcement due to their race, after being stopped for things that white people were doing without police interference. In some jurisdictions

²²⁴ “COVID-19: Montreal police hand out record number of tickets in first week of November”, (9 November 2020) *Montreal Gazette*, online: <<https://montrealgazette.com/news/local-news/covid-19-montreal-police-hand-out-179-tickets-in-first-week-of-november>>.

²²⁵ Philip Authier, “Quebec police ordered to issue more fines to citizens flouting COVID-19 rules”, *Montreal Gazette* (9 December 2020), online: <<https://montrealgazette.com/news/quebec/quebec-replaces-vaccination-campaigns-chief-but-says-rollout-wont-be-delayed>> [Quebec police ordered to issue more fines].

²²⁶ *An extreme last resort, supra.*

²²⁷ *Quebec police ordered to issue more fines, supra.*

²²⁸ *Reopening Ontario (A Flexible Response to Covid-19) Act*, RSO 2020, c 17, s 10.

²²⁹ City of Toronto, Emergency Order No. 1- *To impose regulations requiring physical distancing within Parks and Public Squares* (2 April 2020), in effect until January 2021.

²³⁰ See, for example, City of Kingston, *Emergency order issued to ensure physical distancing in City parks*, (4 September 2020) online: <<https://www.cityofkingston.ca/-/emergency-order-issued-to-ensure-physical-distancing-in-city-parks>>.

people experiencing homelessness reported increased police harassment and were fined for failing to distance.²³¹

While some people intentionally flout the rules, others are simply unaware of the current version of the COVID-19 orders. The legal landscape is constantly changing and the orders – particularly the strictest ones – are often lengthy and complex. Journalists, civil society and businesses have struggled to keep with the changes, with or without the help of lawyers. It is not surprising that many Canadians, dealing with a variety of challenges on many fronts, may not realize that the rules have recently changed or understand the nuances of complex orders. If people are unaware that they are violating rules, then surely fines are not the right approach.

Even for those who are aware of the rules, their focus may shift away from limiting their risk of COVID transmission and exposure, and towards trying to avoid fines. Some jurisdictions have banned almost all indoor and outdoor social gatherings, even if people wear masks and practice social distancing. Because outdoor gatherings are more visible to police, people in need of social connection may be tempted to instead meet indoors, even if it is harder to stay apart and there is less ventilation. In seeking to avoid being caught breaking the rules, people may actually increase their risk of COVID transmission and exposure, thereby undermining the purpose of the public health orders.

For those who were ticketed, it may not be easy to challenge the fines. Contesting a ticket typically requires an in-person court appearance which may require missing work.²³² For some, particularly if they require legal assistance or are not familiar with the legal processes, paying the steep fines might be the only realistic option, even if they know they were not in the wrong.

While there is no denying the need for health measures as daily COVID case counts reach new highs, we cannot fine our way out of the pandemic. With limited evidence on the effectiveness of fines in changing behaviour, the potential for fines to be counterproductive in the fight to combat the spread of COVID, and the harms fines can cause by disproportionately impacting Black, Indigenous and other racialized and marginalized people, it is time to rethink the punitive approach adopted by many jurisdictions.

²³¹ Rachel Emmanuel, "Civil rights advocates caution against over-policing during pandemic", *iPolitics* (17 Apr. 2020) online: <<https://ipolitics.ca/2020/04/17/civil-rights-advocates-caution-against-over-policing-during-pandemic/>>.

²³² Shaina Luck, "Facing steep fines, Nova Scotians with COVID-19 tickets are trickling into court", *CBC News* (13 October 2020), online: <<https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-covid-tickets-court-1.5753460>>.

Chapter 10: Participation in Political and Public Life During COVID-19

Participation in political and public life is critical for the promotion of democratic governance, the rule of law, social inclusion and the advancement of our rights and liberties.²³³ While the ways that we participate in political and public life during COVID-19 may have changed, it is important that we are still able to participate, particularly during a time when many of our rights are being limited in ways that were previously unimaginable. Dissent plays an important role in ensuring that laws which restrict our freedoms are proportional and are not more restrictive than necessary. While the way that we express our views may change during a pandemic, it is important that governments continue to respect the right to protest.

