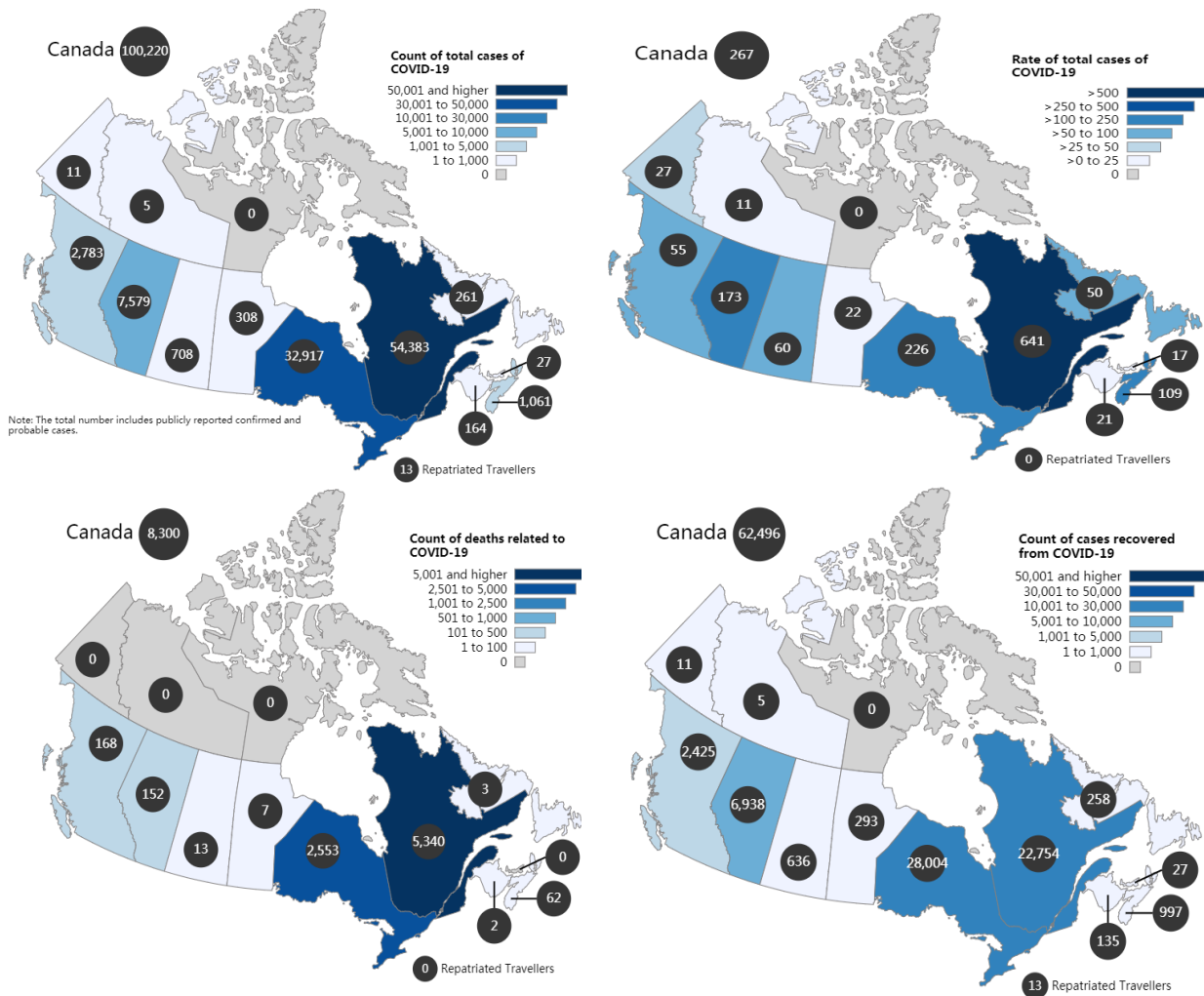




CANADIAN RIGHTS DURING COVID-19:

CCLA's Interim Report on COVID's First Wave (June, 2020)¹



¹ This is a preliminary staff report from CCLA, to be updated and submitted to the CCLA Board and Membership for consideration. For more on both, please see <https://ccla.org>. The maps represented on this cover page: Government of Canada, "Coronavirus disease (COVID-19): Outbreak update" (retrieved 19 June 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?topic=tilelink#a>>.

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



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

Acknowledgments

CCLA extends its heartfelt gratitude to all essential service workers, including healthcare sector professionals, workers in restaurants and grocery stores, first responders, farm workers and food producers, and everyone else who has kept Canada running during this unprecedented time. We also acknowledge that elected officials—who here bear the brunt of our criticisms—had extremely difficult and demanding jobs in 2020.

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This report will be incorporated into lessons taught to over 10,000 students and teachers every year, thanks to the Catalyst Grant generously provided by the Law Foundation of Ontario. Our work on protest rights also borrows from work conducted as part of a re-grant provided to us by Wellspring Philanthropic Fund (<https://wpfund.org/our-mission/>) through the International Network of Civil Liberties Associations (<https://www.inclo.net>), of which CCLA is a proud, paying member.

We would also like to thank all the members of the public who reported their unfair experiences with ticketing and other injustices to the CCLA. Their stories were instrumental to our advocacy efforts, both within this report and elsewhere. A separate report on ticketing was released on June 24th 2020: <https://ccla.org/cclanewsitewp-content/uploads/2020/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada.pdf>.



Foreword by Executive Director and General Counsel

“A nation is a body of people who have done great things together in the past and who hope to do great things together in the future.” F.H. Underhill, *The Image of Confederation: Massey Lectures 1963* (CBC, 1964) at 2, 70.

“You can’t legislate good will,” Malcolm X, 1964.²

By mid-June 2020, 8,000 people had died in Canada from COVID-19, a respiratory illness caused by a virus transmitted chiefly by breathing or touching material on contaminated surfaces. Countless more would have died, but for Canada’s emergency management, which amounted to mass behavioural restrictions and herculean health care interventions, all to prevent the spread of the virus to more people. Without an antidote or vaccine on the horizon, the public health strategy has been to focus on infection prevention, and making every effort to treat those in critical condition.³

The world over, people were asked and then ordered by law to isolate and undertake public health precautions. In Canada, at first, there was advocacy by government officials, then many laws were passed, and then more laws, all seeking to modify our behaviour, in order to better isolate, and better avoid the spread of the virus. The laws amounted to official directions with penalties for non-compliance, often without any evidence of actual harm to public health. Some official directions, like hand-washing, were not the subject of legal orders, for the general public. In all Canadian jurisdictions, peace officers – police and municipal bylaw officers and transit police – were dispatched to enforce the orders, and many people were charged with offences, like driving into the North West Territories from Alberta, standing in a playground, congregating for a birthday party, violating physical distancing rules or sneezing near someone. This extraordinary governmental effort at mass behavioural modification, for public health reasons, had the effect of limiting our civil liberties.

In Canada, many laws met the twin tests of necessity and proportionality that could justify limitations on civil liberties.⁴ Nevertheless, mixed motives intruded upon some laws, which may have satisfied those seeking stricter isolation measures, but were nevertheless unnecessary and disproportionate in terms of their impact upon our civil liberties. Some of the laws limited our freedom, in exchange for speculative but unlikely public health benefits. The balance of this report addresses these unjustified rights limitations.

COVID19 has brought out the best of times and the worst of times, in Canada, when it comes to our civil liberties. As we write this, Canada is having a reckoning with racism and policing, and with the policing of protests. This is not simply a spillover from US events after the death of George Floyd, but about our own past and present. It unfolds during the 2020 spring of

² “Malcolm X Backs House Rights Bill”, *The New York Times* (27 March 1964) 10. Online: <<https://www.nytimes.com/1964/03/27/archives/malcolm-x-backs-house-rights-bill.html>>.

³ As of 13 June 2020, of the nearly 100,000 infected in Canada approximately 1/3 are active, 6% of which are serious. 90% of closed cases are recovered. See: <<https://www.worldometers.info/coronavirus/country/canada/>>.

⁴ I.e., meeting the constitutional tests for justifying a reasonable limit upon a constitutional right under the *Charter of Rights and Freedoms*, all discussed below. Our teachers at the Canadian Civil Liberties Education Trust call it the Acorn Test: <https://ccla.org/cclanewsites/wp-content/uploads/2018/07/Section-1-and-the-Acorn-Test.pdf>

COVID19 but racism kills too, as the protests of urgent pain convey again and again. Esi Edugyan’s truth that “the weight of change should not rest on the shoulders of Black people”⁵ means that CCLA’s 50+ years fighting for equality must scale fifty-fold.

Even within the context of the COVID pandemic, it has been the best and worst of us. On the one hand, the decentralization of emergency management in Canada allowed a city like Winnipeg, despite its terrible record of police brutality and over-incarceration of Indigenous peoples, to show the country how compliance with public health recommendations can be done without charging people with provincial offences. It allowed Ontario to decarcerate its provincial prison population by nearly a quarter, after which no crime pandemic followed, demonstrating just how overpopulated our prisons have been. Federalism also allowed health care workers to innovate in one jurisdiction, then share with another. It allowed a Liberal Deputy Prime Minister to publicly declare a Conservative Premier as her personal therapist, as they collaborated to fend off one of many diplomatic crises with the United States. It allowed some systems and technologies to thrive or become unstuck. Telephone and online appellate court hearings and bail applications became common in some jurisdictions,⁶ bringing our justice system at least into the 20th Century.

Moreover, one of the advantages of 14 different governments managing one emergency is that whatever seemed to work in one province could be copied by another. Plus some provinces that balked at graver restrictions on liberty turned out not to regret it. There was not a lot of innovation.

On the other hand, the authoritarian impulses expected from the State Council of the People’s Republic of China too quickly infected the elected in federal, provincial and municipal governments of Canada. These authoritarian impulses can be boiled down to this: people empowered to serve a constituency, under pressure from an anxious electorate, wrongly concluded that the best way to manage a pandemic is to publicly demonstrate dominion over others: in a word, a power grab – not necessarily in the sense of grabbing power for personal gain, but grabbing power to exert righteous authority over others.

How quickly our country went from coming together in peace, caring for each other, to fearful, righteous, divisive, and indignant aggression against perceived enemies of disorder – deemed COVIDiots. A public health pandemic became mischaracterized by governments as a public order crisis, thanks to public anxiety, anger and fear. *C’mon people!* was the paternalistic *crie de coeur* of Toronto’s Mayor, on behalf of all those filling up the snitch lines with their invective for others presumed to be guilty of one form of “COVIDiot” misbehaviour or another.

As spring thawed another long winter, a step outside entailed a presumption of guilt, so perceived by too many civilians, too many bylaw officers, too many people in power, and even too many police, who are trained to know better. I believe that our collective dignity suffered, until we all started to internalize culpability, as if we were doing something wrong, for the mere reason that we were exercising a little freedom.

⁵ <https://www.macleans.ca/opinion/the-weight-of-change-should-not-rest-on-the-shoulders-of-black-people/>

⁶ “13 Jurisdictions, 1 Pandemic: How COVID-19 has Impacted Courts Across Canada,” <https://www.emond.ca/the-lawyers-lounge-episode-archive>

The most vulnerable in our society got the worst of it, of course. They were always an afterthought for leadership, at best. People experiencing homelessness faced a dilemma: put their lives at risk by entering shelters dangerous to their health, or remain outside where it was cold, wet, often illegal, and basic human needs like food and sanitation were unavailable. For federal inmates, there wasn't even a choice at all, and they just got sick and sicker.

The need to control the uncontrollable translated into a ticketing pandemic: over-policing, primarily by bylaw officers but also by the Sûreté du Québec and other police forces, contrary to the wisdom of the Canadian Association of Chiefs of Police.⁷ An Aurora mom with her baby was ticketed for standing still, alone, for too long, outdoors. The bylaw officer charged her in his vehicle, like a scene from COPS. A Nigerian-Canadian was assaulted by another by-law officer in Ottawa, it was admitted by the City, but only after he'd been carded – not long after Ontario Government tried to legalize this discriminatory and invasive tactic infamous for racial profiling.

The need to control soon wrought the unimaginable: the Come From Away province told Canadians who'd come from away to bloody well stay away. Contrary to our constitutionally protected mobility rights, and contrary to Canada's *raison d'être*, we unstitched our confederation, in a panic. A collection of provinces, territories and colonies spread across the continent came together in 1867 to constitute the Dominion of Canada, in order to do great things. To do great things together that we could not do apart. Until 2020, when we all came apart – Nunavut, Yukon, NW Territories, Quebec, PEI, Newfoundland and New Brunswick. All declared themselves, at least for a time, apart. All declared that their imagined borders were not a remembrance of our history and geography but a line in the COVID sand, over which one Canadian could exile another. No offers to aid other jurisdictions with higher infection rates. They just pulled up the ladder – the True North Strong and Free, in a flash, sprung parasitic. Although I'm not sure what's worse: that they did it, or that the national government and its legislators fell silent, when they did.

So no, this was not the best of times, mostly. How bad was it? This report tries to share some of those stories without the passion of the foregoing. We try to honour the history of this organization, the Canadian Civil Liberties Association. We marshal evidence, the law and our best efforts at an objective analysis, as to what has happened to Canadian civil liberties during what appears to have been the first wave of COVID19, during the winter and spring of 2020. As such, this is an interim report, with all the caveats that come with that. Facts will no doubt need updating and correcting, and new executive orders and legislation will follow. We hope against hope that the worst of it is behind us all: the worst of the viral pandemic, and the worst of its emergency management by governments in Canada, to date.

Michael J. Bryant
Executive Director and General Counsel

TABLE OF CONTENTS	PG
Executive Summary	8
Introduction and Civil Liberties Grading Methodology	9
Legislative Framework: Decentralized Emergency Management	12

⁷ https://cacp.ca/index.html?asst_id=2120

- Quarantine power	14
- The federal <i>Quarantine Act</i>	15
o The CFB Trenton quarantine: <u>B+</u>	16
- Emergency legislation and power grabs	16
o Alberta’s Bill 10: <u>F</u>	17
Mass Behavioural Modification and the Erosion of the Presumption of Liberty	19
- “Policing the pandemic” — Parks, public squares, and physical distancing	20
o Nunavut’s physical distancing laws: from a <u>D</u> to a <u>B+</u>	22
- International and interprovincial borders	24
o Closure of international border: <u>C+</u>	26
o Newfoundland and Labrador’s travel ban: <u>F</u>	28
- Contact tracing and privacy	29
o Alberta’s ABTraceTogether contact tracing app: <u>C</u>	35
o Ontario’s first responder bill: <u>F</u>	36
Overreaching and Underreaching: Emergency Management and the Vulnerable	37
- Homeless shelters	38
- Essential care work	40
o Hospitals	40
o Long-term care homes	43
- Jails, prisons, and immigration detention centers	44
- Children’s rights and domestic violence	46
Canada’s Civil Liberties Forecast for the Pandemic	48
- The death of civil liberties by a thousand cuts	48
- Refugees in a global pandemic	48
Conclusion: Preventing a Second Wave of Civil Rights Violations	50
Appendix – Emergency Measures by Province and Territory as of June 12, 2020	51

Executive Summary

Canada is the second largest country in the world, geographically, with varying COVID19 infection rates, being tackled by 14 different settler governments (federal, provincial and territorial) plus hundreds of Indigenous governments. As of June 2020, the response to COVID19 within Canada is more mangrove shrub than maple tree. Many branches, tangled, no trunk to elevate the whole. The constitutional response was therefore more binary than multifaceted. Different levels of governments (federal, provincial, territorial ('FPT')) responded to the emergency, based on the division of powers under the *Constitution Act, 1867*.⁸ The emergency was a pandemic, so primarily a health care response, plus an effort to restrict activity in public places, more often than not being provincial or municipal lands. Accordingly, to date the emergency management of COVID19 has been overwhelmingly administered by provincial and territorial governments.

This report reviews the COVID-19 pandemic's impact on civil liberties in Canada. The review is not exhaustive. Whereas other organisations have studied COVID's impact with quantitative metrics, this document builds on that quantitative research to provide the first large-scale qualitative, descriptive analysis of how the pandemic has affected civil liberties in Canada.

This approach, described in 'Introduction and Civil Liberties Grading Methodology', reviews Canada's emergency measures as policy instruments, grading them for their rationality, proportionality, and on how they might be justified in a free and democratic society. This report therefore assesses Canada's principal emergency initiatives for whether they:

- 1) Have an important objective;
- 2) Are necessary;
- 3) Proportionate; and
- 4) Time-limited.

