Incalculable Harm: Analyzing the Impact of the COVID-19 Pandemic on Immigration Detention in Canada

Efrat Arbel and Molly Joeck

THIS PAPER REFLECTS on the impact of the COVID-19 pandemic on immigration detention in Canada. Drawing on research spanning 2020 to 2022, we analyze how the pandemic impacted rates of detention, conditions of detention, and other related issues. Data released by the Canada Border Services Agency shows that despite an initial decrease in absolute numbers, Canada detained people at a higher rate after the onset of the pandemic than it did prior. Canada also held people for longer periods of time and relied more heavily on jails than dedicated Immigration Holding Centres. Conditions of confinement deteriorated significantly across all detention facilities, but most acutely in jails. The abrupt shift towards conducting detention review hearings exclusively by remote means, and initially only by telephone — without ensuring meaningful contact between detainees and their counsel — further impeded detainees' ability to understand and participate in their own hearings. These factors, combined with increased isolation within jails and detention facilities, increased use of segregation, diminished availability of alternatives to detention, the continued detention of children and separation of families, and the persistence of structural racism and disregard for detainee mental health paint a very grim picture. This research drives us towards the conclusion that the COVID-19 pandemic has had a devastating impact on immigration detention in Canada. Rather

CET ARTICLE RÉFLÉCHIT à l'impact de la pandémie de COVID-19 sur la détention des immigrants et immigrantes [ci-après «immigrants»] au Canada. En nous appuyant sur des recherches menées entre 2020 et 2022, nous analysons l'impact de la pandémie sur les taux de détention, les conditions de détention et d'autres questions connexes. Les données publiées par l'Agence des services frontaliers du Canada montrent qu'en dépit d'une diminution initiale en chiffres absolus, le Canada a détenu des personnes à un taux plus élevé après le début de la pandémie qu'il ne l'avait fait auparavant. Le Canada a également détenu des personnes pendant des périodes plus longues et s'est appuyé davantage sur les prisons que sur les centres de rétention de l'immigration. Les conditions de détention se sont considérablement détériorées dans tous les centres de détention, mais surtout dans les prisons. Le passage brutal aux audiences de contrôle de la détention exclusivement à distance, et dans un premier temps uniquement par téléphone — sans assurer un contact significatif entre les détenus et détenues [ci-après «détenus»] et leurs avocats et avocates — a encore entravé la capacité des détenus à comprendre et à participer à leurs propres audiences. Ces facteurs, combinés à l'augmentation de l'isolement dans les prisons et les centres de détention, au recours accru à la ségrégation, à la diminution des alternatives à la détention, à la poursuite de la détention des enfants

than drive the immigration detention regime towards greater rates of release, as early researchers hoped, the pandemic ushered in an increased reliance on detention under worse conditions, as well as greater alienation, degradation, and dehumanization of detainees. We conclude our analysis by identifying key criteria that must be prioritized to avoid further entrenching the worst of the COVID-19 era practices and call for the gradual abolition of immigration detention in Canada.

et de la séparation des familles, à la persistance d'un racisme structurel et au mépris de la santé mentale des détenus, donnent une image très sombre de la situation. Cette recherche nous amène à conclure que la pandémie de COVID-19 a eu un impact dévastateur sur la détention des immigrants au Canada. Plutôt que de faire évoluer le régime de détention des immigrants vers des taux de libération plus élevés, comme l'espéraient les premières équipes de recherche, la pandémie a entraîné un recours accru à la détention dans des conditions plus difficiles, ainsi qu'une aliénation, une dégradation et une déshumanisation accrues des détenus. Nous concluons notre analyse en identifiant les critères clés qui doivent être privilégiés pour éviter d'ancrer davantage les pires pratiques de l'ère COVID-19 et appelons à l'abolition graduelle de la détention d'immigrants au Canada.

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I. INTRODUCTION

When COVID-19 tore through correctional institutions and detention centres in the early months of the global pandemic, critics responded with urgency.[1] Lawyers and advocates called for the release of immigration detainees.[2] Medical professionals echoed these calls, arguing that enhanced testing and cleaning protocols would not sufficiently contain the virus.[3] These calls were issued in the name of public health and human

* Efrat Arbel is an Associate Professor at the University of British Columbia Allard School of Law. Molly Joeck is a PhD candidate at the University of British Columbia Allard School of Law and a lawyer at Edelman & Co. The authors extend their sincere thanks to Simran Hothi for invaluable research assistance, and to Zachary Couture for exceptional editing assistance. Thank you also to the UBC Peter Wall Institute of Advanced Studies at the Lew Innovation Fund for generously funding this research. We are also indebted to Hanna Gros, Simon Wallace, and the anonymous reviewers for their helpful comments and suggestions on earlier drafts of this article.

1 In 2020, the WHO Regional Office for Europe cautioned that "people in prisons and other places of detention…are likely to be more vulnerable to coronavirus disease (COVID-19) than the general population" and that places of confinement "may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons" (see WHO Regional Office For Europe, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention*, WHO, 2020, WHO/EURO: 2020-1405-41155-55954 at 1).

2 See e.g. Hanna Gros & Samer Muscati, "Gros and Muscati: Canada's Immigration Detainees at Higher Risk in Pandemic", Editorial, *Ottawa Citizen* (23 March 2020) online: <ottawacitizen.com/opinion/columnists/gros-and-muscati-canadas-immigration-detainees-at-risk-in-pandemic>; Canadian Council for Refugees, Media Release, "These Moments Define Our Humanity: We Must Remain Open to Refugees and Vulnerable Migrants" (23 March 2020), online: <ccrweb.ca/en/these-moments-define-our-humanity>.

3 See e.g. Alexandria Macmadu et al, "COVID-19 and Mass Incarceration: A Call for Urgent Action", Comment (2020) 5:11 Lancet Pub Health e571.

decency—a plea for the recognition of the inherent humanity of detained and incarcerated people. In Canada, both provincial and federal institutions appeared to heed this call: Statistics Canada reported "a record 15% decline in the number of adults in Canadian correctional institutions" in the early months of the pandemic, while the Canada Border Services Agency (CBSA) recorded a sharp decline in the absolute number of immigration detainees during the same period.[4] One Canadian researcher hailed what then appeared to be a trend by which detention numbers dropped "precipitously".[5]

Preliminary research we conducted in 2020 pointed to a similar trend towards decarceration.[6] We examined a small sample of 2020 detention decisions issued during the first two months of the pandemic. In our prior published work, we noted that before the outbreak of COVID-19, members of the Immigration Division (ID), the administrative tribunal with jurisdiction over immigration detention in Canada, generally refused to hear arguments related to conditions of detention and rarely ordered release on that basis. We identified a shift in this practice and documented that with the onset of the pandemic, ID members not only entertained arguments identifying COVID-19 as a condition of detention, but explicitly relied on this condition as a basis for release. We praised this shift in detention decision-making and welcomed what then appeared to be a movement

4 Statistics Canada reported "a record 15% decline in the number of adults held in Canadian correctional institutions, falling from 37,976 in February 2020 to 32,091 in April 2020", and noted further that historically, "monthly changes in counts of adult custody rarely exceed 1%" (see Statistics Canada, News Release, "After an Unprecedented Decline Early in the Pandemic, the Number of Adults in Custody Rose Steadily Over the Summer and Fell Again in December 2020" (8 July 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210708/dq210708a-eng.htm>); Simon Wallace, "Untangling Deportation Law from National Security: The Pandemic Calls for a Softer Touch" in Leah West, Thomas Juneau & Amarnath Amarasingam, eds, Stress Tested: *The COVID-19 Pandemic and Canadian National Security* (Calgary: LCR Publishing Services, 2021) 231 at 238–39. See also Adelina Iftene, "COVID-19, Human Rights and Public Health in Prisons: A Case Study of Nova Scotia's Experience During the First Wave of the Pandemic" (2021) 44:2 Dal LJ 477 at 481–83; See e.g. Simon Wallace, "Untangling Deportation Law from National Security: The Pandemic Calls for a Softer Touch" in Leah West et al, eds, *Stress Tested: The COVID-19 Pandemic and Canadian National Security* (Calgary: LCR Publishing Services, 2021) 231 at 238–39.

5 Simon Wallace, "The Next Jailor: An Empirical Study of Danger to the Public Immigration Detentions in Canada (Summer 2021)" (2023) 26:3 Punishment & Society 566 at 567 [Wallace, "The Next Jailor"].

6 Efrat Arbel & Molly Joeck, "Immigration Detention in the Age of COVID-19" in Catherine Dauvergne, ed, *Research Handbook on the Law and Politics of Migration* (Cheltenham, UK: Edward Elgar Press, 2021).

towards greater rates of release, and greater recognition of the needs and vulnerabilities of detainees. We also suggested that the COVID-19 pandemic might reveal new progressive possibilities through which immigration detention in Canada could be reconfigured.[7]

We were not the only ones to identify such progressive possibilities amidst the devastation of COVID-19; United Nations Secretary-General António Guterres, for example, suggested that "[t]he COVID-19 crisis is an opportunity to reimagine human mobility."[8] Despite its profound ills, the pandemic seemed to bring with it a glimmer of hope—that decarceration was possible, that perhaps it was not necessary for Canada to detain people at such high rates, and that the Canadian immigration detention regime could be reformed to more meaningfully recognize the humanity of those in its custody.

Since pandemic measures have drawn to a close, numerous critics have analyzed the impact of COVID-19 on immigration detainees and other vulnerable populations, both in Canada and around the world.[9] Now, with the benefit of hindsight and further research, this paper offers a more comprehensive reflection on the pandemic's impact on immigration detention in Canada. In addition to reporting on research we conducted from 2020 to 2022—when the pandemic was at its peak—we analyzed relevant data, reviewed publicly available case law, and submitted Access to Information and Privacy (ATIP) requests to access detention review decisions issued by CBSA during the pandemic. We requested a full sampling of cases, which the CBSA ATIP unit could not provide in a timely manner. We therefore narrowed our inquiry and obtained a much smaller sampling of 26 cases,

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7 *Ibid* at 272.

8 António Guterres, "The COVID-19 Crisis is an Opportunity to Reimagine Human Mobility", *United Nations* (3 June 2020), online: <un.org/en/coronavirus/covid-19-crisis-opportunity-reimagine-human-mobility>.

9 Colleen M Flood et al, "Introduction: Borders, Boundaries, and Pandemics" in Colleen M Flood et al, eds, *Pandemics, Public Health, and the Regulation of Borders: Lessons from COVID-19* (Abingdon: Routledge, 2024) 1 (stating that in Canada, the worst of the pandemic "seems to have been borne by the most marginalized, reinforcing structural inequalities and discrimination grounded in age, gender, disability, race, and immigration status" at 10). See e.g. Anthea Vogl et al, "COVID-19 and the Relentless Harms of Australia's Punitive Immigration Detention Regime" (2021) 17:1 Crime, Media, Culture 43; Holly Ventura Miller et al, "Immigration Policy and Justice in the Era of COVID-19" (2020) 45 American J Crim Justice 793; Zia Akhtar, "Immigration Detention, Deportation and Judicial Review in the Age of Covid 19" (2022) 9:2 European J L & Pub Admin 125; José A Brandariz & Cristina Fernández-Bessa, "Coronavirus and Immigration Detention in Europe: The Short Summer of Abolitionism?" (2021) 10:6 Soc Sciences 226.

all pertaining to 30 day detention review hearings conducted in November 2020.[10] Since this sample provided too narrow an entry point into understanding the broader impacts of the pandemic on immigration detention as a whole, we also conducted a total of 25 semi-structured interviews with lawyers, advocates, support workers, and designated representatives across Canada during the summer of 2021.[11] We report on these interviews to provide textured analysis of the day-to-day realities of immigration detention during the pandemic.

As detailed more fully below, our research complicates the initial hopes we expressed early in the pandemic and demonstrates that the preliminary conclusions we drew in early 2020 have not been borne out. Data since released by CBSA shows that despite an initial decrease in absolute detainee numbers, Canada detained people at a higher rate *after* the onset of the pandemic than it did before.[12] Canada also held people for longer periods of time: during the pandemic, the average length of time an individual spent in detention doubled.[13] In addition, Canada relied more heavily on correctional facilities for immigration detention, and held 40 percent of immigration detainees in jails — roughly double the proportion who were held in non-CBSA facilities in previous years.[14] Conditions of confinement deteriorated significantly across all detention facilities during the pandemic, but as our research below demonstrates, most acutely in provincial jails.

Our research further suggests that the abrupt shift towards conducting detention review hearings exclusively by remote means — without ensuring

10 Immigration and Refugee Board of Canada, A-2020-01060, (Access to Information and Privacy Request) (Ottawa: IRB, June 2021).

11 The researchers followed research protocols established by the UBC Ethics Board when carrying out data collection, documentation, and reporting. Research ethics review is a process of initial and ongoing review and monitoring of research involving human participants. The process requires the independent evaluation of all proposed research by an independent committee. See generally UBC Office of Research Ethics, "About Human Research Ethics" (last visited 26 March 2025), online: <researchethics.ubc.ca/about-human-research-ethics>.

12 Canada Border Services Agency, "Quarterly Detention Statistics: Fourth Quarter (Q4) Fiscal Year 2020 to 2021" (last modified 9 December 2021), online: <cbsa-asfc.gc.ca/security-securite/detent/qstat-2020-2021-eng.html> [CBSA, "Q4 2020 to 2021"].

13 Human Rights Watch & Amnesty International, "*I Didn't Feel Like a Human in There*": Immigration Detention in Canada and its Impact on Mental Health (New York: Human Rights Watch, 2021) at 63 [HRW, "*I Didn't Feel Like a Human in There*"].

14 *Ibid*; Human Rights Watch, News Release, "Canada: Jailing Immigration Detainees Infringes on Rights" (4 April 2022), online: <hrw.org/news/2022/04/04/canada-jailing-immigration-detainees-infringes-rights>.

meaningful contact between detainees and counsel—impeded detainees' ability to understand and participate in their own hearings. Teleconference hearings, which the ID relied on heavily in the early weeks and months of the pandemic, proved to be particularly alienating for detainees. Our research also points to significant additional concerns, including restricted communication with counsel and confidentiality breaches for detainees, and in some cases, those held in correctional facilities were denied their statutory right to "timely and frequent" detention review hearings.[15]

The emergence of these barriers—combined with additional factors we discuss more fully below, such as increased isolation within detention facilities, increased use of segregation, diminished availability of alternatives to detention, the continued detention of children and separation of families, and the further entrenchment of structural racism and disregard for detainee mental health—paint an alarmingly grim picture. This research drives us to conclude that the COVID-19 pandemic caused incalculable harm, and had a devastating impact on immigration detainees in Canada in almost every respect. Rather than supporting a shift towards decarceration, as we had initially hoped it might, the pandemic ushered in an era of increased reliance on detention under worsening conditions, as well as greater alienation, degradation, and dehumanization of detainees. Rather than creating opportunities to envision new, more humane immigration enforcement measures, the pandemic further entrenched the "us versus them" divide that underpins the existing detention regime, resulting in further erasure of detainees' humanity.

Our research, however, did not leave us without hope. Before the pandemic broke out, detainees across the country often went unrepresented at their detention review hearings. This changed as the shift to remote hearings provided Ontario lawyers the opportunity to create a program that ensured representation for all detainees in the province—a significant advance in access to justice for the country's largest detention population. In addition, our review of post-2020 case law indicates that, in a significant number of decisions, the ID has considered conditions of detention

15 *Brown v Canada* (*Citizenship and Immigration*), 2020 FCA 130 ("[d]etention reviews are timely and frequent: subsection 57(2) of the *IRPA* requires that detention be reviewed within 48 hours of arrest, within seven days after that, and every 30 days for the detention's duration" and the reviews outlined by subsection 57(2) of the *Immigration and Refugee Protection Act* are required to render the statutory scheme constitutional at paras 37, 14) [*Brown*].

to be relevant to decisions on release.[16] While the progressive possibilities of this jurisprudential shift were never fully realized—as the pandemic progressed, ID members became less likely to grant release based on the risk that COVID-19 posed to incarcerated individuals—it nevertheless opened the door for lawyers to advance arguments regarding the impact of conditions of detention on the health and well-being of detainees when advocating for their release. This jurisprudential shift, in combination with the institution of a legal representation program in Ontario, demonstrates that despite the inherently dehumanizing nature of Canada's immigration detention system, the pandemic did provide some opportunities for reform. Notably, these reforms emerged largely due to activism on the part of immigration detainees, as well as the work of lawyers and advocates pushing for more humane treatment, and not from the institutional actors involved.