There were two approaches taken to enforcing COVID-19 measures during a protest in Manitoba: provincial health officers fined protesters who failed to follow the public health restrictions, while the RCMP chose to instead block vehicle access to the protest but did not issue tickets, saying, “The RCMP respects individuals charter right to peacefully assemble while balancing that with the safety of the public.”²³⁴ Both responses limited the right to protest, however, it is important to remember that all *Charter* rights are subject to reasonable limits that can be justified in a free and democratic society. That means that governments are able to put some limits on our rights, including the right to protest. The government can justify limits by showing they have an important objective and that the objective is proportionate to the limit of the rights. Governments may be able to limit the way that people protest during COVID-19, for example, by requiring distancing or other health precautions, as limiting COVID-19 transmission is an important objective. However, it is important that they also facilitate the right to protest safely and do not entirely prohibit people from expressing their views.

Public Participation in Ontario – Governing by Law or Pronouncement?

The government of Ontario has repeatedly announced the imposition of stricter measures but has failed to make the actual laws that contain the measures public until after they are in effect. The CCLA wrote to the Attorney General about this issue in October, but the government continues to delay in publishing laws until after they said to take effect. The principle of the rule of law requires that laws be publicly accessible. The regulations that contain the COVID-19 restrictions are often more detailed and provide more information than summaries given in press conferences or contained on government websites. As stated by the Supreme Court of Canada, the rule of law has two aspects: that people should be ruled by the law and obey it, and that the law should be

²³³ “Equal participation in political and public affairs”, online: Office of the High Commissioner of Human Rights <<https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>>.

²³⁴ Nicholas Frew, "Fines issued in Manitoba as more than 100 protesters gather in Steinbach to protest COVID-19 restrictions", *CBC News* (14 November 2020), online: <<https://www.cbc.ca/news/canada/manitoba/steinbach-manitoba-protest-covid-19-level-red-restrictions-1.5802494>>.

known such that people will be able to be guided by it.²³⁵ How can we be expected to follow a law when we do not know what the law is?

Equally important, if a law is unknown, then how can we determine whether it is reasonable or challenge its constitutionality? Public participation is facilitated by government transparency. While we do not suggest that the government is intentionally keeping the laws secret, the delays in making the laws publicly available negatively impact the public's ability to participate in political life.

British Columbia's Pandemic Elections

The importance of elections for participation in public and political life cannot be understated. While Longueuil, Quebec postponed a scheduled by-election²³⁶, British Columbia opted to call an election in the middle of the pandemic.²³⁷ There were many reasons cited for calling the election. Premier Horgan insisted it was for reasons of stability, and to ensure that British Columbians are able to rely on a strong and united response to the pandemic for the upcoming months.²³⁸ Other explanations are less rosy. Some point to Horgan's recent high approval ratings for the B.C. government's response to the pandemic, and some describe it as "opportunistic".²³⁹ The strong leadership of Dr. Bonnie Henry, B.C.'s Provincial Health Officer, is wrapped up in this: while she is apolitical and not associated with any political party, she has served as a strong public figure and leader through this pandemic, and many British Columbians are positive about the response from public leaders towards the pandemic.²⁴⁰ In fact, local news site *The Orca*

²³⁵ *Suavé v Canada*, 2002 SCC 68.

²³⁶ Cybèle Olivier, "Pas d'élections dans Iberville: une décision responsable selon l'opposition", *FM 1033* (11 November 19), online: <<https://www.fm1033.ca/pas-delections-dans-iberville-une-decision-responsable-selon-lopposition/>>.

²³⁷ Mike Smyth, "Commentary: Dumb or brilliant? John Horgan takes big gamble with B.C. election call", *Global News* (29 September 2020), online: <<https://globalnews.ca/news/7365128/bc-election-call-john-horgan/>>.

²³⁸ *Ibid.*

²³⁹ Jon Azpiri, "Why did B.C. NDP Leader John Horgan call an election during a pandemic?", *Global News* (21 September 2020), online: <<https://globalnews.ca/news/7348708/bc-election-covid-19-pandemic/>>.