The initiatives were then scored on an A to F grade scale. Notable initiatives considered in this report are efforts to police public spaces, border closures, and attempts to implement technologically-enhanced contact tracing.

CCLA found that laws regulating physical distancing in Canada are often underdeveloped and poorly administered. Penalties are disproportionate and not clearly effective. Provincial and territorial travel bans are also disproportionate, irrational, and unconstitutional. Across Canada, emergency policies have also had a severely disproportionate impact on marginalised persons.

The latter sections of the report review COVID's impact on the rights of marginalised persons and persons in care, such as patients in hospitals, residents of long-term care homes, and children. CCLA's analysis concludes that these persons are bearing the worst of both the COVID

⁸ I.e., health care, education, municipalities, property, courts, most policing (provinces); defence, foreign policy, banking, unemployment insurance, criminal laws (federal). Beaudoin, Gérald A.. "Distribution of Powers". The Canadian Encyclopedia, 24 April 2020, Historica Canada. <https://www.thecanadianencyclopedia.ca/en/article/distribution-of-powers>. Accessed 12 June 2020.

virus and the burden the virus has placed on civil liberties in Canada. Canada's most marginalised people are suffering the most in this pandemic.

Of all the provincial and territorial jurisdictions, British Columbia had the greatest success to date in managing the pandemic. BC lowered and eradicated the first wave of the COVID's spread thanks primarily to its early response and leadership, without limiting civil liberties to the extent seen in other jurisdictions.

Introduction and Civil Liberties Grading Methodology

In December 2019, news reports began to emerge about a mysterious virus that was rapidly spreading through the city of Wuhan in China.⁹ Over the next few months, commercial airliners rapidly dispersed the virus to all corners of the earth. By March 11, 2020, the World Health Organisation had declared a global pandemic.¹⁰ By then, Canada had 103 identified cases of the virus.¹¹ Three months later, Canada had more than 90,000 reported cases.¹²

The virus, known as the "2019 coronavirus", "COVID-19", or now just "COVID", primarily spreads between people who come within 2 metres of each other.¹³ In response to the virus, governments across the world scrambled to pass laws to keep people apart. In February 2020, the Canadian government chartered planes to rescue Canadians trapped in Wuhan and a cruise ship; the passengers were quarantined at an air force base in Ontario upon return.¹⁴ As COVID-19 spread in Canada, provincial, territorial, and municipal governments declared states of emergency. These declarations were followed by a flurry of laws and orders that constitute one of the broadest restrictions on civil liberties and most dramatic expansions of government power in Canadian history.

The state loomed large in this crisis from coast to coast to coast. In Western Canada, the Alberta government passed Bill 10, which allows a single minister to exercise the awesome lawmaking power of a parliamentary majority for up to 6 months after the end of the emergency.¹⁵ In Ontario and Quebec, the provinces worst hit by COVID-19, governments wove a dragnet of social distancing rules that included a \$750 minimum fine for sitting on an empty park bench.¹⁶ The Maritime provinces turned inward, sending police officers to patrol and control

⁹ Mandy Zuo et al, "Hong Kong takes emergency measures as mystery 'pneumonia' infects dozens in China's Wuhan city", *South China Morning Post* (31 December 2019), online: <<https://www.scmp.com/news/china/politics/article/3044050/mystery-illness-hits-chinas-wuhan-city-nearly-30-hospitalised>>.

¹⁰ Dawn Kopecki et al, "World Health Organization declares the coronavirus outbreak a global pandemic", *CNBC* (11 March 2020), online: <<https://www.cnn.com/2020/03/11/who-declares-the-coronavirus-outbreak-a-global-pandemic.html>>.

¹¹ Government of Canada, "Coronavirus disease (COVID-19): Outbreak update" (11 March 2020), online: <<https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?topic=tilelink>>.

¹² *Ibid* (1 June 2020).

¹³ BC Centre for Disease Control, "How it spreads" (2020), online: <www.bccdc.ca/health-info/diseases-conditions/covid-19/about-covid-19/how-it-spreads>.

¹⁴ David Lao, "COVID-19: Remaining Canadians quarantined at CFB Trenton released", *Global News* (25 February 2020), online: <<https://globalnews.ca/news/6595646/covid-19-cfb-trenton-canadians/>>.

¹⁵ *Public Health Act*, RSA 2000, c P-37, s. 52.21(2), online: <canlii.ca/t/54b46#sec52.21subsec2>.

¹⁶ See Hillary Johnstone, "Dozens fined as city moves to enforce pandemic restrictions", *CBC News* (6 April 2020), online: <<https://www.cbc.ca/news/canada/ottawa/ottawa-bylaw-parks-fines-1.5523154>>.

interprovincial borders. In the north, the territories passed some of the most severe restrictions on gatherings in the country, with the Northwest Territories banning outdoor public gatherings of any size.¹⁷

While the government overreached in some areas, it also underreacted in others. The municipality of Toronto dragged its feet on ensuring that there were adequate and safe housing solutions for people experiencing homelessness.¹⁸ Even the city's shelter beds were spaced far too closely together. The city's delays in creating solutions have exposed a vulnerable and disproportionately Black, Indigenous, and otherwise racialized and marginalised community to considerable risk, while thousands of hotel rooms remain vacant despite their availability as safe shelter.¹⁹ Failures to act in essential care spaces, such as hospitals or long-term care homes, exposed the vulnerable to even more risk.

The Canadian Civil Liberties Association (CCLA), an independent, national, non-profit organization, has watched these developments with alarm. CCLA has been fighting for the civil liberties, human rights, and democratic freedoms of people in Canada since 1964. The 1970 October crisis, when members of a Quebec separatist movement kidnapped a government official and a British diplomat, was the last time that civil liberties were restricted to a similar degree.²⁰ Even though the kidnapping happened in Quebec, civil liberties were suspended across the entire country. *Habeas corpus* was suspended, which meant that persons accused of crimes could be held for up to 21 days without trial.²¹ Ultimately, almost 500 people were detained in cities as far flung from Quebec as Vancouver,²² but enough evidence was only found for 62 of them to face charges. Many of the charges bore no relation to the kidnapping.²³ At the time, CCLA criticized Prime Minister Pierre Trudeau's unnecessary invocation of the *War Measures Act*²⁴, the previous incarnation of today's emergencies legislation. CCLA believes that similar overreach is happening now.

CCLA does not take the position that rights can never be restricted. After all, the very first section of the *Canadian Charter of Rights and Freedoms*, the highest law in Canada, states that rights and freedoms are subject to (emphasis added) “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁵ A seminal Supreme Court of Canada case, *R v Oakes*,²⁶ laid out a set of factors that determine when a limit is reasonable. In that case, the court found that restrictions on fundamental rights must have a compelling purpose,

¹⁷ Northwest Territories, “Public Health Order – COVID-19 Prohibition of Gatherings and Closures of Certain Business (effective April 11, 2020)”, s. 1a. (11 April 2020), online: <<https://www.hss.gov.nt.ca/sites/hss/files/resources/public-health-order-covid-19-prohibition-gatherings-closures-certain-business.pdf>>.

¹⁸ Miriam Lafontaine, “Advocates for Toronto homeless sue the city over lack of COVID-19 protections in shelters”, *The Toronto Star* (25 April 2020), online: <<https://www.thestar.com/news/gta/2020/04/25/advocates-for-toronto-homeless-sue-the-city-over-lack-of-covid-19-protections-in-shelters.html>>.

¹⁹ *Ibid.*

²⁰ Dominique Clément, “An Exercise in Futility? Regionalism, State Funding, and Ideology as Obstacles to the Formation of a National Social Movement Organization in Canada” (2005) *BC Studies* No 146 at 77, online: <https://historyofrights.ca/wp-content/uploads/pubs/article_JCS.pdf>.

²¹ *Ibid.* at 167.

²² *Ibid.* at 169.

²³ *Ibid.*

²⁴ *Ibid.* at 174.

²⁵ *Canadian Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²⁶ *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, online: <canlii.ca/t/1ftv6>.

a rational connection to the purpose of the restriction, must be minimally impairing of rights, and that there must be a proportionate effect between the negative and positive effects of that limit.²⁷ Courts may thus uphold a restriction on fundamental rights, but only in light of why the right has been limited, whether the measure works in achieving the goal, whether the measure goes further than necessary to achieve the goal, and the side effects of the measure.

These four factors form the basis for the civil liberties grading methodology used in the first half of this report, which pertains primarily to emergency powers. All of the emergency powers used by the government must:

- 1) Have an important objective;
- 2) be necessary;
- 3) be proportionate; and
- 4) be time-limited.

The emergency orders that have passed so far have, on their face, generally been aimed at limiting the spread of the virus – an important objective. The CCLA’s grading system therefore focuses on the remaining three criteria: first, a good emergency power is necessary insofar as it is actually needed—we use emergency powers only when we truly need to—and when there is a rational connection between the power and the problem that it tries to solve. Second, emergency powers should be proportionate to the problem they are meant to solve. For example, an emergency power that gives police services access to the personal health information of citizens without demonstrable necessity is disproportionate, as was done in Ontario. And finally, emergency powers must be time-limited because emergencies are dangerous to democracy and inherently time sensitive. Whether it be flooding in Manitoba, fires in British Columbia, or a snowstorm in Nova Scotia, every crisis comes to an end. For that reason, emergency powers must be time-limited too. We should expect every emergency power to have a “sunset clause” that determines when the power will automatically terminate unless it is renewed. Anything less risks infringing fundamental rights.

Based on these criteria, the CCLA has assigned a civil liberties grade, ranging from **A** to **F**, to government measures assessed in the first half of this interim report (the latter half of the report is of a different nature, and government actions there will not be graded). An **A** suggests a lean measure that is surgically tailored to the problem it aims to solve. These measures strike the balance between freedom and pressing necessity that all governments should strive for. A **C** suggests a sloppily worded order that may somewhat address the issue at hand, but which also unnecessarily restricts civil liberties. An **F** is a power grab that is wildly disproportionate—or completely unconnected to—the situation it is meant to address. Some open-minded governments were able to pull up their grades from a **D** to a **B+** by responding to feedback from civil society. Others, regrettably, passed measures that deserve an **F**.

As a prelude to our analysis of the different orders, the next section discusses the overarching legislative framework for the various government measures that were taken during the emergency.

²⁷ *Ibid* at paras 69–71.

Legislative Framework: Decentralized Emergency Management

Provinces last majorly updated their emergency management laws after the severe acute respiratory syndrome (SARS) crisis struck Ontario and BC (plus suspect cases in Alberta, Saskatchewan, PEI, and New Brunswick) in 2003.²⁸ During the COVID pandemic, however, some provinces made changes to their emergency management laws mid-crisis. The CCLA warns that this approach can threaten civil liberties, since emergencies tend to create a surplus of fear and a deficit of wisdom, even among legislators.²⁹

The federal government's emergency management and quarantine powers were designed before 2020 so that the federal government would have charge over our national borders, and be able to quarantine those entering Canada who were infected or at risk of infection. During COVID, the federal government transported many Canadians and permanent residents from abroad, back to a central quarantine site at CFB Trenton. The next section explores that episode in greater depth.

But other than its jurisdiction under the aforementioned division of powers, the federal government was legally in a position to either manage the entire country or to permit the provinces and territories to manage the crisis themselves. The latter happened, after a period of brief uncertainty. It took quite a few days for the National Press Gallery to figure out that the Prime Minister, who was self-isolating, was not going to be the main actor in Canada's COVID crisis. Constitutionally, it was an ensemble cast. Although the federal government plays a major role in managing the national economy, it has not played a leading role in Canada's overall management of the pandemic, which was instead led by the Premiers and Chief Medical Officers.

This is not the place to discuss the implications of decentralized emergency management, from a policy, management, or public health perspective. But it is fair to say civil liberties received differential treatment across Canada, depending on one's province or territory. This is not new, to be sure. Constitutional rights—to bail, to access an abortion, to an educational curriculum devoid of homophobia, to equality and the right to not be carded, to a timely trial, to counsel, to religious freedom—do look different for Canadians, depending on their residence. This is also true of urban versus rural versus northern Canadians' civil liberties. These distinctions arise because of different approaches taken to those rights, by different Attorneys General, different police forces, and different provincial governments.

The COVID emergency management orders also provided more or less attention to Canadians' civil liberties, depending on the province or territory. Broadly speaking, provinces east and north of Ontario limited civil liberties more so than BC and Prairie provinces. Alberta passed the legislation that most severely limited civil liberties, but it was also the first province to declare the COVID emergency to be over. Summarising the Ontario experience is difficult, by contrast, because of the different approaches taken in urban versus rural Ontario. The former had the highest population density, and the most civil liberties challenges. Rural municipal and regional

²⁸ Infection Prevention and Control Canada, "SARS (Severe Acute Respiratory Syndrome)" accessed 14 June 2020, online: <<https://ipac-canada.org/sars.php>>.

²⁹ MJ Bryant, "A Crisis is a Terrible Time to Legislate" (27 May 2020), CCLA (blog), online: <<https://ccla.org/coronavirus-update-crisis-legislation/>>.

governments saw the lowest incidence of COVID infections yet went out of their way to stop urban Canadians from accessing their rural properties, all without the legal authority to do so.

In other words, the federal government has not yet played a role in harmonising emergency standards and strategies. A national policy on mobility rights within Canada was absent. A national policy on contact tracing, as of this writing, did not transpire. A national standard on *any* civil liberties has not transpired either, leaving CCLA and other civil society groups to identify and challenge unlawful orders in multiple jurisdictions.

The constitutional literacy of the territories and Atlantic Canada was not on full display. Their Attorneys General, superintendents of the rule of law in their respective jurisdiction, responded to our letters, but were otherwise offstage or absent. The federal Attorney General or the Prime Ministers' Office could have exercised some intergovernmental diplomacy, for example, with respect to some of the more blatantly unconstitutional orders in those regions, including police powers to enter a residence without a warrant, a blanket ban on religious activities, the authorisation of carding or street checks by peace officers, and fewer mobility rights for Canadians than were enjoyed by Americans.

From a constitutional standpoint, at no point was the national government seen to be making use of the plurality of practices undertaken by different subnational jurisdictions, by permitting us to do together, as a nation, what would be unachievable apart. Instead, we would characterise Canada's response to COVID 19 as extreme decentralization, and extreme deference by the federal government to the provinces and territories, even when it came to the provinces asserting their sovereignty over provincial borders, and upon heretofore federal jurisdiction over ferries and ports of call. Accordingly, Canada's response to COVID was narrowly driven along legal jurisdictional lines, but no First Minister offered a national response that was greater than the sum of its parts.

It was not necessarily to be so. Constitutionally, from a division of powers perspective, the provinces were the correct jurisdiction. Their operational experience and expertise in health care made them the clear jurisdiction of choice. While most Chief Medical Officers in most jurisdictions did indeed play the primary role in the early days, soon enough the public saw First Ministers mostly, and independent medical officials less and less. When the Premier of Alberta announced that the province's emergency declaration would expire in mid-June, 2020, the independent medical or scientific assessment was not shared. Those officials were not present. In fact, that may make perfect sense, constitutionally, given the prolonged nature of the pandemic, and the incapacity of the unelected to play a leadership role for socioeconomic recovery.

Chief medical officers are neither lawyers nor versed in socioeconomic affairs, public education or industry. The judgement to close provincial and territorial borders, for instance, could not be answered entirely by scientific evidence. Indeed, as a human rights organization, the CCLA submits that an effort should have been made to permit other independent officials to share the podiums – human rights commissioners, Deputy Attorney Generals, Chief Privacy Officers, Auditors General, for instance.

Instead, decentralized emergency management leadership modified over time, for most jurisdictions, particularly in Alberta and Eastern Canada: initially, public health officials were

the face of the pandemic response, then public communications became less empirical and more political, and eventually power seemed to consolidate with all First Ministers. A notable exception was the British Columbia experience, with its provincial health officer, Dr. Bonnie Henry, achieving international prominence for her leadership and results.³⁰

Thus, the following sections are a survey of the government's powers under these laws and the civil liberties implications of the exercise of those powers.