In what follows, we provide an overview of the Canadian immigration detention regime. We then analyze how the COVID-19 pandemic influenced immigration detention in Canada, focusing on the following areas: rates of detention and criteria for release, sites and demographics of detention, conditions of confinement, the shift to remote hearings, the availability of alternatives to detention, the justiciability of conditions of detention, and the persistence of entrenched inequalities.[17] We demonstrate that in relation to each of these criteria, detainees experienced acute and unnecessary harm. We maintain that this harm is caused by deep-rooted legal and policy problems in Canada's immigration detention regime, which, despite claims to the contrary, effectively constructs detainees as being undeserving of equal humanity due to their immigration status.[18]

We conclude this paper with the hope that the ID will continue to consider the impacts of conditions of detention on the health and well-being of detainees when making release decisions. We further emphasize the value of ensuring that immigration detainees receive meaningful access to legal representation and argue in favour of further developing representation programs across the country. We identify additional priorities for reform

16 This shift was later confirmed by the Federal Court of Appeal in *Brown*, which we discuss in more detail below (see *Brown*, *supra* note 15).

17 Prior to the pandemic, the ID conducted detention review hearings by phone and video in certain circumstances. After the onset of the pandemic, however, the ID shifted to using remote hearings as a matter of course across the country.

18 For a discussion of how COVID-19 amplified the treatment of people without secure immigration status as "undeserving" in contexts other than those involving immigration detention, see Audrey Macklin, "Pandemic Pathways to Permanent Residence" in Colleen M Flood et al, *supra* note 9 at 158.

that would enhance the fairness and integrity of Canada's immigration detention regime while minimizing its dehumanizing impact, and push back against its underlying construction of immigration detainees as undeserving of rights, dignity, autonomy, and protection. Ultimately, we emphasize the vital need for Canada to move towards the gradual abolition of immigration detention.

II. IMMIGRATION DETENTION IN CANADA: AN OVERVIEW

Canada's immigration detention regime is governed by the *Immigration and Refugee Protection Act* (*IRPA*)[19] and the *Immigration and Refugee Protection Regulations* (*IRPR*).[20] CBSA is tasked with enforcement of both the *Act* and its regulations, and has broad discretionary powers to arrest and detain non-Canadian citizens, including asylum seekers and permanent residents, without a warrant. CBSA's powers of detention extend to children, and even children who hold Canadian citizenship may be "housed" in detention if one of their parents is detained.[21]

CBSA is the only major law enforcement agency in Canada that is not subject to independent civilian oversight.[22] Currently, complaints against

19 SC 2001, c 27 [*IRPA*].

20 SOR/2002-227 [*IRPR*]. The Minister of Immigration, Refugees and Citizenship holds primary responsibility for administering the *IRPA*, including enforcement through arrest, detention, and removal (*ibid*).

21 The Minister has delegated enforcement responsibilities as regards arrest, detention, and removals to the Canada Border Services Agency. Under this delegated power, CBSA has authority to determine almost all aspects of immigration detention, including who is arrested and detained, and the location of detention (see Canada Border Services Agency, "Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations" (last modified 24 January 2018), online: <cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2016-07-eng.html> [CBSA, "Delegation of Authority"]); HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 10, 72.

22 The *IRPA* and the *IRPR* do not provide for independent monitoring of CBSA's immigration detention activities (see *IRPA*, *supra* note 19; *IRPR*, *supra* note 20). Canada has also not ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which allows for independent monitoring of detention practices by the United Nations (see *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 February 2003, 2375 UNTS 237). For a discussion of ongoing legislative efforts to create a CBSA oversight body over the years, see Parliamentary committee briefing notes prepared by David Thelen & Darryl Sitka for Public Safety Minister Bill Blair, "CBSA Review Body" (last modified 6 July 2021), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20210302/010/index-en.aspx> [Thelen & Sitka].

the CBSA are investigated by CBSA itself.[23] Calls for external oversight of the agency date as far back as 2006, just three years after the CBSA was created by an Order in Council.[24] In 2015, the Standing Senate Committee on National Security and Defence recommended that the federal government establish both "an oversight body for the CBSA", and "an independent, civilian review and complaints body for all [CBSA] activities."[25] In 2017, the British Columbia Civil Liberties Association published a 56 page report calling for independent oversight of the agency.[26] Amnesty International and Human Rights Watch echoed these sentiments in a 2021 report.[27]

In response to these calls for independent review, the current Liberal government has repeatedly committed to introducing legislation that would establish an independent CBSA oversight body. In the 2019 budget, the government promised to expand the mandate of the Civilian Review and Complaints Commission—the body which provides external oversight of the Royal Canadian Mounted Police—to include CBSA in its mandate.[28] In the same month, the Liberals introduced Bill C-98, *An Act to Amend the Royal Canadian Mounted Police Act and the Canada Border Services Agency Act and to make consequential amendments to other Acts*. Although the bill passed the House of Commons and received first reading in the Senate, it died when Parliament was dissolved later that year.[29] It was reintroduced as Bill C-3, but died again due to delays related to the COVID-19 pandemic.[30] In May 2022, the government introduced Bill C-20 in an apparent effort to

23 Amanda Connolly, "The Liberals want to amend the CBSA Act—will the bill include promised external oversight?", *Global News* (6 May 2019), online: <globalnews.ca/news/5244393/cbsa-oversight-budget-2019>; Catharine Tunney, "CBSA won't be getting independent oversight as bill dies in the Senate", *CBC News* (21 June 2019), online: <cbc.ca/news/politics/cbsa-bill-oversight-goodale-1.5185025>. To file a complaint, individuals must proceed via the CBSA's online platform (see Canada Border Services Agency, "Submit Your Feedback" (last modified 31 May 2024), online: <cbsa-asfc.gc.ca/contact/feedback-retroaction-eng.html>).

24 Laura Track & Josh Paterson, *Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency* (Vancouver: British Columbia Civil Liberties Association, 2017) at 11, 33.

25 *Ibid* at 35.

26 *Ibid* at 10.

27 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 6.

28 Connolly, *supra* note 23.

29 Canada, Library of Parliament, *Legislative Summary of Bill C-20: An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, by Michaela Keenan-Pelletier & Ariel Shapiro, Publication No 44-1-C20-E (Ottawa: LOP, 17 May 2024) at 1 [*Legislative Summary of Bill C-20*].

30 *Ibid*; Thelen & Sitka, *supra* note 22.

revive these earlier oversight proposals.[31] Bill C-20 received Royal Assent on October 31, 2024, and promised to establish an enhanced independent review and complaints body for the CBSA.[32] At the time of writing, this body had not yet been established such that the CBSA still operates without independent oversight despite its sweeping powers.

While the *IRPA* empowers CBSA to order detention in a number of different circumstances, the three primary grounds for detention arise: (1) where an officer has "reasonable grounds to believe" that the person is inadmissible to Canada and constitutes a "danger to the public", (2) where an officer is "not satisfied" of the person's identity, or (3) where an officer has "reasonable grounds to believe" that the person is a "flight risk", that is, they are unlikely to appear for an examination, an admissibility hearing, removal, or for another immigration-related proceeding.[33] The vast majority of people are detained as potential flight risks: from 2012 to 2024, approximately 80.9 percent of immigration detainees were held on this ground.[34] In practical terms, this means that Canada's immigration detention regime is populated by people who have been deprived of their liberty merely because CBSA suspects that they may not appear for a legal proceeding or removal—without either proof or even allegation that they committed an offence or pose a threat to public safety. Put differently, the *IRPA*'s legal framework authorizes CBSA to arrest and detain

31 Bill C-20: *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2024, c 25.

32 "Oversight for CBSA and RCMP", *Senate GRO* (31 October 2024), online: <senate-gro.ca/news/oversight-cbsa-rcmp/>. Notably, refugee support organizations, such as the Canadian Council for Refugees, have identified several shortcomings with Bill C-20 (see Canadian Council for Refugees, "CCR's Submissions on Bill C-20 (CBSA oversight)" (October 2024), online: <ccrweb.ca/en/submission-c20-cbsa-oversight>).

33 *IRPA*, *supra* note 19, ss 33–42.1, 55(2)(a)–(b), 55(3). A non-citizen may also be detained upon entry into Canada if a CBSA officer "considers it necessary to do so in order for the examination to be completed" or where a CBSA officer suspects they are inadmissible because they pose a security risk, have violated human or international rights, or have participated in criminal activity or organized crime (*ibid*, s 55(3)). The *IRPA* authorizes detention through the application of the "designated foreign nationals" regime that can only be invoked in very specific circumstances, and is outside the scope of our analysis here (*ibid*, s 55(3.1)). For a discussion of detention authorized via the designated foreign nationals scheme, see Efrat Arbel, "Between Protection and Punishment: The Irregular Arrival Regime in Canadian Refugee Law" in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solitary Confinement* (Basingstoke: Palgrave Macmillan, 2015) 197.

34 Canada Border Services Agency, "Annual Detention Statistics: 2012 to 2024" (last modified 21 June 2024) Table 1.4, online: <cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2024-eng.html> [CBSA, "Annual Detention Statistics"].

individuals on purely administrative grounds, without any accountability, oversight, or meaningful due process safeguards save for detention review hearings—which we argue are insufficient to address the harms and deprivations caused by detention.

After arrest, CBSA retains sole custody over immigration detainees for 48 hours, and may order release at any point during that time.[35] After that initial period, the authority to release shifts to the ID, an independent, quasi-judicial body that conducts regularly scheduled detention review hearings.[36] The ID is statutorily required to review the reasons for an individual's continued detention within 48 hours of their initial arrest by CBSA, "or without delay afterward".[37] In practice, however, when an arrest takes place on a Friday or on the eve of a federal statutory holiday, the ID will only conduct its first review of detention on the next available working day, meaning that detainees can be held for several days prior to receiving a first review hearing.[38] In the first detention review hearing, the ID is required to determine whether CBSA has established a basis for detention and decide whether to continue detention or order release.[39] If detention is continued, the ID is required to conduct another review "[a]t least once during the seven days following the [initial] review", and "at least once during each 30-day period following each previous review" until the detainee in question is either released or removed from Canada.[40]

Detention review hearings are adversarial in nature. While the Minister is represented by CBSA counsel, immigration detainees have varied access to legal representation depending on where they are being held.[41] In

35 *IRPA*, *supra* note 19, ss 56(1), 57(1). See also CBSA, "Delegation of Authority", *supra* note 21.

36 *IRPA*, *supra* note 19, ss 57(1)–(2). Members of the ID are public servants appointed in accordance with the Public Service Employment Act. For further explanation see *Chaudhary v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2015 ONCA 700 at para 36 [*Chaudhary*].

37 *IRPA*, *supra* note 19, s 57(1).

38 See e.g. Lawyer, Interview #17 (28 June 2021) via oral communication [communicated to author] at 31 [Interview #17]; Lawyer, Interview #8 (14 June 2021) via oral communication [communicated to author] at 12 [Interview #8].

39 *IRPA*, *supra* note 19, s 58; *IRPR*, *supra* note 20, s 248.

40 *IRPA*, *supra* note 19, s 57(2).

41 Immigration and Refugee Board of Canada, "Detention Review Hearings" (last modified 21 December 2023), online: <irb-cisr.gc.ca/en/detention-hearings/Pages/detention-review-hearings.aspx#s2> ["Detention Review Hearings"]; Immigration and Refugee Board of Canada, "Chairperson Guideline 2: Detention" (last modified April 2021), online: <irb.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx> at footnote 7 ["Chairperson Guideline"]. In British Columbia, for example, the regional legal aid provider funds a duty counsel program aimed at ensuring that every detainee in the province is represented at their 48 hour

situations where the ID determines that a detainee is "unable…to appreciate the nature of the proceedings," it must appoint a designated representative to speak on the detainee's behalf.[42] The Minister, as represented by CBSA, bears the legal burden of demonstrating that grounds for detention continue to exist.[43] As the Federal Court of Appeal explained in *Brown v Canada*, "[m]embers of the ID are obligated, under their oath and by law, to consider the circumstances of the particular individual whose detention or liberty is in issue in a fair and open-minded way."[44] Despite this obligation, the ID's function is, in reality, very limited: it can only decide whether to order release or continue detention.[45] The ID cannot, for example, order that a detainee be transferred from one institution to another, nor can it order the CBSA to take any particular steps to ensure access to alternatives to detention for the detainee.[46] Operating within this limited jurisdiction, the ID's assessment must be based on a "fulsome review of the lawfulness of detention, including its *Charter* compliance", as well as a consideration of:[47]

(**a**) the reason for detention;

(**b**) the length of time in detention;

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and seven day detention review hearings, which provides representation to some, but not all, detainees in the Western region. In Ontario, Legal Aid Ontario's Refugee Law Office implemented the Immigration Detention Representation Program, which provides every immigration detainee in the Central region with remote representation at detention review hearings. Pre-pandemic, Central region detainees often went unrepresented by legal counsel during these hearings. For further discussion regarding the adversarial nature of detention review hearings, see *Chaudhary*, *supra* note 36 at para 36; Interview #17, *supra* note 38 at 21–22; Lawyer, Interview #14 (22 June 2021) via oral communication [communicated to author] at 16 [Interview #14].

42 *IRPA*, *supra* note 19, s 167(2); Immigration and Refugee Board, "Designated Representatives" (last modified 1 April 2022), online: <irb-cisr.gc.ca/en/designated-representant/Pages/index.aspx>.

43 "Chairperson Guideline", *supra* note 41, ss 1.1.5–1.1.6.

44 *Brown*, *supra* note 15 at para 133. This marked something of a shift from prior jurisprudence, which suggested that "[o]nce an Immigration and Refugee board member orders a person's detention, members in subsequent reviews of that detention are to depart from a prior decision to detain only where they can provide 'clear and compelling' reasons to do so" (see Siena Anstis, Joshua Blum & Jared Will, "Separate but Unequal: Immigration Detention and the Great Writ of Liberty" (2017) 63:1 McGill LJ 1 at 11; *Canada* (*Minister of Citizenship and Immigration*) *v Thanabalasingham*, 2004 FCA 4 at para 10).

45 "Detention Review Hearings", *supra* note 41.

46 *Brown*, *supra* note 15 at para 36; *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878 at paras 71–72 [*Toure*].

47 *Brown*, *supra* note 15 at para 133, quoting Justice Abella's dissenting opinion in *Canada* (*Public Safety and Emergency Preparedness*) *v China*, 2019 SCC 29 at para 127; *IRPR*, *supra* note 20, s 248.

(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
(d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency, or the person concerned;
(e) the existence of alternatives to detention; and
(f) the best interests of a directly affected child who is under 18 years of age.[48]

ID members may also consider conditions of detention as a factor influencing decisions on release.[49] Although ID members previously viewed consideration of conditions of detention as being beyond their jurisdiction, in our prior published work, we observed that this began to shift early after the onset of the pandemic. At that time, ID members began considering conditions of detention in making a determination as to whether release was warranted.[50] We also documented numerous cases in which counsel pushed for the ID to give particular consideration to COVID-19-related conditions of detention when arguing for release.[51]

In August 2020, the Federal Court of Appeal confirmed the legitimacy of this approach in *Brown*.[52] The appellant in this case "challenged the constitutionality of the immigration detention regime … contend[ing] that the regime violates sections 7, 9, 12, and 15 of the *Canadian Charter of Rights and Freedoms*".[53] The appellant's arguments focused on several features of the regime, namely: the allowance for detention where removal from Canada is not reasonably foreseeable; the onus on the detainees to justify their own release; the ID's lack of control over the location and conditions of detention; and the allowance for indefinite detention.[54] Although the regime was ultimately upheld as constitutional, the Court did conclude that conditions of detention are, in fact, relevant to the legality of detention, and that "a detention order that does not take into the proportionality of the risk and

48 *IRPR*, *supra* note 20, s 248. Notably, ID members are also required to consider the section 248 factors with an eye to ensuring compliance with the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (*UK*), 1982, c 11 [*Charter*]. See also *IRPR*, *supra* note 20, s 248(e).

49 *Brown*, *supra* note 15 at para 107. For analysis, see Arbel & Joeck, *supra* note 6.

50 Arbel & Joeck, *supra* note 6.

51 See e.g. redacted submissions from the Refugee Law Office, on file with authors.

52 *Brown*, *supra* note 15.

53 *Ibid* at para 6.