²⁴⁰ Justin McElroy, "20 reasons why the B.C. NDP had its most successful election ever", *CBC News* (25 October 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/ndp-wins-bc-2020-analysis-horgan-1.5776167>>.

conducted a poll that found that Dr. Bonnie Henry could pull any of the three main political parties in B.C into power if she was their leader.²⁴¹

Whatever the reason, the political decision to call an election in October 2020 had tangible ramifications for the rights and liberties of British Columbians. Elections B.C. estimates voter turnout for this election was approximately 54.5%, with a record number of voters requesting vote-by-mail packages.²⁴² While this number is still being finalized, turnout of 54.5% would be the lowest turnout in B.C.'s recorded history, going back to the earliest available data from the 1928 election.²⁴³ The previous B.C. provincial election in 2017 had a voter turnout of 61.2%.²⁴⁴

This historically low figure for voter turnout is accompanied by other concerns about political and democratic rights and freedoms during this election. These include: the inability of parties to conduct in-person campaigning; voters being left with less information as the rushed and unexpected nature of the election meant that parties had less time to organize; and voters were unable to vote in a traditional, mass-gathering, type of way.²⁴⁵ In fact, advocacy groups Democracy Watch and Integrity B.C. filed a lawsuit against Horgan in the B.C. Supreme Court, asking the court to declare Horgan's calling of the election a violation of B.C.'s *Constitution Act*.²⁴⁶

In British Columbia, fixed election dates are mandated by section 23 of B.C.'s *Constitution Act*.²⁴⁷ While the effectiveness of fixed election date legislation may be debatable, these

²⁴¹ Maclean Kay, "Prescription for a majority", *The Orca* (5 October 2020), online: <<https://theorca.ca/resident-pod/prescription-for-a-majority/>>.

²⁴² "Voter Turnout Estimate Updated; Interim Statement of Votes Available" (20 November 2020), online: Elections BC <<https://elections.bc.ca/news/voter-turnout-estimate-updated-interim-statement-of-votes-available/>>.

²⁴³ Simon Little and Srushti Gangdev, "B.C. on track to set record-low voter turnout at just 52.4 per cent", *Global News* (26 October 2020), online: <<https://globalnews.ca/news/7422877/bc-record-low-election-turnout/>>.

²⁴⁴ *Ibid.*

²⁴⁵ James R. Coggins, "James Coggins: A less than ideal exercise in democracy", *Vancouver Sun* (31 October 2020), online: <<https://vancouver.sun.com/opinion/op-ed/james-coggins-a-less-than-ideal-exercise-in-democracy>>.

²⁴⁶ "Advocacy group file lawsuit against John Horgan's snap election call", *CBC News* (23 October 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/advocacy-groups-file-lawsuit-against-john-horgan-s-snap-election-call-1.5775123>>.

²⁴⁷ *Constitution Act*, RSBC 1996, c 66, s 23.

provisions were enacted to enhance democracy. There are four main arguments that underpin the notion that fixed election dates are beneficial to democracy: that they enhance fairness, increase transparency and predictability, improve governance, and result in higher voter turnout.²⁴⁸ In fact, the Legislative Assembly of B.C. describes these provisions as a mechanism to “reduce uncertainty and improve a government’s accountability to the public.”²⁴⁹

Given the benefits and reasoning for adhering to fixed election dates, Horgan's decision to call an election early raised concerns about democratic rights and liberties. The decision to do this during a pandemic exacerbated many of these issues, threatening the democratic and political rights and liberties of British Columbians.

Alberta’s Rushed Pandemic Legislation

During its Spring 2020 sitting, the Alberta provincial government passed 34 bills in 52 days. Premier Kenney noted that they had the most productive legislature in Canada “by a country mile.”²⁵⁰ Some of these bills — both those connected to the pandemic and those that are not — are controversial. A committee set up in response to criticism of amendments to the *Public Health Act* received over 650 written submissions from the public taking issue with the “severe and unwarranted overreach”²⁵¹ of the Alberta government during the pandemic. Legislation associated with the pandemic was, and continues to be, criticized for lacking transparency, relying on broad delegation of legislative authority to the executive, and not being strictly limited to times of emergency.²⁵²

²⁴⁸ Adam M Dodek, "The Past, Present and Future of Fixed Election Dates in Canada" (2010) 4 J Parliamentary & Pol L 215.