Quarantine power

Different levels of government have quarantine powers of varying scope. The federal *Quarantine Act*³¹ empowers Canada to control the international movement of people and goods in the event of a health emergency. For example, the *Quarantine Act* is used by the government to mandate self-isolation for anyone returning from overseas. This quarantine power has an ancient constitutional source: s. 91(11) of the *1867 Constitution Act* grants the federal government the power to quarantine, although that provision has not been thoroughly considered by the courts.³²

The provinces and territories also have statutory quarantine powers that enable them to impose intra-provincial quarantines. For example, Ontario currently uses its *Health Protection and Promotion Act* to quarantine those in the province who are suspected of carrying COVID.³³

s. 58(1) of the federal Quarantine Act: placing conditions on return

The *Quarantine Act* grants the federal government broad powers to control international travel of persons and goods in times of disease. This law provides the government with a broad range of powers, but the power most commonly used by the federal government in the early stages of the crisis was s. 58(1) of the *Quarantine Act*. s. 58(1) authorizes the imposition of “any condition” on “any class of person” entering Canada where there is a communicable disease outbreak in the country of origin and where such conditions are necessary to contain that outbreak. For example, this power was previously used during the 2014 Ebola outbreak to impose reporting and screening obligations on persons who had come from Guinea within a 21-day period.³⁴

In February 2020, the federal government used s. 58(1) to quarantine Canadian residents who returned via government-chartered plane from two COVID hotspots: Wuhan and the Diamond Princess cruise ship. Those who returned by government plane were subject to the following conditions under s. 58(1): they had to remain at a quarantine facility for 14 days and had to undergo health assessments as required.³⁵ Some Canadians on the cruise ship declined to return via government flight and were quarantined upon their return to Canada.³⁶

³⁰ Catherine Porter, "The Top Doctor Who Aced the Coronavirus Test", *The New York Times* (5 June 2020), online: <<https://www.nytimes.com/2020/06/05/world/canada/bonnie-henry-british-columbia-coronavirus.html>>.

³¹ *Quarantine Act*, SC 2005, c 20.

³² (UK), 30 & 31 Victoria, c 3.

³³ RSO 1990, c H7.

³⁴ *Minimizing the Risk of Exposure to Ebola Virus Disease in Canada Order (No 4)*, PC 2015-1276, (2015) C Gaz I: Vol 149, No 51. Online: <[gazette.gc.ca/rp-pr/p1/2015/2015-12-19/html/order-decret-eng.html?pedisable=true](https://www.gazette.gc.ca/rp-pr/p1/2015/2015-12-19/html/order-decret-eng.html?pedisable=true)>.

³⁵ *Minimizing the Risk of Exposure to 2019-nCoV Acute Respiratory Disease in Canada Order*, PC 2020-0059, (2020) C Gaz I: Vol 154, No 9. Online: <<https://orders-in-council.canada.ca/attachment.php?attach=38812&lang=en>>.

³⁶ *Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Persons Not on Government Flight)*, PC 2020-0071, (19 February 2020), online: <<https://orders-in-council.canada.ca/attachment.php?attach=38951&lang=en>>.

Those on the government flights were quarantined for 14 days at a four-star hotel on Canadian Forces Base (CFB) Trenton, an air force base in Quinte West, Ontario.³⁷ The returnees were housed in comfortable rooms with high-speed internet, access to phones, and meals.³⁸ Returnees were instructed of their rights and were able to contact legal counsel if they wished to do so, although there is no indication that any were dissatisfied with their quarantine.

However, for any person quarantined under s. 58(1) who wishes to challenge their quarantine, the *Quarantine Act* provides no recourse. The relevant remedy would therefore be *habeas corpus* under s. 10 (c) of the *Charter*. *Habeas corpus* is a right possessed by anyone in Canada to ask a court to swiftly determine the legality of their detention. When challenges to quarantine have been mounted through litigation on three previous occasions, however, the courts have deferred to the government’s overriding public health objective.³⁹

CIVIL LIBERTIES GRADE FOR CFB TRENTON QUARANTINES: **B+**

Necessity:

The quarantines were necessary to protect public health, given that the passengers on board the flights were coming directly from COVID ground zero.

Proportionality:

The comfortable and rights-respecting conditions of the quarantine meant that the restrictions on liberty were generally proportionate to their benefit. To make the order even more proportionate, the government could have proactively supplied the quarantined with access to legal counsel.

Time limited:

The liberty restrictions were strictly time limited – 14 days, the length of COVID’s incubation period.

Emergency legislation and power grabs

Emergency legislation sets the parameters for what a government can do in an emergency. The first step for a government to address an emergency is for the cabinet (or premier) to declare an emergency. The provinces and territories vary in terms of which legislation grants the government that power. For example, Nunavut, the Northwest Territories, and Yukon have specific legislation for public health emergencies. Other provinces, such as Ontario or Saskatchewan, draw the power to declare an emergency from their general emergency management legislation, which is also used for non-health emergencies such as flooding or fires. Other provinces, such as BC and Manitoba, have the option of both general emergency legislation and public health emergency legislation, each of which offers different tools to the government.

³⁷ Laura Osman, “Under quarantine: what life will be like at CFB Trenton for evacuees from Wuhan”, *CTV News* (6 February 2020), online: <<https://www.ctvnews.ca/canada/under-quarantine-what-life-will-be-like-at-cfb-trenton-for-evacuees-from-wuhan-1.4800778>>.

³⁸ *Ibid.*

³⁹ *Toronto (City, Medical Officer of Health) v Deakin* [2002] OJ No 2777 (Ct J); *Re George Bowack*, [1892] 2 BCR 216 (SC), and *Canadian AIDS Society v Ontario* (1995) 25 OR (3d) 388 (Gen Div).

Once an emergency is declared, cabinet ministers may issue orders or regulations to manage areas of public and private life that they could not touch before. The premise behind emergency powers is that they significantly but temporarily expand the government's ability to deal with emergency situations. The scope of these orders depends on what is allowed under the applicable emergency legislation. For example, s. 7.0.2(4)(5) of Ontario's *Emergency Management and Civil Protection Act* allows the cabinet to pass orders "Closing any place, whether public or private, including any business, office, school, hospital or other establishment or institution". The government of Ontario was thus authorized to pass a regulation that closed all non-essential businesses.⁴⁰ The Act also restrains measures; for example, they must be exercised in a manner that limits their intrusiveness, they should only apply to the parts of the province where the measure is necessary, and they should be effective for only as long as is necessary.⁴¹ Emergency powers should thus mirror the size and seriousness of the problems they are meant to address, not eclipse them.

Emergency legislation cannot authorize a government to act in a way that is contrary to the *Charter*. However, some governments in Canada, either overwhelmed by the urgency of the crisis or viewing the crisis as an opportunity, have updated their legislation to vastly expand their powers in a manner contrary to the *Charter*. The later sections of this report discuss those powers as they relate to different thematic areas, such as police searches and privacy incursions. The following section, however, focuses on how provincial governments are using the crisis as cover to expand their powers under emergency legislation.

Alberta's Public Health Act and the Public Health (Emergency Powers) Amendment Act, 2020 (Bill 10)

Alberta's *Public Health (Emergency Powers) Amendment Act 2020*,⁴² otherwise known as Bill 10, was introduced in Parliament on March 31st, 2020 and passed 48 hours later on April 2nd. Bill 10 has two main components: the concentration of legislative power in the hands of a single minister, and the retroactive validation of laws. Bill 10 seizes essential powers away from Alberta's legislature and hands them over to just one minister.

Bill 10 made it clear that a single minister could act with the power of a full parliamentary majority: the ability to pass, suspend, or amend laws without consultation. Before Bill 10, s. 52(1) of Alberta's *Public Health Act* enabled a minister to "suspend or modify the application or operation" of laws. On its face, that provision allowed a minister to temporarily prevent a law from operating or make slight changes to how it would apply. Bill 10 then added the power to "specify or set out provisions that apply in addition to, or instead of, any provision of an enactment."⁴³ This addition confirms that the minister has the full suite of legislative powers, including the power to amend and pass completely new laws. There are some exceptions—the minister cannot pass measures that pertain to tax, relate to public funds, or which create new offences with retroactive application.⁴⁴ Otherwise, the minister can freely legislate without

⁴⁰ *O Reg 82/20: ORDER UNDER SUBSECTION 7.0.2 (4) - CLOSURE OF PLACES OF NON-ESSENTIAL BUSINESSES* (24 March 2020), online: <<https://www.ontario.ca/laws/regulation/200082/v1?search=emergency+management>>.

⁴¹ *Ibid* s. 7.0.2(3).

⁴² SA 2020 c 5.

⁴³ *Public Health Act*, s. 52.1(2)(b).

⁴⁴ *Ibid* s. 52.1(2.2).

consultation. The *Public Health Act* provides that resulting orders can last for up to 6 months after the lapse of the public health emergency.⁴⁵

Bill 10 was also an example of retroactive lawmaking—going back in time to authorise previous orders that may not have been valid when they were passed. Normally, if the government makes an order that was not authorized by statute, that order is *ultra vires*—null because it was beyond the government’s authority. However, Bill 10 went back in time to insist that any public health order made after March 17, 2020, but before the passing of Bill 10, was valid.⁴⁶

This retroactive validation was likely designed to assuage the provincial government’s anxiety that some of its earlier orders may have been invalid when they were passed. For example, on March 26, 2020, the health minister ordered a massive increase to the quantum of general fines for violations of the *PHA*—from a maximum of \$2,000 to a maximum of \$100,000 for a first offence, and from a maximum of \$5,000 for subsequent offences to a maximum of \$500,000 for subsequent offences.⁴⁷ These changes were not mere suspensions or modifications of the law, which was all the minister was empowered to do at the time under s. 52(1). The retroactive authorisation was designed to remedy that sort of defect and others like it. Bill 10 thus did not clean up the government’s spilt milk so much as allege that the government had always intended to spill the milk, and moreover that it was a *good thing* the government had spilled the milk—for the public’s safety, of course.

In addition to seizing legislative powers and insisting that bad legal orders were in fact good legal orders, section 11 of Bill 10 took the strange and unjustified step of denying Albertans the positive right to know when the law changes. Ordinarily, when governments pass new laws, they must publish those laws in gazettes. For instance, s. 3(5) of Alberta’s *Regulations Act* states that changes to regulations that create fines are only valid when a fined person was either actually notified of the changes or the changes were published in the Alberta Gazette. This is what makes levying those fines fair: if people do not have a chance to know the law then they cannot reasonably be fined for breaking it. Laws made without any notice are in that way simply unfair. But that is what Bill 10 does: it means that many new or amended laws do not have to be published in the Alberta Gazette for people to be subject to them.⁴⁸

The government of Alberta might argue that its press releases about new fines constitute the actual notice required by the *Regulations Act*. That is not at all clear, however, and not at all what Albertans should expect. Can all of the refugees living in Alberta read the new law? Has Alberta’s government taken steps to ensure that they can? We cannot say for sure. What we can say though is that it looks like Bill 10 has made a mess of civil rights in Alberta.

CIVIL LIBERTIES GRADE FOR ALBERTA’S *PUBLIC HEALTH ACT* AND BILL 10: **F**

Necessity:

⁴⁵ *Ibid* s. 52.811(3).

⁴⁶ *Ibid* s. 52.1(2.3).

⁴⁷ *MO 613/2020* (26 March 2020), online: <<https://open.alberta.ca/dataset/60862f8f-7842-4702-85a5-a9f9577c0222/resource/87fa34d1-e1b8-426b-b34d-4691016d5987/download/health-mo-613-2020.pdf>>.

⁴⁸ *MO 27/2020* (30 March 2020), online: <<https://open.alberta.ca/publications/ministerial-order-27-2020-justice-and-solicitor-general>>.

The Alberta government did not establish that Bill 10 is necessary. There is no demonstrable reason why the concentration of power in an individual minister is needed to solve the public health crisis. Legislatures should pass laws, not individuals, because that process provides scrutiny and democratic accountability; the government failed to show how it is necessary to do away with those time-tested and essential features of good lawmaking.

The government has also failed to show why retroactive validity is necessary. If the government passed laws that it did not have the authority to pass, the rule of law requires that those laws be subject to judicial scrutiny.

Proportionality:

Bill 10 is radically disproportionate. The minimal time saved by waiving the need for a minister to consult with stakeholders pales in comparison to the damage done to Alberta's democracy by stripping Alberta of so many checks and balances. Bill 10 will likely reduce public trust because the public will see the bill as an undue concentration of power. Bill 10's retroactivity is also disproportionate: it offers no benefit and denies Albertans the right to know the laws they are subject to.

Time-limited:

Bill 10 also failed to be time limited. The government offered no justification for why the orders of a single minister should extend for 6 months after the end of the emergency.

Making this bad idea even worse, the government's wanton use of retroactive laws erodes the premise of time limitations altogether. If a government thinks it can get away with going back in time to revise its mistakes, it might also try to go back in time to extend the time limits placed on its other additional powers.

Mass Behavioural Modification and the Erosion of the Presumption of Liberty

This section of the report addresses how different levels of Canadian government have used emergency orders and regulations in this crisis to modify our behaviour on a massive scale. Governments used restrictions on gatherings and physical distancing laws were used to keep people apart, to prevent human-to-human transmission of the virus. Canadian governments imposed interprovincial and interterritorial travel bans for the first time in Canadian history.

These restrictions shifted the presumption of liberty that has been long enjoyed in Canadian life. Aggressive enforcement of physical distancing measures meant that anyone walking in parks, for example, could be treated as a suspect. Emergency legislation in Ontario gave police and by-law officers new powers to card—a practice that has been used disproportionately against racialized persons and other minorities.⁴⁹ Residents of a province were turned away at the province's border unless they could provide the right documentation, which was often not on hand due to

⁴⁹ The Honourable Michael H. Tulloch, "Report of the Independent Street Checks Review", Queen's Printer for Ontario (2018), online: <<https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf>>.

the speed at which the borders closed.⁵⁰ Privacy came under threat as Ontario's⁵¹ and Alberta's⁵² governments gave police direct access to Ontarians' medical information, while provinces clamoured to develop contact tracing apps.

“Policing the pandemic” — Parks, public squares, and physical distancing

Between mid-March to mid-May of 2020, provinces, territories, and municipalities began regulating public spaces in an attempt to enforce physical distancing. They stitched together a patchwork of rules, with penalties attached and enforced by police and by-law officers. Often this enforcement served no clear public health purpose, such as when people were ticketed for stopping in parks to try and *avoid* nearby crowds.⁵³ This issue became so widespread that CCLA is issuing a separate report on this very subject.

Physical distancing rules

The rules governing physical distancing varied from jurisdiction to jurisdiction, but they all followed a similar pattern: gatherings of certain sizes were banned, physical distancing requirements were imposed in some provinces, and non-essential businesses were shuttered. However, the restrictiveness of these rules varied by province, territory, and municipality. There was no clear correlation between the severity of the crisis and the intrusiveness of physical distancing orders. For example, although Mississauga, Ontario, had significantly more COVID cases than Marathon, Ontario⁵⁴ the latter installed stricter physical distancing laws than the former: people in Marathon not in the same household must maintain 2 metres of physical distancing on public property at all times, with no exceptions.⁵⁵

Gatherings and park spaces

Restrictions on gatherings were levied in every province or territory, with limited exceptions, such as persons from the same household. British Columbia was the most permissive province; throughout the pandemic, BC allowed gatherings of fewer than 50 persons.⁵⁶ Next most liberal was Alberta, which limited gatherings to fewer than 15 persons.⁵⁷ Manitoba,⁵⁸ New Brunswick,⁵⁹

⁵⁰ E.g. Sara Fraser, “P.E.I. snowbird 'devastated' to be turned away at bridge”, *CBC News* (5 June 2020), online:

<<https://www.cbc.ca/news/canada/prince-edward-island/pei-snowbird-turned-away-confederation-bridge-1.5533060>>.

⁵¹ *O Reg 120/20* (3 April 2020), online: <<https://www.ontario.ca/laws/regulation/200120?search=emergency+management>>.

⁵² *Ministerial Order 632/2020 [Health]* (4 May 2020), online: <<https://open.alberta.ca/publications/ministerial-order-632-2020-health>>.

⁵³ See Manisha Krishnan, “Mom Says She Was Fined \$880 For 'Standing Too Long' in a Park With Baby” *Vice News* (April 27, 2020), online: <https://www.vice.com/en_ca/article/pkejv/aurora-mom-says-she-was-fined-dollar880-for-standing-too-long-in-a-park-with-baby>.