54 *Ibid* at paras 15–19.

the conditions of detention, can be tested in the Federal Court, on both *Charter* and administrative law principles."[55] Importantly, and as referenced above, while the ID can consider conditions of detention per *Brown*, it does not have authority to order changes to those conditions, nor does it have authority to transfer detainees from one facility to another in order to fulfil its mandate.[56] At the conclusion of a hearing, the ID can elect to continue an individual's detention or order their release; if the individual is released, the ID has the power to impose various conditions.[57]

CBSA has sole authority to decide where to place immigration detainees.[58] During the time period studied here, detainees were primarily placed in dedicated Immigration Holding Centres (IHCs) or provincial jails. There are no laws or regulations that govern CBSA's decision-making regarding sites of detention.[59] Such decisions are left entirely within CBSA's

55 *Ibid* at paras 20, 96, 116.

56 *Ibid*.

57 The ID has authority to order a detainee released from detention without conditions, or, to order release and impose conditions "that it considers necessary" (see *IRPA*, *supra* note 19, s 58(3)). Conditions are listed in "Chairperson Guideline", *supra* note 41, ss 3.2, 3.3, and include, for example, abiding by a curfew, refraining from using a cellphone or a computer, remaining within or outside a particular geographic area, and various reporting obligations. Conditions of release may also include a financial bond or guarantee. The Immigration Division may also require house arrest, an electronic bracelet to track physical location, restrictions on contacts, and/or regular inspection of the individual's residence by immigration officials. CBSA may also recommend that certain conditions be imposed on immigration detainees upon release, as recognized in *Brown*, *supra* note 15 at para 107.

58 *Toure*, *supra* note 46 at paras 71–72.

59 The *IRPA* and *IRPR* are silent on this issue. CBSA has developed a National Risk Assessment for Detention (NRAD) to assist in determining where detainees should be placed (see Canada Border Services Agency, "National Immigration Detention Standards Chapter 6.0: Administration and Management" (last modified 16 August 2024), online: <cbsa-asfc.gc.ca/security-securite/detent/standards-normes/ch6-eng.html>; Canada Border Services Agency, *ENF 20: Detention* (Ottawa: CBSA, 2020) at 37–40 online (pdf): <canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20-det-en.pdf> [*ENF 20: Detention*]). However, the NRAD process is highly opaque: several lawyers we interviewed stated that they had never seen an NRAD form, that their clients' NRAD forms were never disclosed, or that they were unaware that the NRAD requirement existed (see Lawyer, Interview #9 (15 June 2021) via oral communication [communicated to author] at 29 [Interview #9]; Lawyer, Interview #15 (23 June 2021) via oral communication [communicated to author] at 31–32 [Interview #15]; Lawyer, Interview #20 (29 June 2021) via oral communication [communicated to author] at 20 [Interview #20]; Lawyer, Interview #25 (13 August 2021) via oral communication [communicated to author] at 11 [Interview #25]; Lawyer, Interview #22 (30 June 2021) via oral communication [communicated to author] at 24–25 [Interview #22]). For more on the NRAD process' serious procedural problems, see Brendan Kennedy, "Canada's Immigration Detainees Being Locked Up Based on Dodgy Risk Assessments, Star Finds", *The Toronto Star* (12 April 2017), online: <thestar.com/news/investigations/

discretion, and detainees have no meaningful opportunity to challenge or otherwise participate in the initial placement process.[60] CBSA is free to place detainees in jails instead of IHCs, even in situations where they are highly vulnerable, for example, due to pregnancy or mental health.[61] In fact, CBSA identifies mental health concerns as a reason *for* placement in provincial jails.[62] During the time period of our study, CBSA's practice was to presumptively detain anyone arrested outside of Ontario, Quebec, or British Columbia—where the agency's three IHCs are located—in a provincial jail.[63] CBSA retains sole discretion to decide whether to detain that individual in a provincial jail or in an IHC.[64]

At present, CBSA runs three IHCs across the country, one each in the provinces of Ontario, Quebec, and British Columbia.[65] While each of these centres differ, they all generally operate like medium security correctional facilities.[66] Most detainees are held in rooms within living units, and can "move freely to other parts of a secured section" unescorted by guards.[67]

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canada-s-immigration-detainees-being-locked-up-based-on-dodgy-risk-assessments-star-finds/article_2efde681-4d1e-5f03-a93b-cf357e9a6455.html>.

60 *Toure*, *supra* note 46 at paras 71–72.

61 During the time period studied here, CBSA had agreements in place with all of the provinces which allowed for the detention of immigration detainees in provincial jails. Several provinces have since terminated these agreements. For further discussion of this topic, see the text accompanying notes 291–302.

62 Canada Border Services Agency, "Detentions and Alternatives to Detention" (last modified 10 November 2024), online: <cbsa-asfc.gc.ca/security-securite/detent/menu-eng.html#a07> [CBSA, "Detentions and Alternatives"]. However, there is no clear evidence that specialized care is available to immigration detainees held in provincial correctional facilities, especially given the fact that "mental health treatment in provincial jails is woefully inadequate" (see HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 4).

63 *ENF 20: Detention*, *supra* note 59 at 29, 39.

64 CBSA, "Detentions and Alternatives", *supra* note 62. CBSA explains its approach as follows: "[i]n regions where an IHC (immigration holding centres) does not exist or where a risk assessment determines an individual cannot be effectively managed within an IHC (immigration holding centres), the CBSA (Canada Border Services Agency) works closely with provincial partners for the housing of immigration detainees in their facilities. Provincial correction facilities are used to house high-risk detainees whose behaviour cannot be managed within an IHC (immigration holding centres) (for example, those with a propensity towards violent or aggressive behaviour) [and] any detainee who is arrested and detained in an area not served by an immigration holding centre" (*ibid*).

65 Canada Border Services Agency, "Immigration Holding Centres" (last modified 18 September 2023), online: <cbsa-asfc.gc.ca/security-securite/ihc-csi-eng.html#_s1>.

66 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at iii, 2.

67 Canadian Red Cross, *Immigration Detention Monitoring Program* (*IDMP*) *Annual Report: Monitoring* Period—April 2020 to March 2021 (Canadian Red Cross) at 12 [Canadian Red Cross, *IDMP 2020–2021*].

Detainees in IHCs have access to toilets located outside of their rooms, wear their own clothing, and have some limited access to mental health supports, offered by non-governmental agencies, and interpretation services.[68] In general, detainees can more easily connect with the outside world using landline phones, but are not permitted unrestricted access to personal communication devices.[69] Overall, detainees in IHCs are substantially less restricted than detainees in jails, but are nevertheless subject to significant restrictions on their liberty, privacy, autonomy, and movement, including strict routines, constant surveillance, and punitive measures in response to failures to follow rules and orders, including segregation, isolation, or transfer to jail.[70]

Conditions of detention are significantly harsher and more restrictive in jails than those in IHCs.[71] Most jails used for immigration detention are maximum security facilities.[72] Detainees confined in jails are subject to all correctional rules and conditions without exception, including the wearing of prison garb, strip searches, double and triple bunking, lockdowns, segregation, and solitary confinement.[73] Detainees are held in cells in general population units and co-mingle with prisoners who are serving a criminal sentence or are on remand.[74] Toilets are located in the cells, which intrudes upon detainees' privacy.[75] According to Human Rights Watch, "[b]etween

68 *Ibid* at 9, 14, 15.

69 *Ibid* at 14.

70 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 12–13. For a detailed report on detention conditions in Canada, see generally Paloma van Groll & Hanna Gros, *"We Have No Rights": Arbitrary Imprisonment and Cruel Treatment of Migrants With Mental Health Issues in Canada* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2015).

71 Lawyer, Interview #21 (29 June 2021) via oral communication [communicated to author] at 8–10 [Interview #21].

72 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at i.

73 Canadian Red Cross, *Immigration Detention Monitoring Program (IDMP) Annual Monitoring Activity Report: Monitoring Period—September 2017 to March 2018* (Canadian Red Cross) at 7. CBSA has "limited control over detention conditions" in provincial jails (see Canada Border Services Agency, *2020-21 Departmental Plan*, Catalogue No. PS35-8E-PDF (Canada Border Services Agency, 2020) at 20 online (pdf): <cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2020-2021/report-rapport-eng.pdf>; *Brown*, *supra* note 15 at para 105).

74 Canadian Red Cross, *Immigration Detention Monitoring Program (IDMP) Annual Report: Monitoring Period—April 2018 to March 2019* (Canadian Red Cross) at 7. The Canadian Red Cross has stated that "co-mingling people detained under *IRPA* with persons remanded or serving sentences under the Criminal Code is a harmful and disproportionate practice" (*ibid*).

75 Canadian Red Cross, *IDMP* 2020–2021, *supra* note 67 at 12.

April 2017 and March 2020, approximately a fifth of all immigration detainees—about 5,400—were held in 78 provincial jails across Canada."[76]

Under Canadian law, there are no time limits on immigration detention—only the mandatory, regularly scheduled review requirements outlined above. As a result, immigration detention can last indefinitely.[77] Canada has detained people for years on end.[78] The longest recorded detention in Canada lasted 11 years.[79] Although the publicly available statistics on long-term detention are opaque and difficult to analyze, the data makes clear that immigration detainees who are held in provincial jails are more likely to be detained for longer periods of time compared to those held in dedicated IHCs.[80] The data also indicates that racialized individuals, particularly Black men, are detained for disproportionately longer periods of time, and are often detained in provincial jails rather than dedicated immigration facilities.[81] Human Rights Watch and Amnesty International report that in 2019, the largest portion of immigration detainees held for more than 90, 180, and 270 days were from African and Caribbean countries.[82] Since CBSA only collects data disaggregated by country of

76 Human Rights Watch, "Legal Analysis of Agreements Allowing Immigration Detention in Canadian Provincial Jails" (4 April 2022), online: <hrw.org/news/2022/04/04/legal-analysis-agreements-allowing-immigration-detention-canadian-provincial-jails#_ftnref3> [HRW, "Agreements Allowing Immigration Detention"].

77 Efrat Arbel & Ian C Davis, "Immigration Detention and the Problem of Time: Lessons from Solitary Confinement" (2018) 4:4 Intl J Migration & Border Studies 326.

78 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 85–86. Notably, research indicates that "detainees appearing before the Immigration Division become less and less likely to be released as the length of their detention increased" (see Jared Will, *Domestic and International Standards and the Immigration and Refugee Board's Guideline on Detention*, (United Nations High Commission for Refugees, 2018) at 31, citing *Chaudhary*, *supra* note 36 at para 90).

79 HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 3. See also Geoffrey York, "Freed from Canadian Detention, South African Man Left in Limbo", *The Globe and Mail* (14 June 2016), online: <theglobeandmail.com/news/world/freed-from-canadian-detention-south-african-man-left-in-limbo/article30462108/#:~:text=After%20more%20than%2011%20years,the%20Canadian%20immigration%20custody%20system>.

80 Human Rights Watch and Amnesty International report that in 2019, detainees who were held for 90 days or longer were "more likely to be held in provincial jails than immigration holding centers". That same year, 78 percent of immigration detainees held for 90 days or longer spent "at least part of their detention in a provincial jail". This number increased to 85 percent of detainees held for 180 days or longer, and all detainees who were held for 270 days or longer (HRW, "I *Didn't Feel Like a Human in There*", *supra* note 13 at 18).

81 *Ibid* at 64.

82 *Ibid*.

nationality—which we view to be a wholly inadequate proxy for race—it is difficult to assess this issue in a fulsome manner.[83]

Medical research has shown that immigration detention can cause severe harm, including anxiety, depression, despair, psychological distress, psychosis, catatonic withdrawal, self-harm, and suicidal ideation.[84] The harm can be especially severe for asylum seekers, who typically suffer from enhanced vulnerability due to prior exposure to trauma and loss.[85] The medical research further concludes that even when used for a "brief period in relatively adequate conditions", detention can impact people in detrimental ways.[86] Given the absence of time limits, immigration detainees experience detention as indeterminate: they do not know "when—or if—their detention will end."[87] Research has shown that without a fixed end point, immigration detention is experienced as amorphous and unending, and that the absence of time limits results in trauma, cognitive distress, and mental unraveling.[88] Arbel and Davis have drawn parallels between the experience of indeterminacy in immigration detention and the experience of indeterminacy in solitary confinement, which the United Nations recognizes as a form of torture when enforced for more than 15 consecutive days.[89] Arguably, indeterminate immigration detention might also amount to a form of torture, or, at the very least, a form of ill treatment.[90]

In addition to the *IRPA*, immigration detainees are subject to the *Charter* and international human rights instruments, though the regime's

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83 *Ibid*.

84 Rachel Kronick, Cécile Rousseau & Janet Cleveland, "Mandatory Detention of Refugee Children: A Public Health Issue?" (2011) 16:8 Paediatric Child Health e65.

85 Janet Cleveland & Cécile Rousseau, "Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada" (2013) 58:7 Can J Psychiatry 409 at 410.

86 Janet Cleveland et al, "Symbolic Violence and Disempowerment as Factors in the Adverse Impact of Immigration on Adult Asylum Seekers' Mental Health" (2018) 63 Intl J Pub Health 1001 at 1005, 1007.

87 Arbel & Davis, *supra* note 77 at 327.

88 *Ibid*. See also HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 21–22.

89 Arbel & Davis, *supra* note 77 at 329–30.

90 The UN Special Rapporteur on Torture has concluded that indefinite immigration detention inflicts serious psychological harm that can amount to prohibited ill-treatment because of its protracted or indefinite duration (see *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNHRC, 37th Sess, UN Doc A/HRC/37/50 (2018) at para 26 [UNHRC, *Report of the Special Rapporteur on Torture*]). The BC Human Rights Commissioner has also stated that the use of segregation for immigration detainees may constitute torture or cruel, inhuman, or degrading treatment (see British Columbia Office of the Human Rights Commissioner, *Submission Regarding Immigration Detention in Provincial Correctional Centres*, (Vancouver: BCOHRC, 2022) at 11 [BCOHRC Report]).

compliance with the protections set out in these various rights instruments is hotly contested. In *Brown*, the Federal Court of Appeal held that the immigration detention regime does not infringe sections 7, 9, or 12 of the *Charter*.[91] However, the BC Human Rights Commissioner has stated that the Canadian immigration detention regime violates both the *Charter* and the BC *Human Rights Code*[92] as the negative impacts of immigration detention disproportionately impact people with disabilities and racialized individuals, as well as their international human rights obligations to ensure freedom from arbitrary detention.[93]

The UN Working Group on Arbitrary Detention asserts that immigration detention should never be punitive in nature and detainees must not be held in facilities intended to house individuals accused or convicted of criminal acts.[94] The Canadian immigration detention regime violates these standards by subjecting detainees to co-mingling in provincial jails. The UN Special Rapporteur on Torture has concluded that detention based solely on migration status exceeds the legitimate interests of the state and should be regarded as arbitrary.[95] Guidelines set by the UN High Commissioner for Refugees indicate that detention must not be arbitrary, and that any decision to detain must be based on an assessment of the individual's particular circumstances.[96]

III. THE IMPACT OF COVID-19 ON IMMIGRATION DETENTION

It is against this background that our research on the impact of COVID-19 on immigration detention took place. This research focused on detention

91 *Brown*, *supra* note 15 at para 37. The Federal Court of Appeal relied on features of the detention regime such as the frequency and timeliness of review hearings, the burden of proof on the Minister to establish ground(s) for detention, the need for consideration of alternatives to detention, the power of the ID to impose conditions upon release, and the judicial review power of the Federal Court over the ID in order to find that the regime complies with the relevant provisions of the *Charter* (*ibid*).

92 RSBC 1996, c 210.

93 BCOHRC Report, *supra* note 90 at 9, 12. See also HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 5, 64.

94 *Report of the Working Group on Arbitrary Detention*, UNHRC, 39th Sess, UN Doc A/HRC/39/45 (2018) at 36 (para 44 of the Revised Deliberation No. 5 on Deprivation of Liberty of Migrants). See also BCOHRC Report, *supra* note 90 at 7.

95 UNHRC, *Report of the Special Rapporteur on Torture*, *supra* note 90 at para 24. See also BCOHRC Report, *supra* note 90 at 11.