²⁴⁹ Legislative Assembly of British Columbia, "2001 Introduction of Fixed Election Dates in BC", *Legislative Assembly of British Columbia*, online: <<https://www.leg.bc.ca/dyl/Pages/2001-Introduction-of-Fixed-Election-Dates-in-BC.aspx>>.

²⁵⁰ CTV News Edmonton, “Alberta passes contentious health, union bills before wrapping up spring session”, *CTV News* (29 July 2020), online: <<https://edmonton.ctvnews.ca/alberta-passes-contentious-health-union-bills-before-wrapping-up-spring-session-1.5043801>> [Alberta passes contentious health, union bills].

²⁵¹ Lisa Johnson, “Alberta government to repeal Bill 10, which allows ministers to make legislative changes without approval, in spring,” *Edmonton Journal*, (16 October 2020), online: <<https://edmontonjournal.com/news/politics/alberta-government-to-repeal-bill-10-which-allows-ministers-to-make-legislative-changes-without-approval-in-spring>> [Alberta gov’t repeal Bill 10].

²⁵² Shaun Fluker, “Some Comments on Bill 24, the COVID-19 Pandemic Response Statutes Amendment Act, 2020,” *ABlawg: The University of Calgary Faculty of Law Blog* (10 July 2020), online: <<https://ablawg.ca/2020/07/10/some-comments-on-bill-24-the-covid-19-pandemic-response-statutes-amendment-act-2020/>>.

Legislation passed during this session is also the subject of criticism, due not only to its subject matter, but also to the speed at which it was passed during an unprecedented time. The opposition party has specifically accused the government of using the pandemic to push through controversial legislation on health care, labour, and the environment.²⁵³ For example, debate for the *Health Statutes Amendment Act* (Bill 30) was limited to one hour.²⁵⁴ The opposition party criticized the decision for eliminating transparency and attacking free speech.²⁵⁵ Bill 30, which allows for more private health care providers to operate within Alberta, concerns important issues that require significant consideration and debate. Pushing legislation through quickly limits public participation, as the public has less time to express their concerns through their elected representatives.

The *Public Health (Emergency Powers) Amendment Act, 2020*, otherwise known as "Bill 10," was passed on 2 April 2020, forty-eight hours after it was introduced to Parliament. Bill 10 is both a retroactive and forward-looking power grab. First, the law goes back in time to validate orders made after the public health crisis began, which may not have been legally valid at the time they were passed.²⁵⁶ Second, Bill 10 transfers essential powers away from Alberta's legislature and into the hands of a single minister.

Prior to Bill 10, the relevant legislation empowered a minister to temporarily prevent a law from operating or make changes to its application. Bill 10 significantly extends these powers; the Health minister can effectively amend and pass completely new laws, transferring powers from the legislative to the executive branch. There are some exceptions and limitations placed on this power: the minister cannot pass measures associated with taxes, public funds, or the creation of new offences with retroactive applications, and orders can only last for six months after the end of a public health emergency. Nevertheless, the Minister can effectively freely legislate without consultation on many issues.

An [interim report released by CCLA](#) gave Bill 10 an "F" for being radically disproportionate to the needs of the situation and offering no justification for why a single minister's orders should extend for 6 months after the end of an emergency. The general public and other civil society

²⁵³ *Alberta passes contentious health, union bills, supra.*

²⁵⁴ Ashley Joannou, "Prime Minister Kenney trumpets government's 'momentum' as session wraps up; NDP blasts UCP agenda", *Edmonton Journal* (30 July 2020), online <<https://edmontonjournal.com/news/politics/alberta-legislative-assembly-bill-30-bill-32>>.

²⁵⁵ *Ibid.*

²⁵⁶ Jianyang Hoh, "The Albertan Government Covers its Tracks and Grabs Power in Bill 10", *Canadian Civil Liberties Association* (14 April 2020), online: <<https://ccla.org/coronavirus-update-bill-10/>>.

organizations also heavily criticized Bill 10.²⁵⁷ In response, the government hosted a special public health review committee meeting, during which the CCLA's executive director stated that the ability to impose orders without legislative debate is harmful to Albertans.²⁵⁸ Debate is an important aspect of public participation, allowing elected representatives to voice and consider the concerns of constituents.