⁵⁴ Public Health Ontario, “Epidemiological Summary – COVID-19 in Ontario: January 15, 2020 to April 6, 2020”, at 6. Online: <<https://files.ontario.ca/moh-covid-19-report-en-2020-04-06.pdf>>.

⁵⁵ Marathon, by-law No 1979, *A by-law to promote and regulate physical distancing doing the COVID-19 Emergency within the Town of Marathon*, (6/8 April 2020), at s. 6.

⁵⁶ British Columbia Ministry of Health, *ORDER OF THE PROVINCIAL HEALTH OFFICER - Mass Gathering Events* (22 May 2020), online: <<https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/covid-19-pho-class-order-mass-gatherings.pdf>>.

⁵⁷ *Record of decision – CMOH Order 07-2020* (27 March 2020), online: <<https://open.alberta.ca/publications/cmoh-order-07-2020-2020-covid-19-response>>.

⁵⁸ *Order – the Public Health Act (Section 67)* (30 March 2020), online: <https://www.gov.mb.ca/asset_library/en/proactive/2019_2020/orders-soe-03302020.pdf>.

⁵⁹ *Renewed and revised Mandatory Order COVID-19* (29 March 2020), online: <<https://www2.gnb.ca/content/dam/gnb/Corporate/pdf/EmergencyUrgence19.pdf>>.

Saskatchewan,⁶⁰ and Yukon⁶¹ restricted gatherings to 10 persons. Ontario restricted gatherings to 5 persons.⁶² Nunavut initially banned gatherings of any size but revised its order after CCLA advocacy to allow gatherings of fewer than 5 persons.⁶³ Quebec⁶⁴ and the Northwest Territories⁶⁵ banned all gatherings with few exceptions.

Some provinces and municipalities issued more fine-grained physical distancing orders. For example, Ontario and some of its municipalities created rules regarding parks, including the “closure” of “outdoor recreational amenities” such as outdoor playgrounds, sports fields, and benches.⁶⁶ The city of Toronto ordered that persons who were not from the same household had to maintain 2 metres of distance in parks and public squares.⁶⁷

Closures

Social distancing was also enforced through business and other closures. All provinces and territories except BC mandated the closure of non-essential businesses such as spas or toy stores.⁶⁸ This was enforced at the municipal level; for example, while BC did not mandate business closures, the city of Vancouver ordered high-risk businesses to shut down and issued fines to the recalcitrant.⁶⁹ Other public spaces, such as national and provincial parks, were shut down across the country,⁷⁰ although some municipal parks remained open subject to conditions.

Penalties

Anyone in any province or territory who violated any of these orders would face a minimum ticketed fine of between \$486 (Manitoba) and \$2,000 (Saskatchewan) for individuals. Legislation in some provinces led government to fine amounts much larger than the minimum—

⁶⁰ PUBLIC HEALTH ORDER April 4, 2020 (Under Section 38 and Subsection 45(2) of The Public Health Act, 1994) Control of Transmission of 2019 Novel Coronavirus (4 April 2020), online: <<https://www.saskatchewan.ca/-/media/files/coronavirus/public-health-measures/public-health-orders/public-health-order-april-4-2020.pdf>>.

⁶¹ Ministerial Order 2020/14 – Civil Emergency Measures Act (2 April 2020), online: <www.gov.yk.ca/legislation/regs/mo2020_014.pdf>.

⁶² O Reg 52/20: ORDER UNDER SUBSECTION 7.0.2 (4) OF THE ACT - ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS (16 May 2020), online: <<https://www.ontario.ca/laws/regulation/200052>>.

⁶³ Order respecting social distancing and gatherings (24 April 2020), online: <https://gov.nu.ca/sites/default/files/order_re_social_distancing_and_gatherings_signed_200424_v3.pdf>.

⁶⁴ CONCERNING renewal of the public health emergency under section 119 of Public Health Act and certain measures to protect the health of the population (20 March 2020), online: <<https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-222-2020-anglais.pdf?1584827459>>.

⁶⁵ Public Health Order – COVID-19 Prohibition of Gatherings and Closures of Certain Business (effective April 11, 2020), s. 1a. (11 April 2020), online: <<https://www.hss.gov.nt.ca/sites/hss/files/resources/public-health-order-covid-19-prohibition-gatherings-closures-certain-business.pdf>>.

⁶⁶ O Reg 104/20: Emergency Order under Subsection 7.0.2 (4) of the Emergency Management and Civil Protection Act – Closure of Outdoor Recreational Facilities (30 March 2020), online: <<https://www.ontario.ca/laws/regulation/200104/v1>>.

⁶⁷ City of Toronto, by-law 322-2020, To amend Municipal Code Chapters 608 and 636 to impose emergency physical distancing regulations with respect to Parks, and Public Squares (2 April 2020), online: <<https://www.toronto.ca/legdocs/bylaws/2020/law0322.pdf>>.

⁶⁸ E.g. O Reg 82/20: ORDER UNDER SUBSECTION 7.0.2 (4) - CLOSURE OF PLACES OF NON-ESSENTIAL BUSINESSES (24 March 2020), online: <<https://www.ontario.ca/laws/regulation/200082/v1>>.

⁶⁹ Lisa Steacy & Charmaine de Silva, “Vancouver set to fine businesses violating orders to shut down up to \$50,000” *CityNews* (22 March 2020), online: <<https://www.citynews1130.com/2020/03/22/vancouver-set-to-seek-power-to-order-non-essential-workers-to-stay-put-enforce-orders-on-social-distancing/>>.

⁷⁰ E.g. “All BC Parks Closing”, *BC Gov News* (8 April 2020), online: <<https://news.gov.bc.ca/releases/2020ENV0019-000645>>.

in Alberta, for instance, the government can levy fines of up to \$100,000 for individuals and \$500,000 for businesses for breaching emergency orders.⁷¹

Case study: Nunavut changes its grade from a D to a B+

Nunavut’s improved physical distancing order is an example of how a government can improve its *Charter*-compliance through dialogue with civil society. On March 20, 2020, Nunavut issued a physical distancing order that was one of the most restrictive in Canada—it banned all public gatherings, for example.⁷² At time of writing, Nunavut still has no recorded cases of COVID. CCLA wrote to Nunavut’s Minister of Justice and Attorney General on April 8, 2020, expressing concerns over the unconstitutionality of the order.⁷³ On April 24, 2020, Nunavut revised its order to be significantly more *Charter*-compliant.

The March 20, 2020 order

Nunavut’s original “Order Restricting Mass Gatherings” prohibited all public gatherings. No definition was provided for the terms “public”, “private”, or “gathering”. This order also banned all “in-person religious, cultural, or spiritual gatherings”.⁷⁴ Additionally, it enabled police to conduct warrantless searches of dwellings so long as there was a “serious and immediate risk to public health”.⁷⁵

*CIVIL LIBERTIES GRADE FOR NUNAVUT’S MARCH 20, 2020 ORDER: **D***

Necessity:

Since Nunavut had (and still has) no COVID cases when this order was instituted, no plausible argument can be made that its extreme liberty restrictions were necessary. A complete ban on gatherings, with no exceptions, has not been attempted even in Quebec, the province worst-hit by the virus. No clear justification was proffered for why it was necessary to single out religious, cultural, and spiritual gatherings for restriction. Nor was it clear why granting police warrantless entry to dwellings was necessary to protect public health.

Proportionality:

The order’s sloppy drafting and lack of detail made it wildly disproportionate to the objective of protecting public health. Banning all public gatherings without further definition could capture an entire range of conduct—a hospital, for instance, is a public place where people gather. The ban on religious gatherings would cover a smudge ceremony between two members of the same household; a highly intrusive restriction with no clear benefit. Finally, the order (and the enabling statute) authorizes warrantless entry to dwellings, which engages Canadians’ *Charter*-guaranteed rights against unreasonable search and seizure.

Time-limitation:

The order was deemed to last as long as the territory’s public health emergency was in effect.

⁷¹ *MO 613/2020* (26 March 2020), online: <<https://open.alberta.ca/dataset/60862f8f-7842-4702-85a5-a9f9577c0222/resource/87fa34d1-e1b8-426b-b34d-4691016d5987/download/health-mo-613-2020.pdf>>.

⁷² *Order Restricting Mass Gatherings* (20 March 2020), s. 1(a), online: <https://ccla.org/cclanewsletter/wp-content/uploads/2020/04/order_re_mass_gatherings_final_v2signed.pdf>.

⁷³ Canadian Civil Liberties Association, “Re: March 20, 2020 Order Restricting Mass Gatherings” (8 April 2020), online: <<https://ccla.org/coronavirus-update-letter-to-nunavut/>>.

⁷⁴ *Nunavut Order Restricting Mass Gatherings*, s. 1(c).

⁷⁵ *Ibid* s. 4(b).

The new April 24, 2020 order

After CCLA expressed its concerns, the government returned with a revised public health order on April 24, 2020.⁷⁶ The new order authorized public gatherings and private gatherings of 5 persons or less.⁷⁷ It no longer singled out religious, cultural, or spiritual gatherings for restriction. Warrantless entry to dwellings was no longer authorized unless consented to by the occupant or person in charge of the dwelling. This order also had many more reasonable exceptions: the 5-person limit did not apply to hospitals, for example.⁷⁸

CIVIL LIBERTIES GRADE FOR NUNAVUT'S APRIL 24, 2020 ORDER: B+

Necessity:

The new order is a major improvement because it removed unnecessary restrictions, including the complete ban on public gatherings and permission for warrantless entry into dwellings. The dialled-back restrictions bring Nunavut into line with the rest of the provinces and territories in Canada, thereby bringing the order into closer compliance with the *Charter's* necessity requirement.

Proportionality:

The new order is significantly more proportionate than its predecessor. First, the numerous thoughtful exceptions to physical distancing requirements evince an attempt to minimize liberty restrictions where possible. Second, the rephrasing of the order to clarify that religion has not been singled out for restriction ameliorates the risk of discrimination.

Some tweaks to the provision would further improve the proportionality of the order. For example, the new order still states that police may enter a dwelling with the consent of the “occupant or person in charge of the dwelling”;⁷⁹ the latter term could be interpreted to cover a landlord. To protect tenants’ privacy rights, Nunavut’s new order could be amended to clarify that only the legal occupant may provide consent to enter their dwelling.

Second, the new order’s social distancing rules (clause 2) are confusing due to two similar but overlapping subclauses. Subclause 2a states that all persons must maintain two metres of distance “wherever it is safe and practical to do so, except inside dwellings and between immediate family members.” However, subclause 2k states that all persons must maintain two metres of distancing “from any other person while in public, excepting members of their own household.” Which subclause governs? Does the “safe and practical to do so” exception in 2a always apply? This confusion could be easily resolved by combining both clauses: “All persons in Nunavut must maintain social distancing of 2m in public whenever it is safe and practical to do so, excepting members of their own household or immediate family members.”

Third, a more tailored order would use a simpler and unified definition of a “gathering”. The new order does not clearly define or distinguish between the two types of restricted gathering:

⁷⁶ *Order respecting social distancing and gatherings* (24 April 2020), online:

https://gov.nu.ca/sites/default/files/updated_apr_28_social_distancing_and_gathering_order_eng_signed.pdf.

⁷⁷ *Ibid* s. 2(c).

⁷⁸ *Ibid* s. 2e(iv).

⁷⁹ *Ibid* s. 15.

“organized public gathering” and “social gathering”. The contours of “social gathering” are clear because the term has a general definition, examples, and exceptions in clauses 7 - 8. However, it is not clear what a “public organized gathering” is - only examples are provided in clause 6, and this type of gathering is neither defined nor subject to any exceptions. Could behavior that is excepted from the prohibition in clause 7, such as multiple persons driving in a vehicle (clause 8g), be caught under the separate prohibition on “organized public gatherings” in clause 5 since it has no exceptions? There is a solution: since both types of gathering must in any case be comprised of no more than five persons, they could be combined under one prohibition on a single type of gathering that is clearly defined by a general definition, examples, and exceptions.

Time-limited:

The order is deemed to last as long as the territory’s public health emergency is in effect.

In early April CCLA launched its COVID-19 Tickets Tracker Form. Since that time, CCLA has recorded the experiences of people from across the country. On June 24th, 2020, CCLA in collaboration with the Policing the Pandemic Mapping Project published a separate report titled “Stay Off the Grass: a Preliminary Report on COVID-19 Law Enforcement”, which shares their stories and provides some powerful early warning signs regarding the dangers of moving from a public health response to one focused on public order. That report is available on CCLA’s website.⁸⁰

Travel restrictions

Section 6 of the *Charter* provides that “Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to move to and take up residence in any province”. As the different levels of Canadian government scrambled to contain the virus, however, national, provincial, and territorial borders began to shut to all but a few. These closures were not a matter of trivial inconvenience. Real and lasting damage was done to a woman who was unable to return to Newfoundland and Labrador to bury her recently deceased mother.⁸¹ Another man was denied entry to Prince Edward Island because he did not have the documentation on hand to prove that he lived there.⁸² Cross-border U.S.-Canadian couples continued to face family separation until June 8, 2020, when the federal government announced that immediate family members, including spouses, would enjoy an exemption to the travel ban if they can prove that they have a 14-day isolation plan ready.⁸³

International border closures

On March 17, 2020, as the COVID-19 crisis was beginning to escalate, the federal government issued an interim order under the *Aeronautics Act* to enact its first travel restriction: a ban on all

⁸⁰ Canadian Civil Liberties Association and Policing the Pandemic Mapping Project, “Stay Off the Grass: COVID19 and Law Enforcement in Canada” (June 2020), Online: <<https://ccla.org/cclanews/wp-content/uploads/2020/06/2020-06-24-Stay-Off-the-Grass-COVID19-and-Law-Enforcement-in-Canada.pdf>>

⁸¹ “She was denied entry for her mother’s funeral. Now she’s taking the N.L. government to court”, *CBC News* (15 May 2020), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/kim-taylor-constitutional-challenge-1.5571322>>.

⁸² Sara Fraser, “P.E.I. snowbird ‘devastated’ to be turned away at bridge”, *CBC News* (15 April 2020), online: <<https://www.cbc.ca/news/canada/prince-edward-island/pei-snowbird-turned-away-confederation-bridge-1.5533060>>.

⁸³ Rachel Aiello, “Cross-border families can now reunite under new exemption”, *CTV News* (8 June 2020), online: <<https://www.ctvnews.ca/health/coronavirus/cross-border-families-can-now-reunite-under-new-exemption-1.4974140>>.

foreign nationals entering the country by aircraft.⁸⁴ Exceptions to the ban included immediate family members of Canadians and permanent residents. This interim order had another feature: it required all air transport carriers to deny boarding to any symptomatic person, including Canadian citizens.⁸⁵ Thus, even Canadian citizens with flu-like symptoms would be effectively denied the chance to return home.

Canada's remaining open international border, the land border with the U.S., was eventually shut on March 21, 2020 to all foreign nationals engaging in "non-essential travel."⁸⁶ According to guidance from the Canada Border Services Agency (CBSA), essential travel covers work and study, critical infrastructure support, or travelling for healthcare. Non-essential travel includes tourism or entertainment.⁸⁷ Between March 17 and June 8, it was not clear whether family reunification between U.S.-Canada cross-border couples counted as "essential travel", which left the fate of family reunification in the hands of individual border officers with varying results.⁸⁸ On June 8, the federal government clarified that family reunification can count as essential travel.⁸⁹ However, since such trips will only be presumed to count as "essential" if it is for a minimum stay of 15 days,⁹⁰ families that can only make short trips because one spouse works on the other side of the border will still have their reunification subject to the discretion of individual CBSA officers.

CIVIL LIBERTIES GRADE FOR CLOSURE OF INTERNATIONAL BORDER: C+

Necessity:

It is arguable that the closure of international borders was necessary to slow the spread of the virus. Many countries in the world have shut their borders; the virus was initially dispersed throughout the globe through international travel. That said, the decision to shut the borders is not without controversy. Some health experts such as Canadian Health Minister Patty Hajdu and Chief Public Health Officer initially stated that border closures may be ineffective given the practical difficulty of screening at airports,⁹¹ although Dr. Tam later reversed her opinion.⁹²

Proportionality:

⁸⁴ *Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19*, PC 2020-0162 (2020), C Gaz I, Part I, Volume 154, Number 14.

⁸⁵ *Ibid* s. 9.

⁸⁶ *Statement from the Office of the Prime Minister on COVID-19; U.S.-Canada joint initiative: Temporary restriction of travellers crossing the U.S.-Canada border for non-essential purposes* (20 March 2020), online: <<https://www.cbsa-asfc.gc.ca/agency-agence/pm-covid19-eng.html>>.