96 *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR (2012) at paras 18–19. See also BCOHRC Report, *supra* note 90 at 11.

practices in Canada between 2020 and 2022. As detailed above, we reviewed all publicly available statistics, obtained a sample of detention decisions through ATIP requests, reviewed publicly available case law, and conducted 25 semi-structured interviews as per the parameters we outlined earlier. We met with research participants working in British Columbia, Alberta, Saskatchewan, Ontario, and Quebec. We asked a broad range of questions focused on the impact of the COVID-19 pandemic on the law, policy, and practice of immigration detention. In the analysis that follows, we report on our findings with respect to the headings noted above, namely: rates of detention and criteria for release, sites and demographics of detention, conditions of confinement, the shift to remote hearings, the availability of alternatives to detention, the justiciability of conditions of detention in the detention review process, and the persistence of entrenched inequalities.[97]

A. Rates of Detention and Criteria for Release

The outbreak of COVID-19 led to a reduction in the absolute number of detainees in the first few months of the pandemic. CBSA proclaimed its commitment to "ensure that volumes remain at a minimum", in part, by "leveraging alternatives to detention and by working with the Immigration and Refugee Board".[98] A few months into the pandemic, CBSA stated that the "detention population has significantly declined", while Public Safety Canada stated that "in light of the novel coronavirus pandemic, temporary measures have been implemented to further mitigate the risks to more vulnerable detainees and limit the use of detention as much as possible."[99] This decline was particularly felt in IHCs. The three holding centres in Ontario, Quebec, and British Columbia, which have the capacity to hold 183, 109, and 70 detainees respectively, each held fewer than 20 detainees in the early months of the pandemic.[100] Media outlets celebrated this shift

97 We identify research participants by their title, and by the regions recognized by the Immigration and Refugee Board. The Western region encompasses participants from British Columbia, Alberta, and Saskatchewan; the Central region encompasses participants from Ontario, and the Eastern region encompasses participants from Quebec (see Immigration and Refugee Board of Canada, "Regions" (last modified 15 October 2024), online: <irb-cisr.gc.ca/en/contact/Pages/contact3.aspx>).

98 Public Safety Canada, "COVID-19 Measures at Immigration Holding Centres" (12 August 2020), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20201201/017/index-en.aspx>.

99 *Ibid*.

100 See e.g. Brigette Bureau, "Immigration Detention Centers Emptied Over Fear of Possible Covid-19 Outbreaks", *CBC News* (10 November 2020), online: <cbc.ca/news/canada/

as a moment of progressive change. Early research on the subject—including our own—expressed a similar hope.[101]

The research participants we interviewed recounted impressions that align with these statistics.[102] One participant in the Central region noted "an unprecedented number of detainees being released," while another referred to the change in release rates as an "immediate and substantial sea change."[103] One research participant in the Eastern region noted that within two months of the pandemic's outbreak, most of the detainees they were working with had been released, while another stated that the Laval IHC "was almost empty for a while".[104] Another participant from the Eastern region explained: "people who would normally not get released were getting released. Conditions of release were getting, in some cases, relaxed".[105] One participant from the Western region observed that, in the very early stages of the pandemic, "CBSA just stopped detaining people…it was almost as if hearings shut down".[106] Another from the Western region recounted that early in the pandemic there was "a real understanding…that this is unprecedented and we need to be taking this very, very seriously. There was a lot of fear. We weren't sure how to keep it under control and I think that the reaction was detention facilities are inherently at higher risk of COVID-19 exposure and we are therefore going to be much more skeptical of keeping people detained".[107]

However, as the pandemic continued, these impressions shifted. Almost universally, research participants noted that despite the initial push to release most detainees during the early stages of the pandemic,

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montreal/immigration-detainees-released-covid-1.5795659#:~:text=Montreal%C2%B7CBC%20Investigates-,Immigration%20detention%20centres%20emptied%20over%20fear%20of%20possible%20COVID%2D19,people%20who%20were%20being%20detained>.

101 *Ibid*; Arbel & Joeck, *supra* note 6.

102 Lawyer, Interview #10 (15 June 2021) via oral communication [communicated to author] at 4–5 [Interview #10]; Lawyer, Interview #12 (16 June 2021) via oral communication [communicated to author] at 5 [Interview #12]; Interview #15, *supra* note 59 at 8–9; Designated Representative, Interview #19 (29 June 2021) via oral communication [communicated to author] at 4 [Interview #19]; Interview #20, *supra* note 59 at 4.

103 Interview #21, *supra* note 71 at 8; Lawyer, Interview #23 (14 July 2021) via oral communication [communicated to author] at 1 [Interview #23].

104 Service Provider, Interview #1 (19 August 2021) via oral communication [communicated to author] at 12 [Interview #1]; Interview #20, *supra* note 59 at 4.

105 Interview #1, *supra* note 104 at 12.

106 Lawyer, Interview #16 (23 June 2021) via oral communication [communicated to author] at 6 [Interview #16].

107 Interview #8, *supra* note 38 at 8.

the landscape changed relatively quickly as 2020 dragged on.[108] One lawyer from the Western region recounted that while ID members considered COVID-19 a relevant factor for release early in the pandemic, "after a short time, that just all sort of fell by the wayside".[109] Another made similar observations, concluding that ultimately, this was not "the shift we wanted it to be".[110] A lawyer from the Central region recalled a "very high increase in release orders" at the beginning of the pandemic, but also noted that "it really didn't last".[111]

Data that has since been published by CBSA aligns with these impressions, indicating that the shift toward releasing detainees was indeed short lived. In 2020–2021, CBSA detained people at a higher rate as a percentage of the number of entries by non-Canadian citizens to Canada than in any previous year from 2012 onwards—0.054 percent of all entries to Canada.[112] Between 2012 and 2020, the highest percentage was 0.031 in 2012–2013.[113] In the year before the pandemic (2019–2020), the percentage was 0.027.[114] This demonstrates that the rate of detention upon arrival doubled between 2019–2020 and 2020–2021. The 2019–2020 numbers may capture a brief drop in detention in the second half of March 2020, but the 2020–2021 fiscal year, when Canada was weathering the worst of the pandemic, saw an increase.[115] In 2021–2022, detention occurred at a

108 *Ibid* at 8, 3 (noting that while COVID-19 was a primary consideration influencing release through the end of 2020, by the end of 2020 and through 2021, arguments based on the risk posed by COVID-19 did not get the same amount of traction with Board Members; and further, that by February 2021, "they weren't really interested in hearing about COVID"). Consistently, the lawyers we interviewed also noted that COVID-19 was considered as a condition of detention and made relevant in the detention review hearing process. See e.g. Interview #12, *supra* note 102 at 48–49; Interview #17, *supra* note 38 at 15; Lawyer, Interview #18 (28 June 2021) via oral communication [communicated to author] at 2 [Interview #18]; Interview #25, *supra* note 59 at 3.

109 Interview #16, *supra* note 106 at 9–10 (explaining further that as the pandemic continued, Board members took notice of COVID-19 but appeared to be of the view that outbreaks in detention holding centers or provincial jails could be managed such that COVID did not create "much more risk for the detainees than the general public faces").

110 *Ibid* at 8.

111 Interview #12, *supra* note 102 at 8, 10; Interview #23, *supra* note 103 at 16 (stating that arguments based in COVID-19 concerns stopped being effective: "we've fallen back into old patterns").

112 CBSA, "Annual Detention Statistics", *supra* note 34.

113 *Ibid*.

114 *Ibid*.

115 *Ibid*. For CBSA, data is gathered based on the fiscal year, which commences on April 1 and ends on March 31. See also the quarterly data, particularly as compared to the previous year (CBSA, "Q4 2020 to 2021", *supra* note 12; Canada Border Services Agency, "Quarterly

rate of 0.04 percent of entries to Canada — again, significantly higher than pre-pandemic.[116] Notably, in 2022–2023, the rate dropped to 0.02 percent, a rate consistent with the data from 2014 to 2019.[117] These numbers tell us that the liberatory possibilities of the pandemic were never realized. On the contrary, non-Canadian citizens were detained at a higher rate upon arrival than they had been in the eight years previous, at a time when borders were closed and removal was challenging.

The sample of cases we obtained through ATIP requests pointed to a similar trend: of the 26 decisions we obtained — which consisted of 30 day review hearings conducted in November 2020 — COVID-19 concerns were raised and discussed in 18 cases. In three of these decisions, the ID member determined that there was no evidence that COVID-19 posed a great risk to the detainee, given that the virus was well controlled by the detaining authorities.[118] In one decision, the ID member acknowledged that Fraser Regional Correctional Centre in British Columbia was "under surge" and that the risk of COVID-19 was "higher for everyone at this time", but did not order release.[119] In a decision involving the same facility, the ID member recognized that detainees held in correctional facilities were at higher risk of COVID-19 infection, but nevertheless determined that there was insufficient evidence regarding the detainee's pre-existing vulnerability to COVID-19 so as to order release.[120] In a decision involving detention at Maplehurst Correctional Centre in Ontario, the ID member stated that "[j]ail conditions may be harsher than pre-pandemic, but this is true for society at large", and declined to order release.[121] In another decision involving detention at Maplehurst, the ID member acknowledged that the detainee faced a risk of contracting COVID-19 and that "it's just simply

Detention Statistics: Fourth Quarter (Q4) Fiscal Year 2019 to 2020" (last modified 8 September 2020), online: <cbsa-asfc.gc.ca/security-securite/detent/qstat-2019-2020-eng.html>).

116 CBSA, "Annual Detention Statistics", *supra* note 34.

117 *Ibid*.

118 Immigration and Refugee Board of Canada, *02172-A0112521*, (Access to Information and Privacy Request) (IRB, November 2020); Immigration and Refugee Board of Canada, *02484-A0112532*, (Access to Information and Privacy Request) (IRB, November 2020) [ATIP Request #02484-A0112532]; Immigration and Refugee Board of Canada, *02574-A0112533*, (Access to Information and Privacy Request) (IRB, November 2020).

119 Immigration and Refugee Board of Canada, *02095-A0112599*, (Access to Information and Privacy Request) (IRB, November 2020).

120 Immigration and Refugee Board of Canada, *02277-A0112527*, (Access to Information and Privacy Request) (IRB, November 2020).

121 Immigration and Refugee Board of Canada, *02218-A0112524*, (Access to Information and Privacy Request) (IRB, November 2020).

more difficult conditions at Maplehurst as a result of the measures put in place to control the virus"—but still did not order release.[122] In another decision, the ID member did order release, in part due to the finding that conditions of detention at Maplehurst were "very difficult" and that there was a higher risk of COVID-19 transmission.[123]

A decision regarding an individual detained at the Toronto South Detention Centre similarly recognized the heightened risk of COVID-19 infection at that facility, but did not result in release.[124] In a published decision released in January 2022, the ID member made passing reference to the *Brown* decision and the issue of conditions of detention.[125] In that decision, the detainee was being held at the IHC in Toronto and had received two doses of the COVID-19 vaccine. The ID member noted that "the mitigation measures in place at the IHC continue to be relatively effective, though I recognize that the risk of contracting COVID is higher in any sort of congregate facility."[126] The ID member went on to note that the detainee's "risk of adverse health outcomes from COVID" was not "sufficient to favour release," but noted that "the mitigation measures against COVID cause additional restrictions to the [detainee's] liberty, which is a factor that somewhat favours release."[127]

The research participants we interviewed recounted impressions that align with the results of the above-noted ATIP requests. One lawyer from the Western region explained that several months into the pandemic, the "overwhelming feeling of the members that I appeared in front of was that social distancing and other measures taken at the IHC were sufficient to overcome any COVID concerns", unless the detainee in question was "particularly vulnerable".[128] Lawyers across the country similarly noted that COVID-19-based arguments were only effective in cases involving other compelling factors—for example, a detainee's pre-existing condition that made them particularly vulnerable to infection.[129] Research participants

122 Immigration and Refugee Board of Canada, *02131-A0112516*, (Access to Information and Privacy Request) (IRB, November 2020).

123 Immigration and Refugee Board of Canada, *02255-A0112526*, (Access to Information and Privacy Request) (IRB, November 2020) [ATIP Request #02255-A0112526].

124 Immigration and Refugee Board of Canada, *02303-A-112529*, (Access to Information and Privacy Request) (IRB, November 2020).

125 *X* (*Re*), 2022 CanLII 73882 (CAIRB).

126 *Ibid* at para 67.

127 *Ibid*.

128 Interview #8, *supra* note 38 at 3–4.

129 Lawyer, Interview #7 (14 June 2021) via oral communication [communicated to author] at 13 [Interview #7] (stating that because the client was a "healthy guy", "COVID didn't

also indicated that some ID members determined that COVID-19-related conditions were more favourable at IHCs than in emergency shelters, "so it's better for the person to be in detention" rather than to be released.[130] Multiple participants noted that this was a common view among ID members—that is, that detainees would be at similar or greater risk of COVID-19 infection in congregate living settings like shelters as they would be in detention facilities, and therefore the risk of COVID-19 infection in detention did not weigh in favour of release.[131] Three research participants relayed cases where an ID member ordered that their clients be detained on the basis that they were unlikely to obey public health measures, and would therefore be "safer in detention".[132] These accounts raise serious concerns that even though release seemed feasible in each of these cases, the ID determined that the continued deprivation of a person's liberty was warranted because of their own evaluation of that person's ability to comply with public health orders. No less alarmingly, it is also unclear whether a meaningful nexus to an immigration purpose, as required by *Brown*, can be drawn in these instances.[133]

play a big role" in the ID's analysis); Interview #8, *supra* note 38 at 7–8 (noting the need to point to a "specific risk" like pre-existing health condition or age in arguments before the ID); Interview #12, *supra* note 102 at 8–10, 34 (noting that as the pandemic wore on, COVID-19 concerns were "not really getting the same kind of traction"); Interview #12, *supra* note 102 at 2 (noting that pre-existing health conditions were among factors considered by the ID when evaluating release). Notably, in at least one case, evidence of a pre-existing condition that made the detainee vulnerable to COVID-19 infection was not sufficient to justify release (Interview #7 at 7). Several lawyers from the Central region noted that while the ID considered COVID-19 related arguments with consistency, the Board assigned different weight to these arguments based on the circumstances of the case (Interview #7 at 13; Interview #12, *supra* note 102 at 33; Interview #17, *supra* note 38 at 15–16). For a critical analysis on how reliance on "pre-existing" conditions ignores the devaluing of disabled persons, see Thomas Abrams & David Abbot, "Disability, Deadly Discourse, and Collectivity amid Coronavirus" (2020) 22:1 Scandinavian J Disability Research 168.

130 Interview #17, *supra* note 38 at 16. See also Interview #12, *supra* note 102 (reflecting on a decision where the "Board Member said, at first, like yeah, he's actually safer in jail from COVID, because he obviously is someone who doesn't obey rules. And so, if he's released, he won't obey COVID rules and if he's in prison he's going to be forced to obey COVID rules" at 12).

131 Interview #7, *supra* note 129 at 8–9; Interview #16, *supra* note 106 at 8–9; Interview #22, *supra* note 59 at 27.

132 Interview #12, *supra* note 102 at 13–14; Interview #14, *supra* note 41 at 4; Interview #19, *supra* note 102 at 8.

133 Brown, *supra* note 15 ("in order for continued detention to be legal under *IRPA*, there must be a nexus between detention an an immigration purpose. If that is missing, detention under *IRPA* is no longer possible" at para 90).

One lawyer in the Western region observed that as the pandemic progressed, ID members pivoted away from concerns about detainee health to focus on issues with securing flights for removals and the feasibility of deporting individuals at a time when international borders were largely closed.[134] This approach is similarly reflected in the case law we obtained through ATIP requests.[135] The pandemic complicated removal logistics, which in turn impacted the average length of detentions and determinations on release.[136] The added complexity of accounting for different countries' entrance requirements meant that some detainees were held in detention for prolonged periods of time awaiting removal, even where they were ready and willing to be removed—effectively paying for bureaucratic hurdles with their liberty.[137] A lawyer from the Western region recounted a case involving a detainee who was scheduled for removal but was stopped in Toronto and detained there for an additional eight days because Canada grounded all flights to his country of origin on the day of his removal.[138]

Detainees were required to undergo COVID-19 testing and, in some cases, intensive quarantine prior to removal.[139] If detainees refused testing, they were at risk of being deemed uncooperative, which meant they were more likely to be detained longer. This is reflective of long-standing patterns in Canada's detention regime, where a detainee's level of perceived "cooperativeness" is routinely used to justify their detention.[140] For other detainees, flight restrictions enhanced their prospects of release: with removal impracticable and the future length of detention therefore uncertain, some were released.[141]

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134 Interview #16, *supra* note 106 at 29–30.

135 Immigration and Refugee Board of Canada, *02236-A0112525*, (Access to Information and Privacy Request) (IRB, November 2020) [ATIP Request #02236-A0112525]; Immigration and Refugee Board of Canada, *02583-A0111091*, (Access to Information and Privacy Request) (IRB, November 2020); Immigration and Refugee Board of Canada, *02127-A0112517*, (Access to Information and Privacy Request) (IRB, November 2020).