The government announced they would repeal the law in the spring of 2021,²⁵⁹ saying the bill was passed at a time when they were concerned about the legislature's ability to respond to the pandemic.²⁶⁰ Having a few months experience with the demands of the pandemic, they said they now feel that "with the right safety protocols in place and standing orders that allow for the assembly to work quickly in an emergency situation, the power to modify legislation by ministerial order is unnecessary."²⁶¹ However, if this is the case, it is unclear why the government is waiting until the spring to repeal a law that limits public participation in political life.

The Open Court Principle

The open court principle, which requires that court proceedings be open and accessible to the public, is tied to participation and public life. The transparency of our courts enhances the public's confidence in the justice system and the independence and impartiality of the judiciary. In the context of the pandemic, as governments continue to be challenged in courts for the rights-limiting legislation they pass, the public has a right to hear the arguments used to justify such restrictions and a right to understand the overall court process. The open court principle is not just a goal; it is a constitutional right that is also codified in many statutes.

Courts across Canada have varied in their commitment to the open court principle during the pandemic. Regarding in-court hearings, the Supreme Court of British Columbia reduced the number of seats available in the public gallery to maintain safe physical distancing.²⁶² Courts in

²⁵⁷ Dylan Short, "Legal groups blast 'unconstitutional' bill during committee meeting," *Edmonton Journal*, online: <<https://edmontonjournal.com/news/politics/legal-groups-blast-unconsitutional-bill-10-during-committee-meeting>>.

²⁵⁸ *Ibid.*

²⁵⁹ *Alberta gov't repeal Bill 10, supra.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Supreme Court of British Columbia, "Notice to the Profession, the Public and the Media – COVID-19: In Court Measures During the Pandemic", *COVID-19 Notice No 27*, Revised 25 November 2020, online:

Alberta²⁶³, Manitoba²⁶⁴, Saskatchewan²⁶⁵, and New Brunswick²⁶⁶ barred members of the general public from entering their respective courthouses but allowed access to those deemed necessary or essential to court proceedings (i.e. counsel, litigants, and members of the media). In Nova Scotia, anyone not essential to a hearing must get advance permission from the presiding judge to attend a courtroom in person²⁶⁷. By contrast, Quebec²⁶⁸ and PEI²⁶⁹ courthouses allow access to members of the public and the media in accordance with their usual rules and in compliance with their COVID-19 health standards.

While in-person attendance of hearings by the public may not be feasible, statutory and constitutional obligations to uphold the open court principle continue to apply. Some courts and tribunals, like the Ontario Superior Court of Justice,²⁷⁰ adapted quickly and continue to facilitate public access to hearings via videoconference. However, others, including hearings at the Immigration Appeal Division in Toronto, have not facilitated public access. As the CCLA

<https://www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.27_In_Court_Measures_During_the_Pandemic.pdf>.

²⁶³ Court of Queen’s Bench of Alberta, “Notice to the public and legal profession: restricted access to courthouses”, *News & Announcements*, March 27, 2020, online: <<https://albertacourts.ca/qb/resources/announcements/notice-to-the-public-and-legal-profession-restricted-access-to-courthouses/>>.

²⁶⁴ Manitoba Courts, “COVID-19 – Manitoba Courts”, 13 March 2020, online: <<http://www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/>>.

²⁶⁵ Courts of Saskatchewan, “Provincial Court of Saskatchewan: Notice to Court Users and the Public”, 22 May 2020, online: <<https://sasklawcourts.ca/index.php/home/provincial-court/covid-19-update>>.

²⁶⁶ New Brunswick Courts, “COVID-19 General Notice”, 2020, online: <<https://www.courtsnb-coursnb.ca/content/dam/courts/pdf/NB-Courts.pdf>>.

²⁶⁷ Nova Scotia Judiciary Executive Office, “COVID-19: Access to In-Person Court Proceedings”, 23 October 2020, online: <https://www.courts.ns.ca/News_of_Courts/documents/COVID19_Notice_Access_to_In_Person_Proceedings_10_23_20.pdf>.