⁸⁷ *Ibid*.

⁸⁸ Jackie Dunham, "It's devastating': Cross-border couples separated for months due to travel restrictions", *CTV News* (14 May 2020), online: <<https://www.ctvnews.ca/health/coronavirus/it-s-devastating-cross-border-couples-separated-for-months-due-to-travel-restrictions-1.4938963>>.

⁸⁹ *Supra* note 91.

⁹⁰ Canada, Government of Canada, *Travel restriction measures: COVID-19 program delivery* (Program Delivery Instructions) (Government of Canada: 6 June 2020), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/travel-restrictions.html#family-members>>.

⁹¹ Tonda MacCharles, "After Trump targets Europe, Canadian officials say closing the border won't stop COVID-19", *The Toronto Star* (12 March 2020), online: <<https://www.thestar.com/politics/federal/2020/03/12/after-trump-targets-europe-canadian-officials-say-closing-the-border-wont-stop-covid-19.html>>.

⁹² Tonda MacCharles, "Was it perfect? No!: Theresa Tam discusses Canada's early pandemic response", *CBC News* (12 March 2020), online: <<https://www.thestar.com/politics/federal/2020/03/12/after-trump-targets-europe-canadian-officials-say-closing-the-border-wont-stop-covid-19.html>>.

While the border closures do contain numerous exceptions, the omission of an exception for cross-border families has been disproportionate in theory and practice, subjecting cross-border families to arbitrary decision-making by individual border guards. Absent clear guidance on whether to let members of cross-border families through, some border guards have been rejecting family reunification as a form of essential travel, even though cross-border spouses are among the best equipped to carry out 14 days of self-isolation. Other border guards have been demanding documentary proof such as marriage certificates, an unrealistic demand for those who were caught across the border when the crisis unexpectedly hit.

Time limited: The border closures have been time limited in that they have had to be extended by 30 days at a time.

Interprovincial and interterritorial border closures

Next, provincial and territorial borders began to seal for the first time in Canadian history. On March 21, the Northwest Territories banned anyone from entering the territory, subject to exceptions such as NWT residents or those providing essential services.⁹³ Over the next few weeks, New Brunswick,⁹⁴ Newfoundland and Labrador,⁹⁵ Nunavut,⁹⁶ Nova Scotia,⁹⁷ Prince Edward Island,⁹⁸ Quebec,⁹⁹ and the Yukon¹⁰⁰ followed with their own variation of border closure. Saskatchewan and Quebec¹⁰¹ also restricted intraprovincial travel to certain regions; non-essential travel to northern Saskatchewan was prohibited, for example.¹⁰² A different kind of restriction was imposed in some First Nations territories, such as Haida Gwaii, where a system of permits was introduced to regulate movement to and from the region.¹⁰³ Only Alberta, British Columbia, and Ontario did not enact travel restrictions of any kind.

The list of exceptions to travel bans vary by province or territory, but all share common characteristics. Residents, workers, or those providing essential services in that province or

⁹³ Northwest Territories, Chief Public Health Officer, *Public Health Order – COVID-19 Travel Restrictions and Self-Isolation Protocol* (Northwest Territories Health: 21 March 2020), online: <<https://hayriver.com/wp-content/uploads/2020/03/Covid-19-Public-Health-Order-Travel-Restrictions-Self-Isolation-Protocols.pdf>>.

⁹⁴ New Brunswick, Minister of Public Safety, *Renewed and Revised Mandatory Order COVID-19* (New Brunswick Public Safety: 29 May 2020), online: <<https://www2.gnb.ca/content/dam/gnb/Corporate/pdf/EmergencyUrgence19.pdf>>.

⁹⁵ Newfoundland and Labrador, Chief Medical Officer of Health, *Special Measures Order (Travel) Made pursuant to Section 28 of the Public Health Protection and Promotion Act* (Newfoundland and Labrador Health: 15 May 2020), online: <<https://www.gov.nl.ca/covid-19/files/Special-Measures-Order-Travel-May-15-2020.pdf>>.

⁹⁶ Nunavut, Chief Public Health Officer, *Public Health Act, S. Nu. 2016, c. 13 – Travel Restriction Order* (Nunavut Health: 20 March 2020), online: <https://www.gov.nu.ca/sites/default/files/order_re_travel_to_nunavut_final_v5signed.pdf>.

⁹⁷ Nova Scotia, Minister of Municipal Affairs and Housing, *Direction of the Minister under a Declared State of Emergency* (27 March 2020), online: <<https://novascotia.ca/coronavirus/docs/Direction-of-Minister-under-a-Declared-State-of-Emergency.pdf>>.

⁹⁸ Prince Edward Island, Minister of Justice and Public Safety, *MINISTERIAL ORDER in the matter of the Emergency Measures Act and in the matter of a declaration of a Provincial State of Emergency* (Government of Prince Edward Island: 30 April 2020), online: <<https://www.princeedwardisland.ca/sites/default/files/publications/jpsminorderapril30.pdf>>.

⁹⁹ Quebec, Minister of Health and Social Services, *Ministerial Order 2020-011 of the Minister of Health and Social Services dated 28 March 2020* (Quebec Health: 28 March 2020), online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-011_anglais.pdf?1585448894>.

¹⁰⁰ Yukon, Minister of Community Services, *Ministerial Order 2020/19 Civil Emergency Measures Border Control Measures COVID-19 Order* (Government of Yukon: 17 April 2020), online: <www.gov.yk.ca/legislation/regs/mo2020_019.pdf>.

¹⁰¹ *Supra* note 97.

¹⁰² Saskatchewan, Chief Medical Health Officer, *Public Health Order – Control of Transmission of 2019 Novel Coronavirus* (Saskatchewan Health: 24 April 2020), online: <<https://www.saskatchewan.ca/-/media/files/coronavirus/public-health-measures/public-health-orders/order-nsad-april-24---final-2.pdf>>.

¹⁰³ Haida Gwaii State of Emergency (15 May 2020), online: <www.haidanation.ca/wp-content/uploads/2020/05/FINAL-20200515-HGSOE-Poster-11x17-1.pdf>.

territory were generally allowed to enter and stay, while those in transit to another province or territory were generally allowed to pass through. An additional layer of conditions exists in territories like Nunavut; some returnees were only allowed to enter if they met the list of exceptions *and* they self-isolated for two weeks outside of the territory in Ottawa, Winnipeg, Edmonton, or Yellowknife.¹⁰⁴

Border closures were enforced by police or peace officers, who were empowered to assess each justification for travel against vague categories such as “essential travel” or “humanitarian purpose”.¹⁰⁵ Questionable treatment resulted; while those who had work in another province were let through, officers denied entry to multiple people who were attempting to attend the funerals of loved ones; for example, this happened to Lesley Shannon of Vancouver when she tried to mourn her mother in New Brunswick.¹⁰⁶ This discrepancy in access suggests that a job is viewed as more “essential” than family. In at least some cases, these officers were also collecting personal data from each traveler by recording the purposes of each trip. No province or territory appears to have released information about the privacy safeguards around that information – where it will be stored, for how long, and who will have access to it.

Case study: Newfoundland and Labrador

On March 20, 2020, Newfoundland and Labrador issued an emergency order that required all individuals (with some exceptions) who entered the province to self-isolate for 14 days.¹⁰⁷ One and a half months later on May 4, 2020, Newfoundland and Labrador issued another emergency order that banned anyone from entering the province, with the exception of Newfoundland and Labrador residents, certain asymptomatic workers, and exceptional cases who have been approved for travel in advance by Newfoundland and Labrador’s Chief Medical Officer of Health.¹⁰⁸

One casualty of the travel ban was Kimberley Taylor, a Halifax woman and regular visitor to Newfoundland and Labrador to call on family. Ms Taylor’s mother passed away the day before the travel ban came into effect. When she learned of her mother’s passing, she immediately attempted to apply for an exemption from the travel ban. Her initial phone calls and emails to the Newfoundland and Labrador government went unanswered. While waiting, she prepared a detailed self-isolation plan that would prevent her from encountering anyone other than immediate family once in Newfoundland and Labrador. However, the provincial government ultimately rejected her request for an exemption, denying Ms Taylor the ability to grieve with her family and to say goodbye to her mother.

<p><i>CIVIL LIBERTIES GRADING FOR NEWFOUNDLAND AND LABRADOR BORDER CLOSURES: F</i></p>

¹⁰⁴ Nunavut, Chief Public Health Officer, *Travel Restriction Order* (Public Health Order) (Nunavut Health: March 24, 2020), s. 2(1).

¹⁰⁵ Quebec, Minister of Health and Social Services, *Ministerial Order 2020-011*, (Public Health Order) (Minister of Health and Social Services: March 28, 2020).

¹⁰⁶ Sophia Harris, “Provincial border bans during COVID-19 spark lawsuits, anger from Canadians denied entry”, *CBC News* (6 June 2020), online: <<https://www.cbc.ca/news/business/n-b-p-e-i-n-l-territories-border-ban-ccla-court-challenge-1.5600235>>.

¹⁰⁷ This order has been taken down and replaced with s. 3 of the *Newfoundland and Labrador Travel Restriction Order*.

¹⁰⁸ Newfoundland and Labrador, Chief Medical Officer of Health, *Special Measures Order (Revised Order) Made pursuant to Section 28 of the Public Health and Promotion Act* (Public Health Order) (Newfoundland and Labrador Health: May 4, 2020).

Necessary:

The Newfoundland and Labrador government has failed to justify the necessity of a border closure that does not offer a self-isolation plan or other forms of adherence to public health orders as conditions for entry. When the government enacted the ban on May 4, 2020, more than two weeks had passed since a new COVID case had been reported (the province had a total of 3 deaths at the time).¹⁰⁹ It seems clear that the mandatory 14-day isolation period had been effective at controlling the virus. That the travel ban was unnecessary is made even clearer from the fact that many workers and other individuals had been travelling between Newfoundland and Labrador on one hand and Quebec and Alberta on the other in the weeks prior to the travel ban, yet no new cases had emerged.¹¹⁰

Proportionate:

The disproportionality of the travel ban is made most stark from Ms Taylor's example. As stated above, no clear benefit from an absolute travel ban has been proven, but significant lasting damage has been done to Ms Taylor – she was subject to an arbitrary government decision-making process that seemed to elevate economics (some workers allowed in) over family (barred from attending a mother's funeral). The ban would have been more proportionate if the travel ban order included an extensive and thoughtful list of exemptions that covered situations like Ms Taylor's. Instead, she was left to the mercy of a government decision-maker who did not provide any indication that their denial of her application was based on any objective standards.

Time limited:

The order was time limited in that it had to be reviewed every 5 days.

On May 20, 2020, CCLA and Ms Taylor commenced a legal challenge against the government of Newfoundland and Labrador, arguing that the travel ban was an unjustified restriction of her *Charter* mobility rights.¹¹¹ The case is ongoing.

Contact tracing and privacy

Contact tracing is the process of tracking, monitoring, and notifying persons who may have contracted an infectious disease. Contact tracing is often cited as key to containing highly infectious viruses like COVID-19 – if left unchecked, the virus will spread exponentially. If one person spreads the virus to three people they come into contact with, then those three people spread the virus to nine people, who spread it to another 27 people, and so on. Thus, it is important to identify and notify those who may have come near an infected individual so that

¹⁰⁹ “N.L. broadens testing criteria while marking full week with no new COVID-19 cases”, *CBC News* (14 May 2020), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/covid19-newfoundland-labrador-may-14-1.5569361>>.

¹¹⁰ E.g. “Trades Newfoundland and Labrador slams government for allowing out-of-province workers during pandemic”, *The Chronicle Herald* (3 May 2020), online: <<https://www.thechronicleherald.ca/business/regional-business/trades-newfoundland-and-labrador-slams-government-for-allowing-out-of-province-workers-during-pandemic-445181/>>

¹¹¹ Sean Fine, “Newfoundland faces court challenge to ban on non-essential travel from outside province”, *The Globe and Mail* (20 May 2020), online: <<https://www.theglobeandmail.com/canada/article-newfoundland-faces-court-challenge-to-ban-on-non-essential-travel-from/>>.

they can get tested. Contact tracing can be done manually – with trained human contact tracers identifying and warning anyone who has been in contact with suspected or confirmed COVID-19 carriers and providing advice and information about necessary steps including testing and self-isolation. However, since countries such as Taiwan and South Korea have used cell-phone based technology to trace the contacts of those who have contracted the coronavirus (a process known as digital, automated, or technologically-assisted contact tracing),¹¹² there have been calls for Canada to do the same.¹¹³

Privacy does not require that such technologies be avoided altogether – it is a myth that privacy and public health are incompatible, although tensions exist. However, it is highly controversial in a democracy that the state should recommend or enforce the use of a technology to effectively monitor human contacts pre-emptively. It is even more controversial for it to take place without adequate legal protections. Canada’s Privacy Commissioner, speaking to the joint statement on contact tracing his office released in collaboration with provincial and territorial counterparts, has emphasized this gap. Their guidelines deliberately go beyond the strict requirements of Canada’s privacy laws, which he believes are insufficiently up to date to provide sufficient protection for privacy if such apps are widely used) It is in that context that the Canadian debates regarding technologically-assisted contact tracing must be framed.

Privacy principles require that intrusions be necessary and proportionate, and contact tracing has ignited a debate regarding whether these applications can be either. First, there is a real debate to be had over whether technology-assisted contact tracing will work—and a reasonable level of assurance of effectiveness is important when assessing necessity. Given the significant technical challenges in proximity measurement, and the current conditions in Canada (which in many jurisdictions includes limited testing capacity at present), it is unclear whether the tracking will in fact support the public health goals as claimed. If the app registers many false positives—that is, registers a close contact for a sustained period wrongly—people will get too many notifications, which may lead to unnecessary self-isolation and ultimately, notification fatigue encouraging people to just ignore the app. If the app fails to register true instances of close contact, false negatives leave people at risk while providing a dangerous sense of security.

Empirical research also suggests that significant uptake is required to render these apps maximally helpful. Initial research from Oxford University was widely reported as saying that 60% of the population (which equates to about 80% of smart phone users) would need to participate to create strong utility, although some debate is emerging about potential utility with lower levels of uptake.¹¹⁴ In that context, the need for public trust and willingness to download the app has been a driver in many conversations about necessary privacy protections to engender that trust. It has also, more recently, seen some such as MP Nathaniel Erskine-Smith speculate

¹¹² Yasheng Huang et al, “How Digital Contact Tracing Slowed Covid-19 in East Asia”, *Harvard Business Review* (15 April 2020), online: <<https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia>>.

¹¹³ See Andrea Gunn, “Poll shows broad public support for contact tracing apps to fight COVID-19”, *The Guardian (PEI)* (8 May 2020), online: <<https://www.theguardian.pe.ca/news/canada/poll-shows-broad-public-support-for-contact-tracing-apps-to-fight-covid-19-447687/>>.

¹¹⁴ Big Data Institute, “Digital contact tracing can slow or even stop coronavirus transmission and ease us out of lockdown” (16 April 2020), online: <<https://www.bdi.ox.ac.uk/news/digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown>>.

about moving from an opt-in to an opt-out model,¹¹⁵ a move CCLA would oppose as lessening the genuine nature of voluntary consent by placing the onus on people to decide they don't want it, rather than make a deliberate choice to seek it out and download it. Other issues with uptake include the necessity to have a relatively new, expensive phone for most of these apps to run, which may mean some segments of the population would be left out of any benefits such apps might provide, if benefits were to eventually emerge.

In other countries where contact tracing apps have been in use, reports of their utility are mixed at best. In Iceland, the country who has most successfully convinced residents to install and use their contact tracing app with a 38% uptake as of the beginning of May, the person in charge of managing contact tracing for the nation has said the app helped support manual contact tracing to some degree but “wasn't a game changer for us.”¹¹⁶ In Singapore, the product lead who worked on their much-lauded TraceTogether app, explicitly warned against over-reliance on such apps, stating they are not a “panacea.”¹¹⁷

In this context then, where necessity is at least open to question, it becomes more difficult to assess whether the intrusiveness of personal information collection and use is proportionate to the benefits to individuals or society more broadly. Questions of proportionality also depend on the nature of the particular tool chosen; while people often talk about contact tracing apps as a singular concept, there is a range of competing models with varying goals, leading to a range of features that vary in security protocols, centralized or decentralized architectures and data storage and ultimately, in privacy protection. Some of these models will be discussed further below.