136 Immigration and Refugee Board of Canada, *02152-A0112519*, (Access to Information and Privacy Request) (IRB, November 2020); ATIP Request #02255-A0112526, *supra* note 123; Immigration and Refugee Board of Canada, *02410-A0112531*, (Access to Information and Privacy Request) (IRB, November 2020) [ATIP Request #02410-A0112531].

137 Interview #25, *supra* note 59 at 6.

138 Interview #12, *supra* note 102 at 14.

139 Interview #19, *supra* note 102 at 14.

140 *Ibid* at 9. For further analysis, see Siena Anstis & Molly Joeck, "Detaining the Uncooperative Migrant" (2020) 33 J L & Soc Pol'y 38.

141 Interview #14, *supra* note 41 at 13.

B. Sites and Demographics of Detention

When asked to assess the demographics of those who remained in detention despite pandemic conditions, research participants' impressions varied. One lawyer in the Western region did not notice a shift subsequent to COVID-19, and noted that their clients were detained for both major and minor infractions, including non-compliance with study permit terms.[142] In contrast, one lawyer in the Central region noted that most detentions in 2020 involved individuals who were released after serving a criminal sentence.[143] Another lawyer in the same region observed that the people detained in the early months of the pandemic tended to be those with a higher risk profile.[144] Without concrete data, it is difficult to arrive at any clear conclusions on this point.

However, Simon Wallace's recent research sheds some light on the issue. Wallace reports that in the early months of the COVID-19 pandemic, despite a decrease in the absolute number of people detained, CBSA continued to detain people deemed a "danger to the public" at similar or even higher rates than before.[145] Wallace demonstrates that these arrests did not occur at ports of entry or upon arrival, but were rather used "to enforce back-end immigration rules."[146] Wallace concludes that during the time he examined, CBSA relied heavily on enforcement measures conducted by local police forces or police forces from other countries.[147] Several research participants echoed this impression, and observed that increased levels of police interactions as a result of enhanced COVID-19 monitoring—for example, to enforce Quebec's pandemic curfews—meant that some individuals were arrested and detained who wouldn't have been otherwise.[148]

CBSA data demonstrates that during the time period canvassed in our research, the agency incarcerated immigration detainees in provincial jails in staggering numbers. Between 2021–2022, approximately 23 percent of detentions occurred in provincial jails, and between 2020–2021, approximately 40 percent of detentions occurred in provincial jails.[149] This latter number constitutes nearly double the percentage of detainees held in

142 Interview #22, *supra* note 59 at 22.
143 Interview #12, *supra* note 102 at 16–17.
144 Interview #17, *supra* note 38 at 10.
145 Wallace, "Next Jailor", *supra* note 5 at 567.
146 *Ibid* at 567–68.
147 *Ibid* at 568.
148 Interview #1, *supra* note 104 at 13–14; Interview #19, *supra* note 102 at 9.
149 CBSA, "Annual Detention Statistics", *supra* note 34.

jails in previous years.[150] Notably, CBSA was required to pay the provinces a daily rate for each immigration detainee who was jailed in a provincial correctional facility during this time. The rates were as follows:[151]

Province	Per diem rate
British Columbia	C$235.00
Manitoba	C$293.60
New Brunswick	C$231.33 for men, C$375.16 for women
Nova Scotia	C$392.30
Ontario	C$356.69
Prince Edward Island	C$288.33
Quebec	C$270.28 for men, C$301.18 for women
Saskatchewan	C$203.74

The average length of time in detention also more than doubled during the pandemic as compared to the three previous years.[152] These numbers indicate that not only were more detainees subject to imprisonment under exceedingly harsh conditions during the early years of the pandemic, but also that significant public funds were used to pay for that cruelty.

C. Conditions of Confinement

The pandemic rendered conditions of confinement significantly harsher.[153] For both detainees held in IHCs and those held in provincial jails, quarantine, social distancing, and separation measures had the effect of furthering their isolation. Since immigration detainees often rely on connections with community and loved ones to build their cases for release and to support their ongoing immigration or refugee applications, being cut off from the outside world can have devastating consequences. One research participant observed that prior to the pandemic, "the only reason [some detainees] were able to sort of hold on and cope is because they were able to speak with their families while they were in detention".[154] For many, that lifeline was severed with the onset of the pandemic.

Immigration detainees experienced multiple intersecting layers of isolation during the pandemic. The research participants we interviewed

150 *Ibid*; HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 63.
151 HRW, "Agreements Allowing Immigration Detention", *supra* note 76.
152 *Ibid*; CBSA, "Annual Detention Statistics", *supra* note 34.
153 Interview #21, *supra* note 71 at 8.
154 Interview #21, *supra* note 71 at 8.

noted that every aspect of detention became harder.[155] Research participants described experiences of debilitating isolation—particularly among those without a shared language—with meager access to phone and internet, no public visits, and limited contact with other detainees.[156] They spoke of heightened stress, hardship, difficulty, and mental health struggles.[157] One lawyer in the Western region identified a "specific stress that comes with when the world is locked down and you too are in detention. It's like everything moves slower".[158] Detainees experienced acute fear—fear of the virus, fear about the uncertainty of their fate, fear for loved ones elsewhere in the world, fear about not knowing what is going on.[159] As one research participant stated, "then there's the fear. And that is just so significant for people to just be there, not knowing when you might get out. Like not knowing when you might have a chance of getting out".[160] Another spoke of the intense impact of "boredom, isolation, combined with fear…Am I going to get sick? What's going to happen to me, I have no one".[161]

Because of the relatively low numbers of detainees held at IHCs, detainees were able to practice distancing measures and maintain hygiene, which kept the risk of COVID-19 infection comparatively low.[162] This notwithstanding, the experience of detention in IHCs was still profoundly difficult. When detainees first arrived at these centres, whether after arrest, or as a result of transfer from corrections, they were required to isolate in a "wet cell"—a prison-like cell with a toilet and sink, isolated from other living units.[163] Research participants described this experience as exceedingly difficult and akin to solitary confinement.[164] IHCs imposed significant restric-

155 Interview #1, *supra* note 104 at 22 (stating that COVID-19 made everything in detention worse); Interview #15, *supra* note 59 at 27 (describing general worry and stress, reduced contact with outside world, difficulty communicating with loved ones); Interview #21, *supra* note 71 (stating: "it's been far more difficult to be in detention during the pandemic" at 8).

156 Interview #1, *supra* note 104 at 22; Interview #25, *supra* note 59 at 5.

157 Interview #1, *supra* note 104 at 22; Interview #18, *supra* note 108 at 6; Interview #21, *supra* note 71 at 6, 9, 17; Interview #22, *supra* note 59 at 32.

158 Interview #18, *supra* note 108 at 6–7.

159 Interview #8, *supra* note 38 ("there was a lot of fear" at 8); Interview #12, *supra* note 102 ("the difficulty of the conditions and this added layer of fear really is making things that much harder for people" at 32–33); Interview #15, *supra* note 59 ("people are more stressed, and they're worried" at 26); Interview #21, *supra* note 71 at 10 (describing fears about the virus spreading).

160 Interview #12, *supra* note 102 at 32.

161 Interview #1, *supra* note 104 at 20.

162 Interview #14, *supra* note 41 at 5; Interview #22, *supra* note 59 at 8.

163 Interview #14, *supra* note 41 at 5.

164 *Ibid*.

tions on movement and human contact, such that detention was reduced to "basically being alone in a room where you can only leave one at a time, under the supervision of the guards".[165] As one lawyer put it, "the freedom they had before, what little freedom there was, was gone".[166] These restrictions cut detainees off from one another, which prevented them from forming mutual support networks and sharing information about the availability of various supports.[167] Problems caused by a lack of legal representation predated the onset of COVID-19 and persisted throughout the pandemic. This is with the notable exception of the Central region, where access to justice improved significantly, and in British Columbia, where a duty counsel program providing legal representation to detainees had been in place for years before the pandemic broke out. In other regions, access to justice problems persisted. As one research participant from the Eastern region explained, "not being represented when you're alone in a room is inferior in terms of a situation to not being represented when you're mingling with a bunch of other people who can tell you, for better or worse, what their experience was like".[168]

By and large, conditions of detention at IHCs across the country were hostile and difficult. These harsh conditions did not go uncontested by immigration detainees. Research participants referenced two hunger strikes by immigration detainees at the IHC in Laval, Quebec, protesting dire pandemic conditions.[169] One lawyer from the Western region recounted that their client was told by guards, "if you take your mask off with me in the room, I'll send you to jail".[170] That same lawyer recounted a scenario where a detainee was undergoing a detention review hearing in a room by himself, over videoconference, and the guards yelled at him through the door when he took off his mask—despite the fact that he was

165 Interview #1, *supra* note 104 at 17.

166 Interview #16, *supra* note 106 at 13.

167 Interview #1, *supra* note 104 at 17–18.

168 Interview #1, *supra* note 104 at 18.

169 *Ibid* at 23; Interview #21, *supra* note 71 at 10; Interview #25, *supra* note 59 at 13. See also Solidarity Across Borders, "Communique From Prisoners in the Laval Immigration Holding Centre: Hunger Strike Until We Are Free" (5 March 2020), online: <solidarityacrossborders.org/en/communique-from-prisoners-in-the-laval-immigration-holding-centre-hunger-strike-until-we-are-free>; Hanna Gros & Samer Muscati, "Immigration Detainees Hunger Strike Again As Canada Fails to Listen: Conditions in Quebec Detention Facility Even More Dire Because of Covid-19" (20 March 2021), online: <hrw.org/news/2021/03/20/immigration-detainees-hunger-strike-again-canada-fails-listen>.

170 Interview #8, *supra* note 38 at 4.

required to do so to participate in his own hearing.[171] Research participants also made note of small acts of kindness throughout the pandemic. Some IHCs, for example, are serviced by non-governmental organizations, which checked in on detainees by leaving phone messages and donated reading materials and notebooks to assist those who were confined to their cells as a result of COVID-19 outbreaks.[172]

The qualitative experience of detention was much more severe in provincial jails.[173] On the whole, as Lisa Kerr and Kristy-Anne Dubé have argued, COVID-19 "intensified the risks and severity of confinement" in correctional facilities.[174] Courts have similarly recognized that "jails have become harsher environments" as a result of COVID-19.[175] One lawyer from the Central region described conditions of detention in provincial jails as "very, very, very restrictive", referencing "incredible restrictions to movement and access to the outdoors and access to counsel…people went for weeks without a shower. Weeks or months without access to the outdoors. Like not able to see their families. Very, very unreliable access to phones. Being in their cells for like, 23 hours a day".[176] Another stated that throughout the pandemic, "conditions in the provincial jails have been extremely, extremely difficult".[177] Meals were left at cell doors to minimize congregation, and enhanced isolation measures were strictly enforced, which made conditions "so incredibly harsh for people inside. So incredibly harsh".[178] One lawyer from the Western region spoke of severe and enhanced restrictions on detainee movement within jails.[179] Another lawyer from the Western region reflected that, "[i]t's already a terrifying experience to be in prison, but then a terrifying experience with the pandemic, with all these additional rules that are keeping you apart from people".[180]

Lawyers in regions across the country spoke of jails implementing mandatory segregation protocols to contain the virus and its spread—that is, isolation in a cell with little to no human contact, akin to solitary

171 *Ibid*.

172 Anonymized interview transcript on file with author (August 2021) at 20.

173 Interview #8, *supra* note 38 at 4; Interview #12, *supra* note 102 at 20; Interview #16, *supra* note 106 (stating that at the IHC "everything is much, much nicer than in a prison" at 16).

174 Lisa Kerr & Kristy-Anne Dubé, "The Pains of Imprisonment in a Pandemic" (2021) 46:2 Queen's LJ 327 at 328.

175 *R v Hearns*, 2020 ONSC 2365 at para 16.

176 Interview #17, *supra* note 38 at 18–19.

177 Interview #12, *supra* note 102 at 20.

178 *Ibid* at 22.

179 *Ibid* at 9.

180 Interview #22, *supra* note 59 at 7.

confinement.[181] The cases we obtained through ATIP Requests reflected this as well.[182] Solitary confinement is defined as isolation for up to 22 hours in a day without meaningful human contact, and is considered a form of torture when enforced for over 15 consecutive days.[183] Jails enforced mandatory segregation protocols, sometimes for weeks at a time.[184] This is not surprising, given that correctional facilities across Canada deployed "extensive" isolation tactics during the pandemic, and have been criticized for doing so "in conditions and for durations well beyond what was necessary and clinically justified".[185] Lockdowns are a staple of corrections, but were deployed by provincial institutions with greater frequency after the onset of COVID-19, be it as a result of staff shortages, safety concerns, or health measures.[186] During a period of lockdown, a correctional facility restricts mobility in the facility or a portion thereof, for days or weeks at a time.[187] One research participant described lockdown as being "just stuck in a cell".[188]

During lockdowns, detainees experienced significant limitations on their ability to meet with their lawyers, contact loved ones, or access programming, yard time, and basic necessities like showers.[189] Research participants across the country recounted that their clients were subject to frequent lockdowns in provincial jails.[190] One research participant from

181 Interview #12, *supra* note 102 at 21–22; Interview #9, *supra* note 59 at 16; Interview #16, *supra* note 106 at 13–14.

182 ATIP Request #02410-A0112531, *supra* note 135; Immigration and Refugee Board of Canada, *02126-A0112515* (Access to Information and Privacy Request) (IRB, November 2020).

183 See e.g. *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UNODC, 70th sess, UN Doc A/C.3/70/L.3 (2015) at 13–14 (Rules 43–44).

184 Interview #9, *supra* note 59 at 16.

185 Adelina Iftene, "Of Governmental Priorities, Human Rights, and Social Control: Prison Responses to the COVID-19 Pandemic" in Colleen M Flood et al, *supra* note 9 at 266.

186 See e.g. Ainslie MacLellan "Inmates, Advocates Denounce 'Inhuman' 24/7COVID-19 Lockdowns at Quebec's Leclerc Jail", *CBC News* (11 February 2022), online: <cbc.ca/news/canada/montreal/laval-leclerc-detention-centre-covid-conditions-1.6347221>.

187 See e.g. *Ogiamien v Ontario*, 2016 ONSC 3080 at paras 32–34, rev'd on other grounds, 2017 ONCA 667 [*Ogiamien*]; HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 20, 60.

188 Interview #16, *supra* note 106 at 11.

189 See e.g. *Ogiamien*, *supra* note 187 at paras 78–126.

190 Lawyer, Interview #13 (17 June 2021) via oral communication [communicated to author] at 2, 6, 16, 19 [Interview #13]; Interview #16, *supra* note 106 at 11; Interview #17, *supra* note 38 at 19; Interview #18, *supra* note 108 at 5; Interview #21, *supra* note 71 at 8; Interview #23, *supra* note 103 at 7. See also Interview #16, *supra* note 106 at 10–11 (reflecting on one instance when CBSA mistakenly classified a detainee as having tested positive for COVID-19, and as a result, the correctional facility placed him on lockdown, which severely curtailed his ability to access counsel).

the Central region recounted that at Maplehurst Correctional Complex, some immigration detainees were "basically in lockdown for the entirety of August last year, and the majority of July".[191] Another recounted that due to lengthy lockdowns, their clients did not have access to yard time or any other outdoor time for weeks on end.[192] Four other lawyers from the same region stated that their clients experienced lockdowns lasting up to 23 hours a day.[193] One lawyer from the Central region noted that some immigration detainees went for weeks without access to a shower, the outdoors, or visits with family.[194] Another lawyer from the region stated that during lockdowns, detainees were not able to access showers—a serious health concern given the importance of hygiene during a pandemic—and when they did, the showers had not always been cleaned.[195] Others were given access to showers, but since they only had one-half hour out of their cells, they used that time to connect with counsel and had to forego their own hygiene.[196] Another lawyer recounted that toilets became clogged in jail cells during lockdowns and were not repaired for significant periods of time. As a result, the affected detainees "just sort of lived with this clogged toilet, with all of the consequences of that, and there's nothing that they could do about it".[197] Another noted that detainees were forced to clean their own cells and were not given proper personal protective equipment.[198]

Lockdowns are known to cause anxiety and can lead to increased hostility and violence in correctional facilities, even in the absence of a global pandemic.[199] One lawyer described the reality faced by immigration detainees as follows:

> [T]he other consequence of the lockdown is that people don't have access to phones, which may seem trivial to people on the outside but, you know, what it means to have access to a phone is some access to the outside world. And that, in many situations, is like the last sort of—last opportunity to connect, you know, to have any kind of meaningful connection with the world beyond jail. And it's such an important pillar of mental health for

191 Interview #21, *supra* note 71 at 8.

192 Interview #12, *supra* note 102 at 32.

193 *Ibid* at 21; Interview #14, *supra* note 41 at 6; Interview #17, *supra* note 38 at 19; Interview #23, *supra* note 103 at 10.