²⁶⁸ Justice Quebec, “Access to Courthouses”, 2020, online: <<https://www.justice.gouv.qc.ca/en/coronavirus/faq/faq-general/access-to-courthouses/>>.

²⁶⁹ Supreme Court of Prince Edward Island, “COVID-19 Hearing Directives”, 19 June 2020, online: <https://www.courts.pe.ca/sites/www.courts.pe.ca/files/2020-08/Covid-19%20Messages%20from%20Chief%20Justices_2.pdf>.

²⁷⁰ Superior Court of Justice, “Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media”, 13 May 2020, online: <<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/>>.

highlighted in our [letter to the Deputy Chair of the Immigration Appeal Division](#), limiting public access to courts and tribunals is unreasonable. As public health restrictions that make in-person hearings difficult are unlikely to be lifted in the near future, it is imperative that all courts and tribunals honour the open court principle by immediately ensuring the public can access hearings remotely.

Chapter 11: The Right to Movement

Canadians have a constitutional right to move freely across the country. This right has been severely limited by some provinces. While *Charter* rights are subject to reasonable limits, such limits must be justified and must not impair our rights more than necessary. In the context of travel restrictions and COVID-19, if a less restrictive way of effectively limiting COVID-19 transmission exists, for example, the imposition of quarantine requirements when someone enters the province, then the government should use it. In the absence of any evidence to suggest that these less restrictive measures cannot effectively stem the introduction or spread of COVID-19 in a province, there is no reason why the government should not take the approach that is less restrictive of constitutionally protected rights.

The CCLA made this argument before a court when we joined Ms. Taylor in challenging Newfoundland and Labrador’s interprovincial travel ban. Ms. Taylor’s mother suddenly passed away in Newfoundland in May, a day after the government banned certain individuals from entering the province.²⁷¹ Ms. Taylor applied for an exemption so that she could return home for her mother’s funeral, which they planned to delay so that Ms. Taylor could quarantine for 14 days. Her request was denied, along with her ability to say goodbye to her mother or grieve with her family.²⁷² The provincial government had argued that there was no limit placed on mobility rights, suggesting that the *Charter* only protected interprovincial movement for purposes of residence and travel. While the court agreed that the government’s travel ban infringed on *Charter* protected mobility rights, it found that it was a justified measure.²⁷³ The CCLA and Ms. Taylor are appealing this case, as we continue to believe that tightening provincial borders is a violation of our constitutionally protected rights, which cannot be justified in light of other effective measures that are less restrictive.

The implications of this case are far-reaching. The Yukon, Northwest Territories and Nunavut governments all closed their borders to everyone except residents and essential workers early on in the pandemic.²⁷⁴ Yukon faced a *Charter* challenge, and all three of the territories have since

²⁷¹ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, Originating Application, online: <<https://ccla.org/cclanewsites/wp-content/uploads/2020/05/Originating-Application.pdf?fbclid=IwAR30I3n3bsI5xM1cWo5dxIN0jKfLLUyWhtFPYcmO5aJGI24vQHR7-sLAzs>>.

²⁷² *Ibid.*

²⁷³ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 [Taylor v Newfoundland].

²⁷⁴ Aidan Macnab, “Group files Charter challenge against Yukon emergency COVID response”, *Canadian Lawyer* (30 June 2020), online: <<https://www.canadianlawyermag.com/practice-areas/litigation/group-files-charter-challenge-against-yukon-emergency-covid-response/331015>>.

ended their outright bans on non-essential (public) travellers, opting for quarantine/isolation and declaration requirements instead.²⁷⁵

Many of the justifications used in the Newfoundland case are applicable to the territories. For example, the court noted that Newfoundland's population is particularly vulnerable to severe illness from COVID-19, as it ranks the highest or near the highest for many risk factors.²⁷⁶ Similarly, in the Northwest Territories, a survey conducted by the Dene Nation found that at least 21% of their members in the territory are at a high risk of serious complications from COVID-19.²⁷⁷ The rate of tuberculosis in Inuit Nunangat, which includes Nunavut, was over 300 times the rate of non-Indigenous Canadians in 2016²⁷⁸ and Inuit infants experience "some of the highest rates of hospitalization and intensive care unit admission in the world due to a virus called respiratory syncytial virus (RSV)".²⁷⁹