There are also very serious policy questions that have received insufficient consideration. If these tools are released in a policy vacuum, which fails to provide the practical supports needed for individuals asked, based on the app, to stay home from work and to get tested—including paid sick days, job protection, and financial support during a required self-isolation period—it raises risks of discrimination and will exacerbate stress and mental health impacts. Front line workers in places like grocery stores, care homes, and other service industries, who work for minimum wage with minimal job protections are particularly vulnerable to the social impacts of a badly implemented automated contact tracing regime. Statistically, women make up a larger percentage of those employed in these areas that the Centre for Policy Alternatives calls the “5 Cs”: caring, clerical, catering, cashiering and cleaning.¹¹⁸ Many front line workers are also racialized, including many newcomers to Canada, who already face greater discrimination in the job market and absent employment protections, may have more difficulty finding a new position if an app tells them one too many times to stay home from work. While there has been significant social debate on the technical details of app design, the social impacts of

¹¹⁵ Canada, Parliament, House of Commons, Standing Committee on Industry, Science, and Technology, *Minutes of Proceedings and Evidence*, 43rd Parl, 3rd Sess, No 19 (29 May 2020), online: <<https://www.ourcommons.ca/Content/Committee/431/INDU/Evidence/EV10775931/INDUEV19-E.PDF>> at 4.

¹¹⁶ Isobel Asher Hamilton, “Iceland had the most-downloaded contact-tracing app for its population size. Authorities there say it hasn't made much difference”, *Business Insider* (12 May 2020), online: <<https://www.businessinsider.com/iceland-contact-tracing-not-gamechanger-2020-5>>.

¹¹⁷ Jason Bay, “Automated contact tracing is not a coronavirus panacea” (10 April 2020), *Medium*, online: <<https://blog.gds-gov.tech/automated-contact-tracing-is-not-a-coronavirus-panacea-57fb3ce61d98>>.

¹¹⁸ Katherine Scott, “COVID-19 crisis response must address gender faultlines”, *Behind the Numbers* (20 March 2020), online: <behindthenumbers.ca/2020/03/20/covid-19-crisis-response-must-address-gender-faultlines/>.

implementing and relying on contact tracing applications, which extend far beyond privacy concerns, have been woefully underexamined and unaddressed.

CCLA spoke to these broader policy concerns as well as our specific positions in relation to contact tracing before the INDU Committee of Parliament's study of Canada's COVID-19 response.¹¹⁹

Bluetooth-based proximity tracking

Bluetooth is a widely available technology that enables phones to wirelessly exchange data with other phones in proximity. Those apps claiming the greatest privacy protections tend to combine Bluetooth to detect proximity, coupled with a decentralized approach to data storage and notification. Apple and Google have released an API (application programming interface) that allows developers to create Bluetooth-based exposure notification applications on both of their operating systems, and are offering it to public health authorities to serve as a building block in their own contact tracing applications. Ultimately this capacity will be built into both the iOS and Android operating systems (a move that brings its own privacy concerns). The Bluetooth-based apps emit random numbers that serve as anonymous identifiers that change at intervals.¹²⁰ If users of the app walk within a prescribed range of other users, their phones would exchange the numbers to create an encrypted record that is devoid of directly identifying information. If someone tests positive for COVID, they can decide whether to share their contact list which will enable other users to receive notification that they were within proximity to someone who has contracted the virus. Some variants only share these notifications peer-to-peer, while others facilitate sharing lists of contacts with public health who then follow up manually.

Advocates of a Bluetooth-based system have argued that it is superior to a centralised or GPS-based system both in terms of effectiveness and in the case of highly decentralized models, in terms of privacy.¹²¹ It is less vulnerable, so the argument goes, to government overreach because identifying information in some versions of such systems is not collected or stored (although we note that not all Bluetooth-based systems are completely decentralized and some do collect personal information, such as the Alberta app discussed in more depth below). There are also concerns however, because a pure decentralized system bypasses public health and provides notices to people through the app. This means that those who receive notice that they are at risk may not be well supported to make decisions about how to respond or what to do. The onus is placed on individuals to reach out to public health for testing and advice and assumes local public health agencies have the capacity to respond to those calls. Conversely, as Bluetooth-based apps move towards more centralised data storage with public health access, privacy concerns related to creating large stores of personal information accessible by state actors rise, as do concerns about function creep, or secondary uses for the data. Any privacy analysis of a Blue-

¹¹⁹ House of Commons, Standing Committee on Industry, Science and Technology, *Minutes of Proceedings and Evidence*, 43rd Parl, 1st Sess, No 021 (5 June 2020), online <<https://www.ourcommons.ca/DocumentViewer/en/43-1/INDU/meeting-21/evidence>>.

¹²⁰ David Ingram, "How contact tracing could use Bluetooth to track coronavirus on your smartphone" *NBC News* (20 April 2020), online: <<https://www.nbcnews.com/tech/tech-news/how-contact-tracing-could-use-bluetooth-track-coronavirus-your-smartphone-n1187796>>.

¹²¹ See Daniel Kahn Gillmor, "ACLU White Paper – Principles for Technology-Assisted Contact Tracing", *American Civil Liberties Union* (16 April 2020), online: <<https://www.aclu.org/report/aclu-white-paper-principles-technology-assisted-contact-tracing>>.

tooth based contact tracing application can only be meaningful when there is a specific application to discuss.

GPS-based proximity tracking and heat mapping

Other models of contact tracing rely on GPS data, either alone or in combination with Bluetooth beacons, to automate contact tracing. Experts agree that GPS is significantly less accurate for measuring close proximity.¹²² Coronavirus transmission is believed most likely to occur within a 2 metre radius, and global positioning system (GPS) location data is rarely that accurate - one study has found an average accuracy rate of 7 – 13 metres.¹²³ The relative inaccuracy of GPS should be evident to anyone who has tried using Google Maps near large buildings only to find their location pin bouncing erratically. The other option, cell tower location tracking, is even less accurate than GPS. China, no stranger to surveillance, investigated and rejected location-based tracking because it was too imprecise.¹²⁴

However, some contact tracing apps want to do more than just record proximity—they also want to map locations where individuals have been, so that if they are infected, it is potentially possible determine *where* they were infected. Such mapping is also discussed as a way to create “heat maps” that aggregate infection data to reveal places where many infections are occurring, either as information for public health agencies, or more broadly for public consumption. This may be useful public health information, but location data about individual’s movements while going about daily life has the potential to be significantly privacy intrusive. Adding aggregation or de-identification processes into the specifications of an app to facilitate such tracking adds a layer of technical complexity with an accompanying risk of mistakes, hacks, and in general, lower assurance of privacy for users.

A related proposal has governments acquiring location information for contact tracing directly from cellphone companies. The government would then use the location data of someone who has tested positive for the coronavirus to identify who else has come near that person. Anyone who has been contacted would then be ordered to come in for testing or potentially subject to quarantine orders. Location data could also be used to determine compliance with quarantine orders once they have been issued. This model was initially approved in Israel, to be executed by their internal security police, the Shin Bet. The Israeli Supreme Court recently sent that emergency legislation back to the drawing board, saying it did not sufficiently protect citizens’ privacy rights. Data from telecommunications companies has not been widely discussed in Canada as a means of contact tracing but did come up very early in relation to a related process, heat mapping. Very near the time Toronto declared its state of emergency in response to the pandemic, Major John Tory stated, while speaking to an audience of tech entrepreneurs, that he had asked cellphone companies to share customer location data so the city could see where Torontonians were congregating in large

¹²² Adam Schwartz & Andrew Crocker, “Governments Haven’t Shown Location Surveillance Would Help Contain COVID-19”, *EFF* (23 March 2020), online: <<https://www.eff.org/deeplinks/2020/03/governments-havent-shown-location-surveillance-would-help-contain-covid-19>>.

¹²³ Krista Merry & Pete Bettinger, “Smartphone GPS accuracy study in an urban environment”, *PLOS One* (July 18, 2019), online: <<https://journals.plos.org/plosone/article/metrics?id=10.1371/journal.pone.0219890#citedHeader>>

¹²⁴ Jennifer Valentino DeVries, “Translating a Surveillance Tool into a Virus Tracker for Democracies”, *New York Times* (19 March 2020), online: <<https://www.nytimes.com/2020/03/19/us/coronavirus-location-tracking.html>>

number, suggested other tech companies might like to give the city data they held also.¹²⁵ CCLA spoke out quickly against such privacy-invasive requests; the next day the City clarified that data sharing had not, in fact, taken place.

CCLA has been active in a range of public conversations and presentations regarding contact tracing, including conversations with Canadian groups building contact tracing apps. Our most comprehensive and formal intervention thus far has been an open letter to all of the First Ministers of Canada with a set of recommendations and general principles for data surveillance activities as part of a state response to COVID-19.¹²⁶ Proportionate contact tracing should accord with the following privacy principles. First, government contact tracing that relies on data should be a last resort. It should only be used if public health evidence demonstrates that it is necessary because traditional contact tracing cannot work effectively. The privacy-invasive aspects of the measure should be proportionate to the evidence-based public health benefit. Consent should be paramount – no one should be compelled by law to download contact tracing apps, for example. The government must also ensure that independent bodies review any such measures to provide oversight of the measures' effects on vulnerable populations, to ensure that the data is not used improperly or subject to secondary uses and is kept only for the duration of the COVID-19 emergency, and to adjudicate complaints and report them to the relevant legislative body.

Contact tracing, or other technologically facilitated means of social and behaviour monitoring and control, are no silver bullet for virus management. Canadian provinces, territories, and the federal government have generally moved cautiously and with due consideration for the significant privacy concerns that introducing such state-sanctioned surveillance creates, even in this health emergency. As of June 2020, there are indications that more provinces are nearing their own launches of contact tracing apps, and that the federal government may soon announce their preferred app, in order to encourage interoperability across provincial and territorial boundaries. There is increasingly, therefore, an urgent need for privacy impact assessments, human rights impact assessments, and significant policy conversations of those chosen applications to ensure that predictable social impacts have been anticipated and mitigated prior to any implementation of these tools.

Contact tracing in Canada: Alberta's ABTraceTogether

On May 1, 2020, Alberta launched a Bluetooth-based contact tracing app called ABTraceTogether.¹²⁷ Phones that install the app will exchange encrypted signals through Bluetooth at an “approximately” 2-metre distance.¹²⁸ If someone tested positive for COVID, they are asked if they use the app, and if so, to voluntarily upload their phone's signal encounter log to Alberta Health Services (AHS).¹²⁹ AHS then identifies the other app-installed phones that have come into contact with the infected person's phone and uses the phone number of those

¹²⁵ Murad Hemmadi, “City of Toronto gathering cellphone location data from telecoms in bid to slow spread of COVID-19: Tory”, *The Logic* (24 March 2020), online: <<https://thelogic.co/news/city-of-toronto-gathering-cellphone-location-data-from-telecoms-in-bid-to-slow-spread-of-covid-19-tory/>>.

¹²⁶ “Re: Data Surveillance Technology and COVID-19 Response in Canada” (20 April 2020) *Canadian Civil Liberties Association*, online: <<https://ccla.org/coronavirus-update-data-surveillance/>>.

¹²⁷ Emily Mertz, “Alberta launches ABTraceTogether app to improve contact tracing, fight COVID-19 spread”, *Global News* (1 May 2020), online: <<https://globalnews.ca/news/6894997/covid-19-alberta-health-contact-tracing-app/>>.

¹²⁸ Government of Alberta, ABTraceTogether FAQ (2020), online: <<https://www.alberta.ca/ab-trace-together-faq.aspx>>.

¹²⁹ *Ibid.*

users – the only personal information requested by the app – to inform them of the potential exposure.¹³⁰

CIVIL LIBERTIES GRADING FOR ABTRACETOGETHER: C

Necessary

It is not clear that ABTraceTogether is necessary or will be even effective at addressing the coronavirus crisis. Research has demonstrated that 50-60% of the population needs to download the app before it will be effective. However, in the first 3 weeks after its release, less than 5% of Alberta’s population had downloaded it.¹³¹ The likelihood of widespread uptake is compromised by the app’s practical problems – for example, 2/5s of Android users were initially unable to download the app due to operating system incompatibility.¹³²

Proportionate

ABTraceTogether’s privacy protections suggest that its designers considered proportionality. First, it incorporates voluntariness both at the point of downloading the app and uploading the signal encounter log to AHS. Additionally, the only directly identifying data that is collected is the user’s phone number. The indirectly identifying data will be more difficult (albeit not impossible) to re-identify because it comprises encrypted signals that are stored in a decentralized fashion on users’ phones.

Time-limited

AHS has not provided a time horizon for deleting the data it collects from users. Users must manually contact AHS to remove their phone number from the registry. Privacy would be better protected if the app simply deleted all the phone numbers once the public health crisis is over and contact tracing is no longer necessary. With respect to anonymized data, AHS has stated that it will continue to use the allegedly “anonymized” data for analytics;¹³³ a time horizon should also be imposed on the disposal of that data.

Ontario’s first responder bill (O Reg 120/20)

On April 3, 2020, the Ontario government issued an emergency order that allowed police, firefighters, and paramedics to access the names, addresses and dates of birth of Ontarians who have tested positive for COVID-19. According to a news release from the Office of the Ministry of the Solicitor General, the purpose of the emergency regulation was to “allow police, firefighters and paramedics to obtain COVID-19 positive status information about individuals with whom they are coming into contact.” Soon after, memos were sent to Ontario police services notifying them that the Ministry was developing an “online look-up solution” with the

¹³⁰ *Ibid.*

¹³¹ Jason Herring, “Alberta’s COVID-19 tracing app to get iPhone upgrade, but problems persist”, *Calgary Herald* (22 May 2020), online: <<https://calgaryherald.com/news/local-news/alberta-contact-tracing-app-to-get-ios-upgrade-but-many-albertans-left-unable-to-download>>.

¹³² *Ibid.*

¹³³ Alberta, Government of Alberta, *ABTraceTogether FAQ* (Website FAQ) (Government of Alberta: 2020), online: <https://www.alberta.ca/ab-trace-together-faq.aspx>

intention of making the data available to authorized users “as soon as possible.”¹³⁴ Police services boards across the province soon started to pass their own local policies to pave the way for access to the database. The week of April 13, a new database was filled with the names, addresses, and dates of birth of those who have tested positive for the virus.¹³⁵

Providing personal health information directly to law enforcement is an extraordinary invasion of privacy. Such a measure should only be taken when clearly authorized by law and absolutely necessary in the particular circumstances.¹³⁶

CIVIL LIBERTIES GRADE OF ONTARIO’S FIRST RESPONDER BILL: F

Necessary:

First, any database listing individuals who have tested positive for COVID-19 in Ontario will be underinclusive. The government currently has restrictive testing criteria, and many individuals who have COVID-19 may not have received a COVID-19 test. Police officers, like all first responders, must operate under the assumption that everyone they come into contact with is a potential active carrier. Infection control measures targeting only individuals who have tested positive for COVID-19 will be ineffective at protecting frontline workers. Universal precautions are necessary, and it is not clear what – if any – additional protective measures police officers and other first responders could or would take based on Ontario’s incomplete COVID-19 testing information.

Second, according to the regulation and government statements, the information that will be provided does not include the date that an individual tested positive. This means that outdated test results could incorrectly identify people as having COVID-19 when they have already recovered and are no longer contagious.

It is difficult to understand how first responders will effectively use testing information that is both incomplete and out of date. Indeed, there is a real risk that using this database will create a false sense of security when first responders are interacting with individuals who have not been flagged, thus serving to create rather than mitigate danger.

Proportionate:

The government has not shown how this database will be useful in responding to the pandemic. The decision to provide this information to the police has a disproportionately interferes with Ontarians’ right to privacy, disproportionately affects communities already excessively targeted for criminalization who are also at increased risk for COVID-19, and inappropriately captures individuals who do not pose any health or safety risk. The impact of sharing this information on already marginalized communities, including Indigenous and Black Canadians, is particularly significant.