194 Interview #17, *supra* note 38 at 18.

195 Interview #21, *supra* note 71 at 9–10.

196 Interview #12, *supra* note 102 at 21–22.

197 Interview #21, *supra* note 71 at 10.

198 Interview #14, *supra* note 41 at 4.

199 See e.g. *Ogiamien*, *supra* note 187 at paras 78–126.

> people who are detained and in lockdown…even if they are released from the lockdown, there's such a rush to the phones that then you introduce hierarchies within the facilities. And there's a lot of tension. There's violence. And so it can become very dangerous very quickly.[200]

Research participants also identified poor and inconsistent access to counsel during lockdowns as a central and substantial concern. One lawyer from the Western region spoke of the extreme difficulties detainees faced reaching counsel during lockdowns, which impeded their ability to receive meaningful legal support.[201] Other lawyers similarly spoke of significant difficulties accessing clients during lockdowns.[202] One lawyer from the Central region recounted an example of a detention review hearing taking place in corrections, where the correctional institution adjourned and rescheduled the hearing for a time when counsel was not available, and then proceeded without counsel present despite counsel's protest.[203] Three other lawyers from the Central region recounted experiences of lockdowns resulting in hearings being postponed or delayed.[204] This is a significant infraction, given that adherence to holding a detention review hearing within the statutorily mandated timeline is necessary to ensure that detention remains lawful.[205]

In sum, the COVID-19 pandemic made the immigration detention regime's already harsh conditions of confinement even harsher. Pandemic protocols imposed an added layer of isolation on detainees that resulted in significant harm: segregation, degradation, unsanitary living conditions, prolonged lockdowns, detriments to mental and physical health, restricted human contact, diminished legal rights, and severely compromised access to justice. The restrictions were so severe as to result in violations of statutorily required detention review hearings, despite these being necessary to ensure the constitutionality of the immigration detention regime.

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200 Interview #21, *supra* note 71 at 8.

201 Interview #13, *supra* note 190 (stating further: "staff at a jail are not going to go out of their way to make sure that somebody gets a chance to speak to their lawyer at their convenience" at 10).

202 Interview #18, *supra* note 108 at 5.

203 Interview #14, *supra* note 41 at 16–17.

204 Interview #12, *supra* note 102 at 23–24; Interview #13, *supra* note 190 at 16, 19; Interview #14, *supra* note 41 at 16. See also Interview #23, *supra* note 103 at 7 (speaking of general delays in hearing schedules).

205 See e.g. *Brown*, *supra* note 15.

D. The Shift to Remote Hearings

The COVID-19 pandemic ushered in another significant change: detention review hearings across the country shifted from in-person to virtual proceedings. In the initial stages of the pandemic, many detention review hearings were conducted via telephone. Across the board, research participants reported the severely negative impact of teleconference hearings on access to justice and the quality of hearings. Research participants stated that teleconference hearings impeded their ability to build relationships of trust with their clients, and emphasized that with telephone hearings, detainees struggled to differentiate their lawyer from the other individuals involved in the detention system.[206] One research participant characterized these types of hearings as "a massive detriment to solicitor-client relationships because you just can't build trust the same way over the phone".[207] Research participants also emphasized that teleconference hearings impeded their ability to engage in effective advocacy. For example, a research participant from the Eastern region emphasized the enormous value of "being seen—really seen—by the Board and having that relationship with counsel, having counsel be able to properly meet with their client before, but also, if necessary, during the hearing".[208] Another research participant from the same region noted that without appearing in person, it was harder for Board members to appreciate the human factor that lies at the core of detention review hearings.[209] One lawyer from the Western region stated that the shift to telephone hearings was "quite debilitating", explaining that "the biggest change—and I think downfall—is really just the lack of face to face. That for me changed everything. It just…it just took

206 Interview #10, *supra* note 102 (stating that for detainees, "to speak with somebody they don't know, they don't see, sometimes they refuse to speak because who are you? What I'm doing here? Who is my lawyer?" at 9); Interview #14, *supra* note 41 (stating "I really appreciate being able to see my client and have my client see me, I think that actually has a real impact on being able to maintain trust. Because I have clients that I would just only speak with on the phone and it was definitely a deficient experience in that respect" at 18); Interview #16, *supra* note 106 (stating "I would often come across people who have never been in detention before and that I think were comforted by sitting down in a room with me and being able to share—have me explain what was going to happen to them…It's a little bit colder over the telephone" at 22–23); Interview #20, *supra* note 59 at 12; Interview #25, *supra* note 59 (stating "for me this is a huge problem and it—and linked to that issue also it's the difficulty to builds trust with the client especially, not like exclusively, but especially when they have mental health issues" at 3).

207 Interview #8, *supra* note 38 at 11.

208 Interview #1, *supra* note 104 at 55.

209 Interview #10, *supra* note 102 at 8.

out the human in it".[210] Another explained that, "on a human-to-human level, the member not having to look at the person that they're ordering detained… it's entirely speculation but it's a feeling that I had that it's easier to order someone detained when they're just a voice on the other end of a line rather than seeing them in person".[211] A lawyer from Central region stated that, "[t]here's so many of these clients that I've had over the last year that I've never seen, which seems totally perverse…it's perverse in any case, but especially when you're arguing over something so fundamental as liberty, and the Members have never seen them face to face".[212]

Uniformly, research participants spoke of the challenges detainees faced in understanding the telephone hearings process, in meaningfully participating in that process, and in understanding the broader ramifications of that process. Research participants were consistent in their view that virtual hearings imposed significant barriers to meaningful participation, and made it more challenging for detainees to "interact or participate or understand".[213] As one lawyer from the Western region reflected, "I don't think that they understand as clearly what's happening to them, who the players are in the system, why things are happening to them. Because it's just like all these disembodied voices over the phone. It's not clear".[214] These challenges were compounded by language barriers, and the confusion many detainees experience after being interviewed by so many different actors without knowing who was working in their best interest. That same lawyer explained further that, "in the layout of a physical detention hearing, it's very obvious that you are sitting with a detainee and you're like on their side. But I don't think that is obvious to them by phone".[215] One lawyer from the Eastern region described:

> I think it was a lot harder for clients, particularly clients who don't speak English, because I think it's pretty hard to distinguish different speakers on the phone. And it's pretty hard to build a rapport with a lawyer who you've never seen, you don't know whether there are other people on the phone,

210 Interview #18, *supra* note 108 at 5.

211 Interview #8, *supra* note 38 at 11.

212 Interview #12, *supra* note 102 at 28. See also Interview #15, *supra* note 59 (lamenting the costs of not having "an opportunity to like really physically be present and share the space with them" at 13).

213 Interview #22, *supra* note 59 at 16. See also Interview #16, *supra* note 106 at 22.

214 Interview #22, *supra* note 59 at 34. See also Interview #21, *supra* note 71 at 16 (reflecting on difficulties differentiating between voices on telephone hearings).

215 Interview #22, *supra* note 59 at 14–15.

> and the only thing you have to go on is their word that there is no one else on the line, and you can trust them, and it's ok.[216]

One lawyer from the Central region reflected in similar terms that, "for the detainees it's a really different experience as well, it's already so hard to navigate what's going on, and just being on a phone call, I think feels probably pretty alien to some people. And maybe further disconnecting them from a process that's already extremely degrading and alienating and confusing".[217]

Telephone hearings also diminished effective and principled adjudication. One research participant highlighted the challenges faced by interpreters, and the impact this had on their clients:

> I think interpreters aren't as effective when they can't see the person. I had a lot of hearings that didn't go off the rails but where I could tell that interpretation issues were frustrating the member. And I think that sometimes that was enough to turn what could have been a positive outcome, you know, where there's a solid, like a solid alternative [to detention] presented, but the bondsperson who is non-English speaking wasn't able to get their testimony out in a way that was sufficiently coherent and that really impacted the member's appraisal of their credibility.[218]

For detainees who had a designated representative appointed because an ID member determined they were unable to "appreciate the nature of the proceedings", telephone hearings posed even greater barriers.[219] Individuals with mental health struggles or disabilities faced particular challenges. As one research participant noted, it can be difficult for ID members to appreciate the impact of detention on a detainee's mental health without a meaningful interaction with the person, or some sort of visual connection; members are forced instead to rely on the sanitized accounts provided by guards from the detention facilities, or counsel's impressions, with the result that mental health concerns were too often neglected or ignored.[220] Telephone hearings also diminished the quality of representation lawyers were able to provide. One lawyer reflected that their ability to provide effective representation without observing their client's body language and facial expressions was diminished without in-person meetings, stat-

216 Interview #23, *supra* note 103 at 6.
217 Interview #14, *supra* note 41 at 18.
218 Interview #8, *supra* note 38 at 11.
219 Interview #21, *supra* note 71 at 16.
220 *Ibid* at 17.

ing, "I think you miss things. You miss opportunities to dive into some information".[221] No human contact in the course of detention reviews also negatively impacts detainees' mental and emotional health.[222]

Research participants also spoke of the practical and technical challenges posed by the shift to telephone hearings. In Quebec, for example, detainees were initially given mobile phones in plastic bags as a COVID-19 safety measure, in order to conduct hearings in their rooms or cells, sometimes with others present.[223] The plastic bag, however, impeded the audio and prevented detainees from hearing what was being said.[224] Throughout other regions, dropped calls and poor internet connections diminished the quality of communication over the course of hearings.[225] One lawyer from the Western region recounted an experience of the phone line cutting out during a detention review hearing and the hearing proceeding in their absence.[226] Another lawyer from the Eastern region recalled instances where detainees were cut off from their own hearing and the hearing continued without anyone noticing.[227] Similar issues arose in the sampling of decisions we obtained pursuant to ATIP Requests, all of which involved 30-day reviews conducted in November 2020. Of the 26 cases surveyed, 23 were held via teleconference and three were held via a hybrid format combining both video and teleconference. Seven decisions made express reference to technical difficulties impeding the hearing, with two resulting in the member not being able to see the detainee.[228] Another referenced the member's inability to hear counsel's submissions, and another, where the detainee was held in North Fraser Pre-Trial Centre, involved an audio connection that was impeded by background noise in the jail, over which

221 Interview #18, *supra* note 108 at 4.

222 Interview #25, *supra* note 59 at 5.

223 *Ibid* at 2.

224 *Ibid*.

225 *Ibid*; Interview #22, *supra* note 59 at 8–9.

226 Interview #22, *supra* note 59 at 8.

227 Interview #20, *supra* note 59 at 5. See also *ibid* at 9 (stating that at various stages of the pandemic, lawyers had to rely on communicating with detainees using their own personal cellphones, without the guarantees of connecting via a secure line).

228 Immigration and Refugee Board of Canada, *01958-A0112594*, (Access to Information and Privacy Request) (IRB, November 2020) (audio cuts out and is unclear); ATIP Request #02255-A0112526, *supra* note 123 (technical difficulties); Immigration and Refugee Board of Canada, *02366-A0112530*, (Access to Information and Privacy Request) (IRB, November 2020) [ATIP Request #02366-A0112530] (technical audio problems); Immigration and Refugee Board of Canada, *02161-A0112520*, (Access to Information and Privacy Request) (IRB, November 2020); ATIP Request #02484-A0112532, *supra* note 118.

the detainee had no control.[229] In one hearing, the transcript reflects a series of inaudible statements made by the detainee. The detainee then states "it is hard being Black, that is what I am saying", but his statement goes unacknowledged, buttressed in between a series of inaudible notations.[230]

Without a doubt, the shift to virtual hearings had a disproportionate impact on detainees in correctional facilities, particularly where hearings were conducted by phone. The necessity of relying on the correctional authority to facilitate contact placed significant restrictions on every aspect of the hearings process.[231] Numerous research participants spoke of immense difficulty contacting clients detained in provincial jails.[232] One lawyer in the Western region stated that, "[i]n the holding center it's better. They're pretty good about getting—like if you send a message, you know, if you call and ask them to call you back, they're pretty good about letting the clients do that. But the provincial facilities are just like, not".[233] A lawyer in the Central region identified access to detainees in corrections as a "consistent issue across the board", stating further, "at the IHC, I call and leave a message. I get a call back within five to ten minutes. At the jails, it's like a nightmare. Like maybe clients will be let out to call. Maybe not. If they miss me, then that's—that's it".[234] A lawyer in the Eastern region similarly stated that, "sometimes it was almost impossible to speak with a detainee, because they were lacking space to isolate people, so they didn't want movement in the prison".[235] Lawyers also had restricted access to detention review hearings at correctional facilities due to the prioritization

229 ATIP Request #02236-A0112525, *supra* note 135; Immigration and Refugee Board of Canada, *02201-A0112523*, (Access to Information and Privacy Request) (IRB, November 2020).

230 ATIP Request #02366-A0112530, *supra* note 135.

231 Interview #17, *supra* note 38 at 31–32 (stating that the pandemic exacerbated what were already long-standing problems that prohibited detainees from accessing a "fair and able detention review").

232 Interview #12, *supra* note 102 at 25–29 (stating that sometimes the correctional authority will reply to requests for contact with detainees by saying "Well, sorry. That won't happen", but also recounting one scenario involving lockdown at a provincial jail, and the jailing authorities brought the client a phone to his cell so he could connect with his lawyer); Interview #17, *supra* note 38 (stating "That's been a huge problem for counsel with clients in jails. So, you know, to be able to access their clients and speak with them" at 9); Interview #18, *supra* note 108 at 4 (reflecting on difficulties contacting clients in British Columbia corrections); Interview #22, *supra* note 59 (stating "It is difficult to get in touch with a client, particularly when they're being held at provincial jails, by phone" at 11).

233 Interview #22, *supra* note 59 at 13.

234 Interview #12, *supra* note 102 at 19–20.

235 Interview #20, *supra* note 59 at 8–9.

of criminal bail hearings.[236] Criminal bail hearings consistently took precedence over immigration detention review hearings, with the result that immigration detention review hearings would be postponed, sometimes in violation of statutory requirements.[237]

Research participants raised serious concerns about maintaining confidentiality protocols when connecting with detainees in corrections. In the early stages of the pandemic, Ontario detainees held in provincial jails had to undergo detention review hearings on a mobile phone in their cells, sometimes with their cell mates in attendance.[238] Lawyers noted that this setting did not allow for maintaining effective confidentiality, and criticized the inadequacy of relying on makeshift confidentiality measures, such as assurances from Minister's counsel and the member that they would put their phones on mute and walk away.[239] One lawyer in the Central region recounted several instances where confidential conversations between detainees and counsel were recorded, or where telephone lines were crossed such that others overheard portions of another detainee's confidential exchanges.[240] Another raised concerns about being unable to maintain confidential exchanges with counsel, as well as hearings being cut off prematurely, stating that, "it all continues to be a problem".[241]

Gradually, regions across the country moved away from using telephones and conducted detention review hearings by video conference. Describing telephone hearings as "painful", "clinical", "robotic", "detached", "pro forma", and "really difficult", research participants were consistent in their position that videoconferencing was less depersonalizing than telephone.[242] Nevertheless, while video hearings were superior to telephone hearings, they remained far from ideal, primarily because of the focus on institutional and administrative needs rather than the representation needs of detainees.[243] Most lawyers had minimal or sometimes no contact with their clients in advance of the hearing, which meant they still could not

236 Interview #17, *supra* note 38 at 31; Interview #20, *supra* note 59 at 12.

237 Interview #14, *supra* note 41 (stating that bail hearings are "always prioritized, no matter what is going on in the jail, but that's not the case for detention reviews" at 17–18); Interview #17, *supra* note 38 (stating that it "can sometimes take a week for a 48-hour detention review to take place at Maplehurst Correctional Facility" at 31).

238 Interview #12, *supra* note 102 at 26.

239 Interview #15, *supra* note 59 at 23; Interview #17, *supra* note 38 at 34.

240 Interview #12, *supra* note 102 at 15–16.

241 Interview #17, *supra* note 38 at 32–33.

242 *Ibid* at 28–29; Interview #18, *supra* note 108 at 4; Interview #25, *supra* note 59 at 14; Interview #22, *supra* note 59 at 16; Interview #14, *supra* note 41 at 17.