The territories face additional challenges. Winter roads are closing and some communities face fly-in options only, making access to healthcare more difficult.²⁸⁰ A survey from 2017-2018 found that only 14% of residents in Nunavut had access to a regular health care provider, a

²⁷⁵ There are no travel bans in effect for the Territories as of 14 December 2020. See "Border restrictions during COVID-19", *Government of Yukon*, online: <<https://yukon.ca/en/health-and-wellness/covid-19-information/borders-and-travel-covid-19/border-enforcement-during-covid-19>>; GNWT's Response to COVID-19, "Arriving in the NWT", online: <<https://www.gov.nt.ca/covid-19/en/services/travel-moving-around/travellers-arriving-nwt>>; "Travel and Isolation", *Government of Nunavut*, online: <<https://gov.nu.ca/health/information/travel-and-isolation>>.

²⁷⁶ *Taylor v Newfoundland*, *supra* at 412.

²⁷⁷ Anna Desmarais, "Dene Nation survey suggests a fifth of its members could have severe complications from COVID-19", *CBC* (26 March 2020), online: <<https://www.cbc.ca/news/canada/north/dene-nation-caps-coronavirus-1.5511110>> [Dene Nation survey].

²⁷⁸ "Tuberculosis in Inuit Nunangat", *Indigenous Services Canada*, online: <<https://www.canada.ca/content/dam/hc-sc/documents/services/first-nations-inuit-health/diseases-health-conditions/tuberculosis/tuberculosis-resources-first-nations-inuit-aboriginal-health-health-canada/map-tuberculosis-inuit-nunangat/map-tuberculosis-inuit-nunangat.pdf>>.

²⁷⁹ Anna Banerji et al, "Inuit infants need access to medication to prevent respiratory illness", *The Conversation* (January 8, 2020), online: <<https://theconversation.com/inuit-infants-need-access-to-medication-to-prevent-respiratory-illness-129204>>.

²⁸⁰ *Dene Nation survey*, *supra*.

number that is significantly below the 85% Canadian average.²⁸¹ With Nunavut having only one hospital,²⁸² concerns about overloading the health system are at least as salient in the territories as they are in Newfoundland.²⁸³ Longstanding housing crises also persist.²⁸⁴ In Nunavut, nearly half of the population lives in overcrowded conditions and, on average, eight people share a two-bedroom unit, making isolation if someone becomes sick next to impossible.²⁸⁵

In spite of all of these concerns, the territories have found less restrictive ways of preventing the introduction and spread of COVID-19, for example, through isolation centres. The Northwest Territories, which in early February 2021 had only 1 active case and no deaths, acknowledged that outright travel bans conflict with the *Charter*.²⁸⁶

Some travel restrictions made apparently arbitrary distinctions. In New Brunswick, for example, the government informed a Mi'gmaq Nation on the Quebec side of the provincial border that their students were no longer welcome to attend their high school in person.²⁸⁷ This decision was made, notwithstanding the fact that the First Nation had no COVID cases, that staff from the

²⁸¹ Sébastien LaRoche-Côté and Sharanjit Uppal, "Concerns and precautions taken in the Canadian North during the pandemic, *Statistics Canada* (6 July 2020), online: <<https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00048-eng.htm>> [Concerns and precautions taken in the Canadian North].

²⁸² "Qikiqtani General Hospital", The Government of Nunavut, *Department of Health*, online: <<https://gov.nu.ca/health/information/qikiqtani-general-hospital>>.

²⁸³ *Concerns and precautions taken in the Canadian North, supra*.

²⁸⁴ Hilde-Gunn Bye, "Many Canadian Arctic communities are vulnerable to the social impacts of Covid-19 crisis", *High North News* (17 April 2020), online: <<https://www.highnorthnews.com/en/many-canadian-arctic-communities-are-vulnerable-social-impacts-covid-19-crisis>>.