¹³⁴ Ontario, Ministry of the Solicitor General, *Disclosure of COVID-19 Status Information by Laboratories and Public Health Units* (Memorandum) (Ministry of the Solicitor General: 6, 9 April 2020), online: <<http://calendar.londonpolice.ca/Meetings/Detail/2020-04-16-1130-LPSB-Meeting-April-2020/327a58bd-95e1-417b-860c-ab9f00bffb3f>>

¹³⁵ “Civil liberties group warns of ‘invasion of privacy’ after Ontario gives police COVID-19 test data”, *CBC News* (24 April 2020), online: <<https://www.cbc.ca/news/canada/toronto/ontario-covid19-data-police-1.5544272>>.

¹³⁶ *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sched A, s. 32 online: <<https://www.ontario.ca/laws/statute/04p03>>.

Time limited:

There are no time limits contained in the regulation. The regulation is also silent on how long first responders may retain the COVID status information. Thus, once collected, the information could theoretically be kept indefinitely, which renders it vulnerable to data privacy breaches.

Overreaching and Underreaching: Emergency Management and the Vulnerable

This section considers the plight of marginalized populations in Canada, including those living in state custody or who are subject to state care. Although the state owes obligations to everyone in Canada, it owes its strongest obligations to its most vulnerable persons and those under state control. Some populations in Canada are systemically vulnerable or marginalized, such as refugees, children, persons experiencing homelessness, the elderly, and members of minority groups. Members of these populations face systemic discrimination generally, and now face additional and disproportionate challenges because of COVID-19. When marginalized persons are under state care or control, their vulnerability, and the state's obligations to them, are amplified. The state should therefore pay close attention to—and make specific efforts to protect—these populations in its response to COVID-19.

Homelessness, Lack of Housing, and Unsafe Conditions in Shelters

Approximately 235,000 people in Canada experience homelessness each year, while at least 35,000 experience homelessness on any given night.¹³⁷ A disproportionate number of those experiencing homelessness are Indigenous, Black,¹³⁸ and many suffer from disabilities or chronic health conditions. COVID physical distancing laws created an impossible situation for these individuals: how do you safely stay at home when you have no home?

Governments across Canada, so eager to overreach in other areas, underreached in their duty to protect this highly vulnerable group. In Canada's largest city of Toronto, municipal homeless shelters functioned under unsafe standards that contradicted physical distancing guidelines and failed to create safe environments for shelter users, while countless hotel rooms of all kinds - including hotels on the verge of bankruptcy - and student accommodations sat empty. Out of concern regarding unsafe shelter conditions, many continue to sleep in ravines or under bridges. COVID's impact on people experiencing homelessness across Canada is still a developing situation. However, the CCLA in coalition with five other organizations acted to bring the crisis to a head in Toronto.

Case study: Unsafe homeless shelters in Toronto

¹³⁷ Stephen Gaetz et al, "The State of Homelessness in Canada 2016" (2016) *Canadian Observatory on Homeless; Canadian Alliance to End Homelessness*, online: <<https://homelesshub.ca/SOHC2016>>.

¹³⁸ Canada, Statistics Canada, *2018 Toronto Street Needs Assessment*, p.20; *2016 Census of Canada*, (Statistics Canada: 2019) online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E>> (accessed April 30, 2020).

Toronto has had a housing crisis for decades. Anywhere between 8,000 – 9,000 persons experience homelessness at a given time. They are served by a shelter system that includes shelters (63 of which are operated or overseen by the municipality),¹³⁹ respites, and drop-ins. The occupancy rates of these shelters regularly reach 100%, and program officers have described the conditions as involving people “sleeping and eating almost on top of each other”.¹⁴⁰ Over the years, disturbing pictures and videos have emerged that suggest that shelter authorities have failed to maintain sanitary conditions.¹⁴¹

When the COVID crisis escalated in Toronto in mid-March, this long-simmering problem in the shelter system was on track to become a full-blown humanitarian crisis. In late March, CCLA wrote to the city¹⁴² and shortly thereafter spoke on the issue at a socially distanced protest. By mid-April, COVID outbreaks had been reported in three shelters in Toronto, including Seaton House, the city’s largest shelter.¹⁴³ An immigration lawyer described a client inside one of the shelters as being “terrified” because “it’s overpacked and physical distancing is a complete impossibility.”¹⁴⁴

As the COVID positive cases increased, the city continued to maintain its *Shelter Standards* and *Respite Standards*, which only required beds inside homeless shelters to be 0.75 metres apart. This directly contradicted strongly worded advice and aggressively enforced regulations that compelled the general population to stay 2 metres apart.¹⁴⁵

While permanent housing solutions were still needed, the urgency of the situation demanded that at a minimum, alternatives to the overcrowded shelters should be found. For example, Halifax moved several shelter residents into hotels after reports of a COVID case in one shelter.¹⁴⁶ Similarly, at a time of increasing public pressure, the City of Toronto announced on March 30th that it had leased several hundred hotels as alternative accommodation.¹⁴⁷ Unfortunately, however, by the sixth week of Ontario’s emergency in mid-April, most of those rooms still remained empty – the municipality had been slow to move people from shelters into those rooms.¹⁴⁸

¹³⁹ City of Toronto, “About City-Operated Services” (2020), online: <<https://www.toronto.ca/community-people/community-partners/emergency-shelter-operators/about-torontos-shelter-system/see-our-shelters/>>.

¹⁴⁰ Shanifa Nasser, “‘Like a petri dish’: Advocates worry Toronto’s homeless shelters are ill-prepared for COVID-19”, *CBC News* (11 March 2020), online: <<https://www.cbc.ca/news/canada/toronto/homeless-coronavirus-canada-toronto-covid19-1.5492322>>.

¹⁴¹ E.g. *Ibid.*

¹⁴² CCLA, “Letter to John Tory on Homelessness in Toronto” (29 March 2020), online: <<https://ccla.org/coronavirus-update-toronto-homeless/>>.

¹⁴³ Liam Casey, “COVID-19 spreading among Toronto’s homeless, with 30 cases reported”, *CBC News* (14 April 2020), online: <<https://www.cbc.ca/news/canada/toronto/homeless-population-toronto-covid-19-1.5532300>>.

¹⁴⁴ *Supra* note 120.

¹⁴⁵ City of Toronto, by-law No 322-2020, *To amend Municipal Code Chapters 608 and 636 to impose emergency physical distancing regulations with respect to Parks, and Public Squares* (2 April 2020), online: <<https://www.toronto.ca/legdocs/bylaws/2020/law0322.pdf>>.

¹⁴⁶ Taryn Grant, “Halifax homeless shelter closes, residents moved into hotel due to COVID-19 case”, *CBC News* (24 April 2020), online: <<https://www.cbc.ca/news/canada/nova-scotia/halifax-homeless-shelter-covid-19-case-1.5544066>>.

¹⁴⁷ Jeff Gray & Francis Bula, “Toronto to lease hundreds of hotel rooms to ease crowding in homeless shelters”, *The Globe and Mail* (30 March 2020), online: <<https://www.theglobeandmail.com/canada/toronto/article-toronto-to-lease-hundreds-of-hotel-rooms-to-ease-crowding-in-homeless/>>.

¹⁴⁸ Omar Mosleh, “Positive COVID-19 case identified at Toronto’s Seaton House homeless shelter”, *The Toronto Star* (7 April 2020), online: <<https://www.thestar.com/news/gta/2020/04/07/positive-covid-19-case-identified-at-torontos-seaton-house-homeless-shelter.html>>.

On April 23, 2020, a coalition of non-profit organisations filed a *Charter* challenge against the City of Toronto. The coalition consisted of CCLA, the Sanctuary Ministries of Toronto, Aboriginal Legal Services, Advocacy Centre for Tenants Ontario, Black Legal Action Centre, and HIV & AIDS Legal Clinic Ontario. The coalition argued that the municipality’s failure to mandate physical distancing in its shelters violated the *Charter* rights of people experiencing homelessness to security of the person, and the rights of this population, which has a disproportionate number of individuals who are Indigenous, Black, and/or who have disabilities, to be free from discrimination under the *Charter* and the Human Rights Code. On May 19, 2020, the City reached a settlement with the Coalition, and committed to maintaining physical distancing between beds in its shelter system and providing sufficient beds to shelter clients.

The City also committed to providing regular progress reports on those obligations until it reaches and sustains compliance for two months. Several reports have been submitted to the coalition so far,¹⁴⁹ and the coalition has exercised its right under the settlement to ask questions about these reports.¹⁵⁰ The coalition will continue to monitor the situation and hold the municipality accountable to its commitments under the settlement agreement.

Essential Care Work

Essential work is done by first responders, health care workers, infrastructure workers, by workers who are essential to the provision of essential goods, and many others. The focus of this section is essential care workers and the work they do: these workers provide health and medical support, ranging from frontline doctors to client-facing workers in care homes. COVID-19 poses a special threat to these workers because, as frontline workers, they often face a considerable risk of exposure to the virus. Moreover, as care workers, they implement Canada’s evolving health policy and best healthcare practices. Essential care workers are thus often both Canada’s first line of defense against COVID and the group that faces first risk of exposure.

Essential care work can have an extraordinary impact on marginalized people. For people with disabilities, for example, care workers can open the door to social and professional life. It is therefore paramount that essential care work be done in a way that respects the civil rights and disadvantaged circumstances of both care workers and the people aided by these workers.

The following sub-sections look at COVID’s impact on civil rights in care facilities, specifically hospitals and long-term care homes.

Hospitals

As Canada’s foremost provider for emergency healthcare services, hospitals across Canada are at the center of Canada’s response to COVID. Patients, visitors, staff, and the public are all affected by hospitals’ COVID policy. Since most hospitals fall under provincial jurisdiction, the impact

¹⁴⁹ Mary-Anne Bedard, “Progress Report”, *City of Toronto* (19 May 2020), online: <https://ccla.org/cclanewsitewp-content/uploads/2020/05/Progress-Report-May-19-2020_Redacted.pdf>; Mary-Anne Bedard, “Progress Report” *City of Toronto*. (25 May 2020), online: <https://ccla.org/cclanewsitewp-content/uploads/2020/05/Progress-Report-May-25-2020-Final_Redacted.pdf>.

¹⁵⁰ *Applicants’ Questions regarding the City of Toronto’s Progress Report dated May 19, 2020 - Pursuant to the terms of the Interim Settlement Agreement dated May 15, 2020* (22 May 2020), online: <<https://ccla.org/cclanewsitewp-content/uploads/2020/05/2020-05-22-Applicants-Questions-re-Progress-Report-dated-May-19-2020-and-Attached-Appendices.pdf>>.

of COVID on civil rights in hospitals has varied by province. Tracking of the pandemic has varied by province as well, with some provinces adopting their own definitions of when a reportable “outbreak” occurs.¹⁵¹ Our guiding concerns in this section of the report are COVID’s impact on the civil rights of people in Canadian hospitals generally and on the civil rights of marginalized people.

COVID patients in hospitals should be recognised as a marginalized group. In addition to the challenges posed by their physical condition, these people are at risk of being stigmatized for their association with the virus. This stigma is exacerbated by racial prejudices: many people associate COVID with Chinese people, or people of Asian heritage more generally, and so discriminate against them on this basis.¹⁵² In a recent survey of healthcare workers in Manitoba, for example, one in five who self-identified as being of Asian heritage reported experiencing racism during the pandemic.¹⁵³

Care workers and hospital staff are also at risk of experiencing sustained physical, social, and psychological pressure. Working in the proverbial trenches, especially during a socially distant lockdown, can cause alienation and stress. Care workers in 2003 experienced this acutely during the SARS epidemic.¹⁵⁴ Studies of the SARS outbreak concluded that it “had significant psychosocial effects on hospital staff... The effects on families and lifestyle was also substantial.”¹⁵⁵ This alienation is not new. The HIV/AIDS epidemic led to systemic discrimination against persons with the disease and those who worked with them—discrimination which is now often illegal.¹⁵⁶ All of these healthcare workers’ experiences with discrimination attract *Charter* scrutiny insofar as they are a result of provincial government action and policy.

The Ontario Court of Appeal has already considered the issue of how governments might owe a duty of care to front-line healthcare workers in an epidemic. The case arose from a claim by nurses and their family members who had contracted SARS in the 2003 outbreak in Ontario.¹⁵⁷ They sued the province for damages in negligence and for breach of their rights under section 7 of the *Charter*, which enshrines the right to life, liberty, and security of the person. The court ruled that although Ontario was obliged to protect the public at large from the spread of communicable diseases, it does not owe a private law duty of care to individual residents of the province—including healthcare workers. On the *Charter* claim, the court ruled that the plaintiffs

¹⁵¹ Jennifer Yang, “Why COVID-19 outbreaks in hospitals are such a thorny issue”, *The Toronto Star* (12 May 2020), online: <<https://www.thestar.com/news/canada/2020/05/12/why-are-covid-19-outbreaks-in-hospitals-such-a-thorny-issue.html>>.

¹⁵² Robin Gill, “Asian communities across Canada report rising racist behaviour during COVID-19 crisis”, *Global News* (June 7, 2020), online: <<https://globalnews.ca/news/7033253/coronavirus-asian-racism-crisis-canada/>>.

¹⁵³ Will Reimer, “Coronavirus: CUPE survey reveals anti-Asian racism towards Manitoba health-care workers”, *Global News* (14 April 2020), online: <<https://globalnews.ca/news/6816668/cupe-survey-anti-asian-racism-manitoba-coronavirus/>>.

¹⁵⁴ Canada, National Advisory Committee on SARS and Public Health, *Learning from SARS: Renewal of Public Health in Canada* (Ottawa: Health Canada, 2003) by Commissioner David Naylor at 155: “The impact of SARS on individuals working within the health system should not be underestimated.” See also D L Reynolds et al, “Understanding, compliance and psychological impact of the SARS quarantine experience” (2007) 136:7 *Epidemiology and Infection* 997.

¹⁵⁵ Leslie A Nickell et al, “Psychosocial effects of SARS on hospital staff: survey of a large tertiary care institution” (2004) 170:5 *CMAJ* at 793.

¹⁵⁶ Richard Elliott & Jennifer Gold, “Protection against discrimination based on HIV/AIDS status in Canada: the legal framework” *HIV/AIDS Policy Law Rev* (2005) 10(1):20-31, online: <www.aidslaw.ca/site/wp-content/uploads/2013/04/DiscrProtect-Review10-1-E.pdf>.

¹⁵⁷ *Abarquez v Ontario*, 2009 ONCA 374, 95 OR (3d) 414 Sharoe JA [*Abarquez v Ontario*].

did not plead sufficient facts to support a section 7 claim.¹⁵⁸ The Court of Appeal did not, however, rule out *Charter* claims in these circumstances. Rather, it clarified that the courts would require that plaintiffs rely on a robust set of pleadings to support such a claim.

The question of what pleadings would be required to support a section 7 *Charter* claim has evolved since the Court of Appeal's decision. In *Bedford v Canada (AG)*, for example, the Supreme Court in 2013 clarified the threshold that is required to find that a section 7 right is infringed, elucidated the principles of fundamental justice, and affirmed that a section 7 violation might be saved under section 1 of the *Charter*.¹⁵⁹ Moreover, governments and hospitals' responses to COVID have evolved rapidly too. The CCLA therefore recommends that governments across Canada pay particular attention to whether their policies and emergency orders affecting hospitals are *Charter* compliant.

COVID has posed different burdens to hospitals in each province, causing access to care and to vary by province as well. Some hospitals in Saskatchewan have declared themselves free of COVID. The number of cases of COVID in British Columbia continues to decline, reducing the strain on hospitals.¹⁶⁰ Access to services nationally, however, remains uneven, especially for non-emergency services. In Montreal, there are backlogs of patients due for non-emergency services. For some patients, like those seeking orthopedic surgery, this systemic delay is utterly debilitating. One Montreal doctor commented that, "People are in pain, suffering, taking narcotics because of it... [p]eople are suffering great psychological distress, and of course, by not being mobile, you're no longer productive and can't go back to work."¹⁶¹ Anthony Dale, the president and CEO of the Ontario Hospital Association, said in May that some hospitals in Ontario were approaching one hundred percent occupancy, and that "[a] large minority of hospitals" in Ontario do not qualify under provincial government criteria to resume non-emergency procedures.¹⁶² Taken together, these disparate and evolving provincial responses to the pandemic indicate that there is still unequal access to hospital care across the country.

Despite declining numbers of new COVID cases, hospitals continue to present perilous working conditions for many of their staff. All Canadian governments should make specific efforts to replenish and maintain supplies of Personal Protective Equipment (PPE), since supply chains for PPE are vulnerable to interference and collapse.¹⁶³ Stories coming out of the United Kingdom suggest that make-shift PPE, improvised as a consequence of PPE shortages, may be insufficient to protect staff and patients in hospitals.¹⁶⁴

¹⁵⁸ *Abarquez v Ontario* at para 50. The unsupported claim was that the impugned government action was 'arbitrary' and thus not in accordance with section 7's 'principles of fundamental justice'.