243 Interview #17, *supra* note 38 at 22.

build trust and rapport, or see their clients, prior to the commencement of the hearing.[244] In such instances, lawyers were still unable to establish meaningful communication with their clients. Even with video hearings, detainees were unable to have informal exchanges or debrief with counsel before or after the hearing, or during a break.[245] Once the hearing came to an end, particularly for detainees held in jail, the correctional authority required detainees to seek approval to make a new phone call to counsel, which was sometimes denied.[246] This limited "their ability to get advice in a timely way" and meant that their ability to "understand what's happening is compromised".[247] These findings point to the paramount importance of ensuring meaningful contact between immigration detainees and counsel, not just during but also before and after detention review hearings. Absent such contact, detention review hearings are rendered unfair.

This shift to remote hearings had different impacts across the country depending on regional practice. For example, the Refugee Law Office, a staff office of Legal Aid Ontario, implemented the Immigration Detention Representation Program, which provides remote representation to every immigration detainee in the Central region for their detention review hearings.[248] The creation of this program represents a significant step in the provision of essential legal representation to many immigration detainees. In addition, lawyers in regions across the country noted that the pandemic spurred changes in CBSA's practice as regards disclosure of evidence, ushering in a shift towards disclosure via email—a much more effective way to relay documents than the previous practice, where counsel had to wait to receive hard copies the day of the hearing, or wait for fax transmissions.[249]

Some research participants noted that the shift to virtual hearings brought an end to the gruelling transportation requirements of in-person hearings, which typically involved detainees being shackled and transported in vans to and from hearing sites, where they would then spend

244 Interview #16, *supra* note 106 at 26.

245 Interview #1, *supra* note 104 at 55.

246 Interview #22, *supra* note 59 at 16.

247 *Ibid*.

248 Interview #12, *supra* note 102 at 4; Interview #17, *supra* note 38 at 4–5. Pre-pandemic, detainees in Ontario often went unrepresented by legal counsel during their detention review hearings, unlike in British Columbia, where the regional legal aid provider had a longstanding duty counsel program aimed at ensuring representation for every detainee at their 48-hour and seven-day detention review hearings.

249 Interview #16, *supra* note 106 at 21–22; Interview #17, *supra* note 38 at 27; Interview #25, *supra* note 59 at 3. Notably, one research participant spoke of delays in providing disclosure (Interview #19, *supra* note 102 at 17).

the better part of a day in tiny cells with other detainees, awaiting a hearing.[250] Detainees held in jails had to endure strip searching upon return to the facility.[251] These conditions were so challenging—described by one research participant as "being moved around like cattle"—as to disincentivize some detainees from appearing at their own hearings. As one lawyer from the Western region described:[252]

> I know that in the past, a lot of the long-term detainees hated having hearings, because they had to spend an entire day trapped in a van for two hours to get downtown, and then sitting in the cell, that's essentially a bathroom. You know, there's a toilet in there and there's benches around the toilet. And then they just do the same thing again, on the way home. And trapped in a van for two and a half hours, or two hours. So there were a lot of people who would just refuse to come in.[253]

While remote hearings allowed detainees to avoid having to endure these dehumanizing transport measures, one lawyer from the Eastern region shared the view that for some, despite the difficulty and degradation inherent in shackled transport, the trip into the city to attend a hearing was a chance for a momentary reprieve, to get some "fresh air" and a "sense of release".[254] In this lawyer's view, the momentary reprieve was beneficial for mental health and it too was lost with onset of the pandemic. What is notable is that detainees lost the option of an in-person hearing, regardless of their preference.

What emerges from our research is that virtual hearings enhanced both efficiency and the capacity for legal representation, constituting significant improvements. But this development also came with a cost, in that research participants spoke of the isolation wrought by virtual hearings on detainees. Virtual hearings, and in particular telephone hearings, meant that detainees had no in-person contact with their counsel, the hearings officer, and the Board member, which rendered the experience even more alienating and difficult than it had been previously.[255]

Even with pandemic measures coming to an end, the ID has maintained remote hearings as its norm, in keeping with the broad approach adopted

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250 Interview #16, *supra* note 106 at 27; Interview #19, *supra* note 102 at 17.
251 Interview #23, *supra* note 103 at 6.
252 Interview #19, *supra* note 102 at 17.
253 Interview #16, *supra* note 106 at 28.
254 Interview #25, *supra* note 59 at 5.
255 *Ibid* at 3.

by the Immigration and Refugee Board (IRB). The IRB has since evaluated the impact of the shift to remote hearings, and among other initiatives, commissioned the BVC Cyberjustice group "to assess stakeholders' sense of access to justice during these virtual hearings, as well as to make recommendations aimed at improving them in the future".[256] This assessment was not focused on immigration detention *per se*, but rather evaluated the Board's work as a whole, with a particular focus on the work of the Refugee Protection Division.[257] Notably, while the evaluation did not center on detention review hearings, its recommendations nevertheless apply to these hearings.

In addition to a variety of findings with tangential impact on the work of the ID, the report made only one substantive finding specific to detention review hearings.[258] It raised "concerns regarding the dehumanizing aspect

256 Immigration and Refugee Board of Canada, "Report on the Sense of Access to Justice Hearings Held Before the IRB Using MS Teams" (last modified 13 July 2022), online: <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/access-to-justice-virtual-hearings-report-2022.aspx#summary> [IRB, "Report on the Sense of Access to Justice"].

257 *Ibid*. In conducting this analysis, BVC Cyberjustice group engaged a number of research methods, including analysis of a survey circulated to 270 individuals about their experiences in remote hearings. The 270 individuals include 42 persons who appeared before the IRB, 120 representatives, and 108 CBSA officers. It is not clear what proportion of these individuals were involved in immigration detention review hearings before the ID. BVC Cyberjustice group also did not observe any ID hearings, it only attended hearings of the Refugee Protection Division. Notably as well, the analysis also focused only on the use of video hearings, not telephone hearings.

258 The Board itself recognized its limits in effecting this in practice, stating: "As the IRB is not responsible for the infrastructure and equipment of jails and detention centers, it is not possible to create access to every place of detention" (Immigration and Refugee Board of Canada, "Report on the Sense of Access to Justice Hearings Held Before the IRB Using MS Teams—Management Response and Action Plan" (last modified 8 July 2022), online: <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/access-to-justice-virtual-hearings-mrap-2022.aspx> [IRB, "Report on the Sense of Access to Justice—Management Response"]). The report also raises concerns that virtual hearings might impact "the ability to read non-verbal cues, and therefore, the Board member's capacity to assess credibility" (IRB, "Report on the Sense of Access to Justice", *supra* note 256). In response to this, the Board agreed to "offer training to members and interpreters on how to address non-verbal cues", not just to the Refugee Protection Division, but also Immigration Division (IRB, "Report on the Sense of Access to Justice", *supra* note 256; IRB, "Report on the Sense of Access to Justice – Management Response"). These two recommendations, in addition to a number of technical recommendations directed at camera use and the like, are the only substantive recommendations adopted by the Board that are relevant to the Immigration Division. See e.g. IRB, "Report on the Sense of Access to Justice – Management Response" at recommendation #8 (encouraging Members, including ID Members, to make use of the "spotlight" feature while using MS Teams), recommendation #10 (regarding protocols on participants not being alone during remote hearings), recommendation #11 (regarding the

of virtual hearings", particularly in relation to "remote hearings where the person appearing before the IRB does so from police custody or jail where they may experience disorientation, not being able to hear or understand the proceedings due to their environment or the technology", or where the person "may also perceive a lack of fairness as they are visibly appearing from detention."[259] Despite the severity of this concern, the report offers little by way of response. Instead, it recommends that the Board "[w]ork with jails, detention centers, [Immigration and Refugee Board of Canada's Consultative Committee] members and other partners to try and offer quiet and accessible areas for taking part in virtual hearings."[260] This is an ineffective recommendation that prioritizes institutional and administrative needs and does nothing to meaningfully address the dehumanization, lack of fairness, disorientation, and lack of understanding. In response to this recommendation, the Board noted that it "agrees with the spirit of the recommendation" and is "actively working with the Canada Border Services Agency to provide access to such spaces wherever possible."[261] It is telling, however, that the Board also noted that since it is "not responsible for the infrastructure and equipment of jails and detention centers," it is "not possible to create access in every place of detention."[262] This callous and bureaucratic response fails to respond to the urgency and severity of the issue, and leaves the matter substantively unaddressed.

The Board's approach suggests that the substantive concerns about the dehumanization of detainees are being cast by the wayside, and with them, the material needs and access to justice rights of detainees. Indeed, the trade-offs at stake with the shift to remote hearings are stark. The rights

adoption of clear guidelines on camera placement, framing, and lighting), recommendation #15 (regarding the publishing of virtual hearing guides which, in practical terms, may not be easily accessible to people in detention given restrictions on internet use).

259 IRB, "Report on the Sense of Access to Justice", *supra* note 256.

260 *Ibid*.

261 IRB, "Report on the Sense of Access to Justice – Management Response", *supra* note 258.

262 *Ibid*.

and interests are too important to reduce to a simple binary, which pits access to justice against the quality of that justice. It should be feasible to guarantee legal representation for detainees *and* minimize isolation, lack of meaningful participation, diminished trust, confidentiality breaches, and delays in required statutory reviews. This balance could be achieved through a variety of different configurations, but what emerges from our research on pandemic measures is that meaningful access to counsel must always remain a paramount consideration. This means that detainees need ready, confidential, and practically workable access to counsel before, during, and after detention review hearings. It is impossible to achieve such a balance when the convenience of the administrative actors involved—*i.e.*, the ID and CBSA—is prioritized above all else, which our research indicates has been the animating force behind institutional decisionmaking. A hearings model that allows CBSA ready access to detainees via their detention centres, while counsel cannot have meaningful contact with their client before or after a hearing, further perpetuates the imbalances and inequities already inherent to the immigration detention system.

E. Alternatives to Detention

Several research participants observed that at the outset of the pandemic, the ID was more willing to push for alternatives to detention for detainees.[263] Research participants across the country observed that the pandemic made it more difficult to find alternatives to detention.[264] Various facilities, including drug treatment facilities and shelters, reduced their available beds during the pandemic, which meant that fewer alternative accommodations were available for immigration detainees. One lawyer in the Central region stated that the "inadequacy of resources continues to be felt…the inadequacy of mental health resources continues to be a problem…. There are no beds".[265] This view was echoed by a lawyer in the Western region.[266] That same lawyer noted that the pandemic's biggest impact was in "finding people places to stay. Alternatives to detention. Half of the shelters just shut down. They stopped taking people entirely".[267] This meant that more

263 Interview #17, *supra* note 38 at 36.

264 Interview #12, *supra* note 102 at 37–39 (also noting difficulties in working with CBSA community liaison officer, which positions CBSA as a gatekeeper for alternatives to detention); Interview #22, *supra* note 59 at 27.

265 Interview #17, *supra* note 38 at 38.

266 Interview #18, *supra* note 108 at 3.

267 Interview #16, *supra* note 106 at 37.

immigration detainees had to remain in detention and forego their right to liberty given the unavailability of alternative placements. One lawyer in the Central region recounted a case involving a detainee who was ordered released by the ID, but remained in detention for three more weeks because shelters were full.[268] The same situation arose in the Eastern region.[269] One participant cited an example of a diabetic man who was detained in British Columbia and was at greater risk of COVID-19 complications. He had a supervisory bondsperson available in Ontario to support his release. However, the presiding Board member was of the view that taking a flight to Ontario was not a safe alternative as a result of the risk of infection, so he remained detained.[270]

In sum, despite CBSA's stated commitment to "ensure that volumes remain at a minimum" by "leveraging alternatives to detention", alternative placements were not readily available during the time period in question.[271] As a result, even detainees who had a legal right to their own freedom were required to forego that freedom in certain circumstances for reasons well beyond their control.

F. The Justiciability of Conditions of Detention

Despite our bleak findings, our research was not without a glimmer of hope. Our review of detention review decisions obtained via ATIP requests, as well as publicly available decisions, indicates a positive shift in decision-making that coincided with the onset of the pandemic, and was reinforced in the Federal Court of Appeal's 2020 decision in *Brown*. Of the 26 decisions we received through ATIP Requests—all of which involved 30-day review hearings conducted remotely in November 2020—only eight did not engage in a discussion of COVID-19's impact on detention.[272] This sample points to a clear shift in the treatment of conditions of detention by both

268 Interview #21, *supra* note 71 ("I've had one client, for example, who stayed in detention for approximately three weeks, after he was ordered released because shelters were full" at 14).

269 Interview #25, *supra* note 59 at 14 (noting that when detainees were ordered released to the YMCA, which had mandatory quarantine protocols in place, they were forced to remain in detention for ten additional days of quarantine regardless of when the release order was issued).

270 Interview #22, *supra* note 59 at 19.

271 Canada Border Services Agency, "Current Issues" (last modified 25 March 2021), online: <cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/secu/2020-11-25/issues-enjeux-eng.html>.

272 Three hearings resulted in release orders, two resulted in adjournments, and the remaining 21 resulted in continued detention.

the ID and the Federal Court pursuant to the *Brown* decision. Whether directly or indirectly, COVID-19 helped usher in conditions of detention as an important consideration in evaluating the prospects of release. We also located several decisions published since *Brown* where conditions of detention were either a central or passing concern. In three decisions rendered at the end of 2021 and 2022, the ID discussed conditions of detention in relation to their effect on the mental health of the detainees.[273] This is a significant evolution in the case law given the prevalence of mental health conditions amongst migrants, in combination with the demonstrated "devastating effects" of immigration detention on mental health.[274]

273 All three detainees suffered from apparent mental health problems, and had experienced a serious decline in mental health as a result of the time they had spent in detention. In all three cases, the detainee's lawyer made arguments about the impact of the conditions of detention on the detainee: *Canada (Public Safety and Emergency Preparedness) v Mawut*, 2022 FC 415 (the Federal Court upheld the findings of the ID that the detainee's "conditions of detention overwhelmed any factors favouring the continuation of his detention", but further finding it was "unreasonable to release him without imposing any condition mitigating the danger he poses to the public" at para 2); *Lee v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 383 at para 65 (the Federal Court's reasoning was based in part on the ID's failure to take into consideration conditions of detention, and the impact of those conditions of detention on a detainee's health); *Canada (Citizenship and Immigration) v Tjhang*, 2022 FC 1664 at paras 21, 25, 27 (the Federal Court upheld the ID's findings that conditions of detention were a key factor in ordering release). See also *Atem v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 165 (where, in refusing the judicial review application, the Federal Court acknowledged that "[t]he conditions of detention are far from ideal to say the least," referring to Mr. Atem's submission that he faced a "lack of access to medical treatment, and ha[d] yet to receive a proper psychiatric assessment despite receiving provisional diagnoses of depression and Post-Traumatic Stress Disorder." These harsh conditions were not enough for the Immigration Division to order release, nor for the Court to overturn the Division's decision, though the Court did find that "[a]ll of these factors [relating to conditions of detention], in my view, warrant a careful weighing in future detention reviews to assess whether and when alternatives to detention should be considered" at para 66).

274 Jutta Lindert et al, "Depression and Anxiety in Labor Migrants and Refugees: A Systematic Review and Meta-Analysis" (2009) 69:2 Soc Science & Medicine 246; Julien Fakhoury et al, "Mental Health of Undocumented Migrants and Migrants Undergoing Regularization in Switzerland: A Cross-Sectional Study" (2021) 21:1 BMC Psychiatry 1; Laurence J Kirmayer et al, "Common Mental Health Problems in Immigrants and Refugees: General Approach in Primary Care" (2011) 183:12 CMAJ E959; Emma Stirling-Cameron & Shira Goldenberg, "The Detention of Migrants in Canadian Jails Is a Public Health Emergency", *The Conversation* (27 November 2022), online: <theconversation.com/the-detention-of-migrants-in-canadian-jails-is-a-public-health-emergency-194968>; HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13 at 19.

G. Embedded Inequalities

As detailed in the previous sections, the pandemic measures in immigration detention exacerbated the issues that were already present in the detention system. Our research demonstrates that this is also true when it comes to the embedded inequalities inherent to a system that is premised upon detaining non-citizens who often experience elevated levels of vulnerability, both because of their migration status, but also because of their socioeconomic class, gender, ethnicity, race, *etc*.