²⁸⁵ Kieran Oudshoorn, "This family of five lives in a laundry room, a sign of Nunavut's housing crisis", *CBC* (18 March 2019), online: <<https://www.cbc.ca/radio/docproject/this-family-of-five-lives-in-a-laundry-room-a-sign-of-nunavut-s-housing-crisis-1.5048497>>.

²⁸⁶ "N.W.T.'s previous travel restrictions may infringe on Charter freedoms, admits government", *CBC* (10 June 2020), online: <<https://www.cbc.ca/news/canada/north/nwt-open-to-national-travellers-exemption-self-isolate-1.5606623>>.

²⁸⁷ Les Perreux, "New Brunswick says Mi'gmaq students from Quebec can't cross border for school", *The Globe and Mail* (15 October 2020), online: <<https://www.theglobeandmail.com/canada/article-new-brunswick-says-migmaq-students-from-quebec-cant-cross-border-for/>>.

First Nation were still allowed to cross the border,²⁸⁸ and that students could cross into New Brunswick for employment purposes. The students were expected to study online, while their classmates living on the other side of the border could continue to learn in person.²⁸⁹ This is unacceptable and indefensible discrimination.

²⁸⁸ *Ibid*; The Canadian Press Staff, “Civil rights group says N.B. must let Indigenous students from Quebec into province” *CTV News* (10 November 2020), online: <<https://atlantic.ctvnews.ca/civil-rights-group-says-n-b-must-let-indigenous-students-from-quebec-into-province-1.5182620>>.

²⁸⁹ *Ibid*.

Conclusions

Injustices are typically amplified during a crisis. Racial profiling gets worse, not better, for example, because there are more rules with more enforcement involving still greater instances of biased enforcement that assaults equality, liberty, dignity and principles of fundamental justice. News of COVID-19 vaccines being approved and administered within Canada brought a sense of hope for many people, after months of struggle, despair, loss and uncertainty. But the second wave is nowhere near behind us. As 2021 began, single-day COVID-19 case records were set and then topped as cases exploded in parts of the country. All that stokes public fear, the enemy of the good during any emergency.

It is not too late for everyone to take human rights more seriously, especially those empowered to exercise lawful authority that can help and harm. Federal, provincial, territorial and municipal governments can commit and re-commit to using human rights and civil liberties as frameworks to guide all future action. The Constitution demands nothing less.

Human rights and civil liberties are not something to be put on hold until danger subsides. Especially during a calamity, we need the guideposts of our human rights protections. We cannot lose sight of them as we begin to make choices about who will get the vaccine first and consider the impacts of policy decisions on those who are not yet vaccinated. While many people hope that a safe and effective vaccine will help us to “enjoy life more as we remember it before this pandemic began,”²⁹⁰ we cannot forget that many of the issues highlighted in this report existed long before we had heard the term “COVID-19” and will persist after case counts dwindle. Instead of looking to get back to normal, we need to focus on “recovering better,”²⁹¹ by ensuring that human rights and civil liberties are at the heart of recovery efforts. We need to actively fight against discrimination of all kinds, address inequalities and ensure that there are opportunities for everyone to participate in public and political life. Perhaps most urgently, we need the administration of justice to put itself into a position where timely action by the judicial branch of the state is possible.

The pandemic’s disparate impacts were not unpredictable or inevitable. Existing inequalities were exacerbated, the disenfranchised were further marginalized, and there will be pockets of injustice we’ve yet to uncover. The impact of emergency management upon our population’s mental health, upon narcotic overdose and suicide, upon addiction treatment, and upon those activities rarely spoken of and often shadowed in public shame – religious worship, sex worker

²⁹⁰ “COVID-19: Vaccines”, (16 December 2020), online: *City of Toronto* <<https://www.toronto.ca/home/covid-19/covid-19-protect-yourself-others/covid-19-vaccines/>>.

²⁹¹ Office of the High Commissioner for Human Rights, “Recover Better – Human Rights Day”, *United Nations* (2020), online: Stand up for Human Rights <<https://www.standup4humanrights.org/en/humanrightsdays2020.html>>.

conditions, disguised instances of solitary confinement – remains largely unknown and likely oppressed. We're not just witnesses; we're participants too. All of us. Our work therefore continues. But over the course of 2020, the overall trajectory, was in the direction of improvement, with notable exceptions.