Several research participants reflected on the structural racism underpinning Canada's immigration detention regime, particularly as against Black men, and the extent to which these structures inform the detention review process. One research participant noted a "strong belief, that [race] has an impact on detention decision-making and on the perception of it in dangerousness".[275] Some referenced the significant role race plays in every aspect of immigration detention.[276] Others referenced the role unconscious bias plays in detention review hearings, whether in relation to race or other identity grounds.[277] Several research participants questioned the broader impact that the shift to remote hearings had on racialized detainees, and the extent to which this shift exacerbated existing structures of harm and bias.[278] As detailed throughout the analysis above, research participants uniformly raised serious concerns about extreme and profound disregard

275 Interview #17, *supra* note 38 at 12.

276 See e.g. Interview #1, *supra* note 104 (stating: "It's definitely been striking to me over the years…walking into detention and most of the people that I'm seeing are Black or from the Middle East….But for so many of us who are concerned about race-based detention and racial profiling, we might not be able to pinpoint exactly the extent of the problem or what's happening" at 46–47); Interview #16, *supra* note 106 (stating: "I have a lot of racialized clients who tell me that their treatment in the detention facility is influenced by the colour of their skin. That racism exists and the guards will treat them differently, depending on their race", and further that "[s]ome of my clients suggest that…the fact that they are still in detention is because of their race" at 1–2); Interview #17, *supra* note 38 (stating: "There's always been a high percentage of racialized individuals in the detention population….Without having done a higher-level study of it, all I can say is that it is my belief, my strong belief, that race has an impact on detention decision making" at 12–13); Interview #23, *supra* note 103 (stating: "Race is everywhere in immigration detention, but no one ever notices it, or it's like never officially noticed" at 13).

277 Interview #16, *supra* note 106 (speculating that racism is ignored in detention because of the shadow of criminality and disbelief that shrouds detention: "There is a general perception, I think, that these people who are in detention are not telling the truth…I expect that a lot of ignored racism might be because of that" at 3). See also Interview #25, *supra* note 59 at 12–13.

278 Interview #19, *supra* note 102 at 18–20; Interview #16, *supra* note 106 at 23–24.

for detainee mental health—including at the intersection of race—in all aspects of immigration detention.

Notably, despite its commitment to detain children only as a last resort, CBSA did not stop detaining children during the time period in question. One research participant in the Eastern region shared a story of one child and one unaccompanied minor detained during the pandemic, and expressed shock that neither had been released on a priority basis in the face of the public health emergency.[279] The same individual also noted that detention resulting in family separation continued to occur during the pandemic.[280] Another research participant in the same region recounted a case involving family separation when the pandemic was at its peak, all despite CBSA directives that emphasize family unity.[281] A research participant in the Western region recounted a case of a mother being detained with her infant child during the early months of the pandemic.[282] Another research participant in the Western region recounted a case of a family being detained during the time period, including a child.[283]

In sum, not only did we determine that the pandemic saw an uptick in the rate of detention, it also saw a continuation of some of the most problematic pre-pandemic practices, such as the detention of individuals with mental health conditions, the detention of children, family separation, and racial bias in detention practices and decisionmaking. CBSA and the ID did not seize the chance to reconfigure detention practices such that they would not impact the most vulnerable non-citizens in Canada. Once again, the emancipatory possibilities of the pandemic were not realized, and instead, the worst features of the detention system were brought into sharp relief.

IV. CONCLUSION

Like so many others, in the early months of the COVID-19 pandemic, we marvelled at the relative ease with which CBSA and the ID seemed to be releasing detainees. We celebrated the fact that though the number of immigration detainees in Canada decreased significantly, the sky did

279 Interview #1, *supra* note 104 at 29.

280 *Ibid* at 10–11, 30–31.

281 Interview #25, *supra* note 59 at 7.

282 Service Provider, Interview #4 (9 June 2021) via oral communication [communicated to author] at 19. Notably, one research participant from Central Region noted they were not aware of any children detained in the region (see Interview #12, *supra* note 102 at 43).

283 Interview #16, *supra* note 106 at 16.

not fall—CBSA still engaged in effective immigration enforcement, non-Canadian citizens continued to appear for their immigration proceedings, and public safety threats did not increase. We therefore embarked on this research expecting to see a continued decrease in the use of immigration detention in Canada as the pandemic progressed, in part due to the real and substantial risks COVID-19 posed to people in congregate settings and the public at large, but also because the Federal Court of Appeal's 2020 decision in *Brown* made clear that detention must have a nexus to an immigration purpose, in the absence of which it is unlawful.[284] Given that the pandemic rendered removal from Canada effectively impossible in many cases, the immigration purpose for detention was no longer present. The closure of the Canadian border also meant that non-Canadian citizens were largely prohibited from entering Canada, thereby reducing the population under CBSA's scrutiny. The significant increase in legal representation for immigration detainees in the Central region meant that more individuals had access to counsel. These factors—combined with the impact of detainee hunger strikes, community protests, and the steady, scathing criticism of the Canadian immigration detention regime in this time period—led us to believe that there would be a marked decrease in the use of immigration detention, and to hope that this would create an opportunity for a meaningful shift away from the cruel and punitive practices within this system.[285] Our research did not bear this out, leaving us to question why Canada would detain a larger proportion of non-Canadian citizens upon arrival, in harsher conditions of confinement and for longer periods of time, than before the pandemic began.

Canada had ample choice in how it handled immigration detention in the face of the pandemic.[286] The suspension of normalcy after the onset of COVID-19 created an opportunity for change—a chance to re-envision detention practices and procedures to meet the federal government's previously stated goal of doing "better" in its treatment of immigration detainees,

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284 *Brown*, *supra* note 15.

285 See e.g. HRW, "*I Didn't Feel Like a Human in There*", *supra* note 13.

286 Many jurisdictions, including the United States and various European Union member states, reacted to the pandemic by implementing social distancing protocols in detention centres, further isolating detainees by suspending visitation procedures. However, there is at least one global north country that chose a different path. The Spanish government decreed a moratorium on immigration detention and closed down all immigration detention facilities from mid-spring to late summer 2020. Spanish academics have pointed out that this "short summer of abolitionism" serves as a "window of opportunity to reflect on detention abolition" (José Brandariz & Fernández-Bessa, *supra* note 9 at 2).

and its pledge to create a "better, fairer immigration detention system that supports the humane and dignified treatment of individuals while protecting public safety."[287] But this opportunity was not seized and these lofty goals remain unmet. As our research makes clear, throughout the COVID-19 pandemic, CBSA and the ID increased their use of immigration detention despite stated commitments to use detention only as a "last resort" and to create a "more humane, dignified, and risk-based detention process."[288]

In countries around the world, COVID-19 "intensified a logic of social exclusion and disposability" towards migrants and detained persons.[289] Audrey Macklin has traced the ways in which public and government responses to the COVID-19 pandemic in Canada operated to embed logics of deservingness related to who is perceived to be deserving of legal and human rights, and why.[290] Building on Macklin's analysis, we arrive at the conclusion that COVID-19 constructed immigration detainees as undeserving in every way—of liberty, of dignity, of agency, of human contact, of fair and principled adjudication, and ultimately, of basic humanity. This response, in the face of the worst of the global pandemic, points to an ethos of callous and aggressive immigration enforcement. The decision to detain despite Canada's stated commitment to "do better", and in the face of pressing public health risks, lays bare the fundamental cruelty of Canada's immigration detention regime, and the construction of immigration detainees not only as undeserving of legal and human rights, but ultimately, as less than human.

Since the lifting of most, if not all, pandemic-era measures, the Canadian immigration detention landscape has shifted. In 2021, Human Rights Watch and Amnesty International launched a national campaign directed

287 Muriel Draaisma, "Federal Government Reviewing Immigration Detention Process After String of Deaths", *CBC News* (16 May 2016), online: <cbc.ca/news/canada/toronto/public-safety-immigration-detention-1.3584700> (citing statement from then Public Safety Minister Ralph Goodale, stating "we can and must do better"); Canada Border Services Agency, "National Immigration Detention Framework" (last modified 7 December 2022), online: <cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html>; Canada Border Services Agency, "National Immigration Detention Framework" (last modified 7 December 2022), online: <cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html>.

288 Public Safety Canada, "Immigration Detention (CBSA)" (last modified 5 May 2022), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20211207/08-en.aspx>.

289 Sara Dehm, Claire Loughnan & Linda Steele, "COVID-19 and Sites of Confinement: Public Health, Disposable Lives, and Legal Accountability in Immigration Detention and Aged Care" (2021) 44:1 UNSWLJ 60 at 60.

290 Macklin, *supra* note 18.

towards the gradual abolition of immigration detention in Canada.[291] The campaign's initial focus was on the termination of contracts between the federal and provincial governments which allowed CBSA to use provincial correctional facilities for the purposes of immigration detention. British Columbia was the first to respond: in fall 2021, the province undertook a review of its memorandum of understanding with CBSA that allowed CBSA to imprison immigration detainees in provincial jails.[292] The province solicited and received submissions from numerous external stakeholders, legal and medical experts, formerly detained individuals, and advocacy groups.[293] British Columbia's Human Rights Commissioner made submissions to the province, and maintained that CBSA's agreement with the province operates contrary to the BC Human Rights Code, the *Canadian Charter of Rights and Freedoms*, article 14 of the UN *Convention on the Rights of Persons with Disabilities*, and article 9 of the *International Covenant on Civil and Political Rights*.[294] British Columbia officially terminated its agreement with CBSA on October 31, 2023, after announcing that "aspects of the arrangement do not align with our government's commitment to upholding human-rights standards or our dedication to pursuing social justice and equity for everyone."[295] Since then, all ten Canadian provinces have either terminated or committed to terminating their agreements with CBSA and

291 Human Rights Watch, "#WelcomeToCanada" (last visited 17 February 2025), online: <hrw.org/welcometocanada>.

292 Public Safety and Solicitor General, News Release, "Minister's Statement on Ending Immigration Detention Arrangement with CBSA" (21 July 2022), online: <news.gov.bc.ca/releases/2022PSSG0050-001139> [Public Safety and Solicitor General, "Minister's Statement"].

293 These include, among others: Amnesty International, Human Rights Watch, the BC Human Rights Commissioner, Investigations and Standards Office, the BC Ombudsperson, British Columbia Civil Liberties Association, Rainbow Refugee, SWAN Vancouver, and West Coast Prison Justice Society (British Columbia, Ministry of Public Safety and Solicitor General, *Review of the Arrangement Between Canada Border Services Agency and BC Corrections* (2022) at 19 online (pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/corrections/reports-publications/review-arrangement-cbsa-bc-corrections.pdf> [Public Safety and Solicitor General, *Review of the Arrangement*]).

294 BCOHRC Report, *supra* note 90 at 8–11.

295 Canada Border Services Agency, "Key Issues: Ministerial Transition 2023" (last modified 23 November 2023), online: <cbsa-asfc.gc.ca/transparency-transparence/pd-dp/tb-ct/min/2023/issue-enjeux-eng.html>; Public Safety and Solicitor General, "Minister's Statement", *supra* note 292. British Columbia also stated that the practice of holding detainees in provincial jails does not align with BC Corrections' mandate, stating: "Holding immigration detainees is not in alignment with BC Corrections' mandate and that in fact, may use resources that could otherwise be used to better address the criminal behaviours of people in custody serving sentences or awaiting trial" (Public Safety and Solicitor General, *Review of the Arrangement*, *supra* note 293 at 25).

ending the use of provincial correctional facilities for the purposes of immigration detention.[296]

Despite announcing its intent to end the use of correctional facilities for the purposes of immigration detention, the province of Ontario in the Central region, where the largest population of detainees is held, has yet to terminate the practice. At the time of writing, Ontario had agreed to extend its agreement with CBSA to use provincial correctional facilities for immigration detention until September 2025, following a request to do so from the federal government.[297] In tandem with the termination of these agreements with the provinces, in April 2024 the federal government revealed a plan to use federal prisons to detain individuals who CBSA deems to be "high-risk" in lieu of provincial correctional facilities.[298] The necessary legislative amendments were tabled in Parliament as part of a budget bill, which virtually eliminated the opportunity for meaningful public debate and discussion around this decision.[299] The supporting documents to the *Budget Implementation Act* explicitly recognize the advese effect this proposal will have on Black and other racialized people, stating that while the plan is likely to impact people from a "diverse range of countries," a "majority are Black or racialized."[300] Despite this adverse impact, and despite the United Nations Working Group on Arbitrary Detention noting their "alarm" about Canada's "plans to use federal correctional facilities to imprison persons detained purely on the basis of their migration status", [301] Canada is pro-

296 Amnesty International Canada, "Canada: All 10 Provinces to End Immigration Detention in Jails" (21 March 2024), online: <amnesty.ca/human-rights-news/canada-all-10-provinces-to-end-immigration-detention-in-jails>.

297 Brigitte Bureau, "Ontario Extends Contract to Jail Migrants for Another Year", *CBC News* (27 September 2024), online: <cbc.ca/news/canada/ottawa/ontario-extends-contract-to-jail-migrants-for-another-year-1.7334601>.

298 Brigitte Bureau, "Federal Government Plans on Incarcerating Migrants in Its Penitentiaries", *CBC News* (18 April 2024), online: <cbc.ca/news/canada/ottawa/federal-government-plans-on-incarcerating-migrants-in-its-penitentiaries-1.7177094>.

299 Canada, Department of Finance, *Budget 2024: Statement and Impacts Report on Gender, Diversity, and Inclusion* (Ottawa: 2024) at 102 online (pdf): <budget.canada.ca/2024/report-rapport/gdql-egdqv-en.pdf>.

300 United Nations Office of the High Commissioner for Human Rights, Press Release, "Canada: Positive Practices but Serious Concerns Regarding Detention of Marginalized Groups Persist, Say UN Experts" (24 May 2024), online: <ohchr.org/en/press-releases/2024/05/canada-positive-practices-serious-concerns-regarding-detention-marginalized>.

301 United Nations Human Rights Office of the High Commissioner, "Canada: Positive Practices but Serious Concerns Regarding Detention of Marginalized Groups Persist, say UN Experts" (24 May 2024), online: <ohchr.org/en/press-releases/2024/05/canada-positive-practices-serious-concerns-regarding-detention-marginalized>.

ceeding to implement this plan.[302] These developments, along with the research findings detailed above, emphasize the pervasive cruelty of immigration detention in Canada, underscore the logic of non-deservingness illuminated by Macklin's analysis, point to the limits of piecemeal reform, and drive us to emphasize the fundamental importance of striving for the gradual abolition of immigration detention in Canada.

If nothing else, the COVID-19 era is a strong indication that immigration detention in Canada is not used as a last resort, has a severe adverse impact on marginalized people, and is not implemented for the exclusive goal of traditional border control. Canada's immigration detention regime is instead driven by logistical convenience and by the goals of advancing immigration enforcement, no matter how grave the human cost. In an effort to push back against this dehumanization, we identify key criteria that must be prioritized to enhance the fairness and integrity of Canada's immigration detention regime and limit its dehumanizing impact. The use of correctional facilities for the purposes of immigration detention must end. Conditions of immigration detention must improve. Time limits on immigration detention must be imposed. Rigorous procedural safeguards at the time of arrest and throughout detention must be further developed. Effective interpretation services must be provided. Alternatives to detention must be utilized more frequently and more effectively.[303] Children should never be detained, and families should never be separated. The immigration detention review process must ensure meaningful, principled, and timely review. The ID must continue to consider how conditions of detention impact detainees when deciding release. Access to justice must remain a paramount concern; immigration detainees must have access to meaningful contact with their counsel before, during, and after their detention review hearings. To ensure this, any future reforms must be driven not solely by institutional needs and administrative convenience,

302 Marisela Amador, "Quebec Federal Prison Near Montreal to House High-Risk Immigration Detainees", *CTV News* (7 September 2024), online: <montreal.ctvnews.ca/quebec-federal-prison-near-montreal-to-house-high-risk-immigration-detainees-1.7028946>.

303 We make this recommendation with caution, mindful of Monish Bhatia and Victoria Canning's reminder that alternatived to detention can sometimes create "realms of existential confinement" and "insidious control" (see Monish Bhatia & Victoria Canning, "Exponential Expansionism: Key Contemporary Challenges to Immigration Detention Abolitionism" in Mary Bosworth et al, eds, *Handbook on Border Criminology* (Cheltenham, UK: Edward Elgar Press, 2024) 328).

but rather, by a firm commitment to ensuring meaningful access to justice. This means that, at a miminum, counsel must have ready access not just to detainees, but also to the infrastructure necessary to represent their clients effectively, including timely disclosure, meaningful working access within detention facilities, and the institutional safeguards necessary to ensure rigorous, confidential, and productive representation. This requires effective and sustainable funding for existing and developing programs across the country. Structural problems like institutional racism and a lack of regard for detainee mental health must be addressed through systematic, structural reform. And last but not least, CBSA must be subject to rigorous, principled oversight.

Ultimately, however, even if implemented, these reforms can only go so far as long as the logic of non-deservingness and disposability of immigration detainees persists and the underlying dehumanization of immigration detention continues. There is a pressing need to move towards the gradual abolition of immigration detention in Canada.