¹⁵⁹ 2013 SCC 72.

¹⁶⁰ Liam Britten, "For 5th day in a row, no COVID-19-related deaths in B.C.", *CBC News* (10 June 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/bc-coronavirus-covid-19-update-cases-june-10-1.5607053>>.

¹⁶¹ Matt Gilmour & Selena Ross, "Surgeries resume without longer waits, and doctors warn of fallout", *CTV News* (22 May 2020), online: <<https://montreal.ctvnews.ca/surgeries-resume-with-much-longer-waits-and-doctors-warn-of-fallout-1.4951419>>.

¹⁶² Mike Crawley, "Ontario's hospitals are filling up, hampering the resumption of surgeries", *CBC News* (23 May 2020), online: <<https://www.cbc.ca/news/canada/toronto/covid-19-ontario-hospitals-elective-surgeries-1.5581177>>.

¹⁶³ Ryan Flanagan, "With some provinces reopening, where does Canada's PPE supply chain stand?", *CTV News* (3 May 2020), online: <<https://www.ctvnews.ca/health/coronavirus/with-some-provinces-reopening-where-does-canada-s-ppe-supply-chain-stand-1.4922887>>.

¹⁶⁴ David Gilbert, "These Nurses Had to Wear Trash Bags as PPE, Now They Have Coronavirus", *VICE* (9 April 2020), online: <https://www.vice.com/en_ca/article/dygbdz/these-nurses-had-to-wear-trash-bags-as-ppe-now-they-have-coronavirus>.

Long-term Care Homes

The pandemic has had an extraordinary and catastrophic impact on elderly people in Canadian long-term care homes. Long-term care homes are uniquely vulnerable to COVID-19: people in care homes are vulnerable to the worst effects of the virus due to residents' age and comorbidities, there is little opportunity to quarantine many residents, and low standards of care prevail in many facilities.¹⁶⁵ Of the many disasters wrought by COVID-19 in Canada, its impact on elderly people in care homes is perhaps the most devastating. Both in Canada and around the world, watchdogs and elected leaders are asking: why has COVID devastated care homes and why was more not done to prevent it?

Some government responses to COVID have certainly led to more death in care homes. Pinched by new policies limiting hospitals' capacity, many elderly people in Canadian long-term care homes were discouraged or prevented from visiting hospitals.¹⁶⁶ This policy was lethal for many residents: people with COVID in care homes received far less attention in their understaffed facilities, while beds remained empty at nearby hospitals. The Globe and Mail reported,

'There's a lot of age discrimination. There's this presumption that, well, everybody in long-term care is there to die,' said Jane Meadus, a lawyer with the Advocacy Centre for the Elderly in Toronto. 'Of course, that doesn't deal with the fact that, had they moved people out [of nursing homes] when they became aware they were COVID-positive, they might have been able to slow or stop the infections from continuing through the homes.'

An estimated 80 per cent of the Canadians who've died of COVID-19 have been residents of seniors' facilities, according to the Public Health Agency of Canada.¹⁶⁷

Governments and decisionmakers across Canada should therefore understand the pandemic as having a discriminatory effect on elderly persons' civil and human rights. Moreover, Canadians may reasonably view government *failures* to respond to the pandemic as discriminatory failures to protect its elderly population. Given other countries' experiences with COVID, Canadian governments should have anticipated how COVID would devastate care homes and Canada's elderly people.¹⁶⁸

The pandemic has also caused social harms to the elderly: many care homes have limited visitors' access during the pandemic, as well as limited activities for residents. These barriers deny residents essential human contact and personal care. The extent to which this care is 'essential' is difficult to overstate. Elderly persons in long-term care sometimes have no other social contact besides visits by family and friends. Persons with serious conditions, like dementia, often have no better caregivers than their close family. Their presence cannot be replaced by remote care or mere contact over the phone. Denying residents access to visitors can

¹⁶⁵ Adam Carter, "Military report reveals what sector has long known: Ontario's nursing homes are in trouble", *CBC News* (27 May 2020), online: <<https://www.cbc.ca/news/canada/toronto/military-long-term-care-home-report-covid-ontario-1.5585844>>.

¹⁶⁶ Kelly Grant & Tu Thanh Ha, "How shoring up hospitals for COVID-19 contributed to Canada's long-term care crisis", *The Globe and Mail* (20 May 2020), online: <<https://www.theglobeandmail.com/canada/article-how-shoring-up-hospitals-for-covid-19-contributed-to-canadas-long/>>.

¹⁶⁷ *Ibid.*

¹⁶⁸ M J Cummings et al, "Epidemiology, clinical course, and outcomes of critically ill adults with COVID-19 in New York City: a prospective cohort study" (2020) 395:10239 *The Lancet* 1763. DOI: doi.org/10.1016/S0140-6736(20)31189-2.

thus deny them the better part of their social and psychological support. All of the challenges are further aggravated by many care homes' chronic staffing shortages.

The virus' impact on Canadian care homes has varied by region.¹⁶⁹ In Ontario and Quebec, where facilities are chronically under-resourced, the military was deployed to provide assistance. Troops found many residents malnourished and uncared for, in clear violation of safety protocols.¹⁷⁰ Prime Minister Trudeau rightly described reports of this situation "deeply disturbing" and called for better support for Canada's elderly population. British Columbia and other provinces have largely contained the outbreak among care homes. Despite this, low standards of care across Canada are a systemic problem. No province or territory is meeting the benchmark standard of 4.1 hours of hands-on care per day.¹⁷¹

Jails, prisons, and immigration detention facilities

COVID-19 swept through some Canadian prisons because staff and prisoners' proximity rarely permits physical distancing. In the federal Mission Medium Institution in British Columbia, for example, 120 inmates tested positive for COVID-19. As of June 12th, one inmate at the facility had died and all other inmates had 'recovered'.¹⁷²

Prisons across the country have taken some steps to protect inmates from COVID-19 infection, including increased cleaning, additional hygiene supplies, cancelling programs and visits and lockdowns. Physical distancing, the primary public health recommendation to slow the spread of the pandemic and protect the health and lives of Canadians, is only possible if correctional authorities prioritize community supervision. Manitoba's population of adult jailed people, for example, has fallen by almost thirty percent, to its lowest level in a decade.¹⁷³ Ontario has similarly released nearly a quarter of its jailed population.¹⁷⁴ The Correctional Service of Canada, however, has not demonstrated any meaningful increase in community supervision.¹⁷⁵

In May, CCLA joined with a coalition of public interest groups and one prisoner to file an application in federal court alleging that the Correctional Service of Canada had failed to take sufficient steps to keep prisoners safe.¹⁷⁶ The legal claim also asks the court to find that extended, indefinite lockdowns that are indistinguishable from solitary confinement constitute

¹⁶⁹ Kathleen Harris & Ashley Burke, "The long-term care crisis: How B.C. controlled COVID-19 while Ontario, Quebec face disaster", *CBC News* (28 May 2020), online: <<https://www.cbc.ca/news/politics/long-term-care-crisis-covid19-pandemic-1.5589097>>.

¹⁷⁰ Leyland Cecco, "Canada: neglected residents and rotten food found at care homes hit by Covid-19", *The Guardian* (26 May 2020), online: <<https://www.theguardian.com/world/2020/may/26/canada-care-homes-military-report-coronavirus>>.

¹⁷¹ House of Commons, Standing Committee on Health, Evidence, 43rd Parliament, 1st Sess, No 017 (5 May 2020), online: <<https://www.ourcommons.ca/DocumentViewer/en/43-1/HESA/meeting-17/evidence>>.

¹⁷² Available data only describes inmates as 'recovered' but does not record whether they suffered lasting side-effects from the virus.

¹⁷³ Kristin Annable, "Number of inmates in Manitoba jails drops by almost 30% in wake of COVID-19 pandemic", *CBC News* (7 May 2020), online: <<https://www.cbc.ca/news/canada/manitoba/manitoba-jails-inmates-numbers-down-coronavirus-1.5558238>>.

¹⁷⁴ "More than 2,000 inmates released, 6 COVID-19 cases confirmed inside Ontario jails", *CBC News* (9 April 2020), online: <<https://www.cbc.ca/news/canada/toronto/ontario-jails-coronavirus-1.5527677>>.

¹⁷⁵ https://www.vice.com/en_ca/article/ep44aa/justin-trudeau-canada-has-failed-to-protect-inmates-from-pandemic-lawsuit-alleges.

¹⁷⁶ See Liam Casey, "Coronavirus: Prisoner, human rights groups file lawsuit over federal inmates' safety", *Global News* (12 May 2020), online: <<https://globalnews.ca/news/6933013/coronavirus-lawsuit-federal-inmates-safety/>> and see also Amanda Jerome, "Legal groups file Charter challenge against government to protect federal inmates", *The Lawyers Daily* (19 May 2020), online: <<https://www.thelawyersdaily.ca/articles/19081/legal-groups-file-charter-challenge-against-government-to-protect-federal-inmates>>.

cruel and unusual punishment contrary to the *Charter*. There have also been class action lawsuits launched in Quebec and British Columbia. The Quebec class action, for example, argues that officials acted too slowly in establishing proper protective measures in carceral institutions.¹⁷⁷

Stories from across the country indicate that Canadian correctional facilities were unprepared for COVID-19 and that prisoners, staff, and public health are all at risk as a consequence. Civil rights groups are already challenging governments' responses to COVID as a breach of inmates' *Charter* rights.¹⁷⁸

Immigration detention centers are another frontline in the COVID crisis. Foreign nationals and permanent residents may be detained by the Canada Border Services Agency at immigration detention facilities throughout Canada. Immigration detainees are held on non-criminal grounds and the vast majority are not a safety risk. There is no reason to hold people in close quarters during a pandemic when they pose no security risk. The CCLA therefore applauds the federal government's goal of reducing the number of people held in detention, especially since many detained persons are not held in designated Immigration Holding Centers, but are instead kept in jails.¹⁷⁹ This effort follows the government's reduction of the average time spent in detention centers by more than 35% since 2012, down to a median of 1 day.¹⁸⁰

The CCLA is concerned, however, about the way and speed at which detainees have been released since the pandemic began. In March, people detained at Laval Immigration Holding Centre launched a hunger strike to protest what they considered unsafe conditions during the pandemic. Since then, most of the protesters were released, but there are reports of detained persons now being monitored the Canada Border Services Agency (CBSA) with tracking bracelets. These bracelets are an extraordinary surveillance tool that infringes on these people's privacy and autonomy.¹⁸¹ The CBSA has not demonstrated that these tools are necessary to monitor people released from detention. Moreover, although the CBSA describes these bracelets as a "temporary" measure, the CCLA is concerned that they may be permanently adopted by the CBSA.

Children's rights and domestic violence

The pandemic has had a negative impact on children across Canada. Lockdown and emergency orders have closed schools, daycares, libraries, shelters, community centres, eliminated after-school programming, and isolated children in the home. These closures have put extraordinary pressure on many families and people living in shared spaces. Incidents of domestic violence

¹⁷⁷ Amy Smart, "B.C. rally calls for safe release of prisoners due to COVID-19 outbreak", *CBC News* (3 May 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/b-c-rally-calls-for-safe-release-of-prisoners-due-to-covid-19-outbreak-1.5554114>>.

¹⁷⁸ Jamie Pashagumskum, "Coalition of civil rights groups file constitutional challenge over handling of inmates during pandemic", *APTN News* (13 May 2020), online: <<https://www.aptnnews.ca/national-news/coalition-of-civil-rights-groups-file-constitutional-challenge-over-handling-of-inmates-during-pandemic/>>.

¹⁷⁹ Rachel Browne, "Canada is releasing immigration detainees at 'unprecedented' rates amid COVID-19 fears", *Global News* (25 April 2020), online: <<https://globalnews.ca/news/6861756/canada-releasing-immigration-detainees-coronavirus-covid-19/>>.

¹⁸⁰ Canada Border Services Agency, *Annual Detention Statistics 2012-2019*, online: <<https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html>>.

¹⁸¹ Selena Ross, "Some migrants now tracked with ankle bracelets as pandemic 'temporary measure'", *CTV News* (28 May 2020), online: <<https://montreal.ctvnews.ca/some-migrants-now-tracked-with-ankle-bracelets-as-pandemic-temporary-measure-1.4959851>>.

have increased since the lockdowns began.¹⁸² Victims of abuse are compelled to remain in quarantine and lockdown with their abusers, with reduced access to family courts and mediation services. Financial instability and insecure employment have added additional stress for many as well.¹⁸³

While many people face these challenges, they place a special burden on women and children. Children are often not equipped to manage new and stressful family dynamics. Women are disproportionately victims of domestic violence. The prospect of an indefinite lockdown is a nightmare for people trapped with their abusers.

In response to the crisis, the federal government has pledged \$40 million to support survivors of domestic violence. It is unclear, however, how these funds will be distributed or the timeline for their distribution. Governments across Canada should consider lockdowns a threat to children's right to education. Education is a human right.¹⁸⁴ As a signatory of the UN Convention on the Rights of the Child, Canada has an obligation to ensure children in Canada have access to education. This is especially true in a crisis, where children's access to educational resources may vary with their family income. Families with more resources may be able to provide for their children's education in ways that poorer families cannot. This disparate access to education is antithetical to Canada's commitment to the rights of children to be educated.

Some schoolboards have been addressing access to education issues through novel public-private partnerships, and all have moved to some form of technologically mediated programming. This rapid and unplanned shift to facilitated online education raises significant privacy issues for students, parents, and teachers.¹⁸⁵ Synchronous online learning may give teachers an unprecedented window into the homes of their students and vice versa. Policy meant to regulate this relationship has been inconsistent at best. Spending more time online also poses questions about these services' terms of use including the amount of information collected about students. Given that this technology is new to most students, teachers, and parents, it is no surprise that many are likely unfamiliar with the technologies' potential impact on their privacy. Boards struggled to fill that gap. In Ontario, for example, as of May 2020, only 17 of 65 English language school boards provided some guidance for teachers or families on privacy precautions to consider in an online learning environment.

Lockdowns also threaten children's access to their families and caregivers. Under both Canadian and international law, questions about who may access a child and how that access is realised must be answered with respect to the best interests of the child. This is common in the family

¹⁸² Molly Hayes, "At least nine women and girls killed in domestic homicides in Canada during pandemic", *The Globe and Mail* (13 May 2020), online: <<https://www.theglobeandmail.com/canada/article-at-least-nine-women-and-girls-killed-in-domestic-homicides-in-canada/>>. See: "'Since the pandemic struck, front-line service organizations have noted a surge in requests for help from women and children experiencing and fleeing violence,' Ms. Baril said. 'There is an estimated [20-per-cent] to 30-per-cent increase in domestic violence, calls to shelters and demand on the [gender-based violence] sector, mirroring recent trends in China, France, Cyprus, Singapore, the United Kingdom and the United States.'"

¹⁸³ Gabriela Panza-Beltrandi, "Domestic violence, mental health calls up, violent crimes down amid pandemic: Saskatoon police", *Global News* (20 May 2020), online: <<https://globalnews.ca/news/6965985/domestic-violence-mental-health-calls-up-saskatoon-police-covid-19-coronavirus/>>.

¹⁸⁴ Sajal Lahiri, "A Child's Right to Education: What Can the International Community Do?" (2019) *Q J of Int Law* 165, 2019 CanLIIDocs 3737, online: <www.canlii.org/t/spsl>.

¹⁸⁵ See e.g. Rogers/TDSB project, "Helping Ontario students in need access online learning during COVID-19 pandemic", *Rogers* (17 April 2020), online: <<https://about.rogers.com/news-ideas/helping-ontario-students-in-need-access-online-learning-during-covid-19-pandemic/>>.

law contexts, where separated parents must negotiate each other's interests and capacity. The pandemic, however, risks reorienting disputes about access around the pandemic, rather than the best interests of the child. The CCLA has therefore called on children's aid and welfare societies to observe the fundamental principle that issues of access must be resolved in accordance with the best interests of the child.

Canada's Civil Liberties Forecast for the Pandemic

This report provides a qualitative assessment of COVID's most salient impacts on civil liberties and human rights in Canada. Many issues that bear on civil liberties, directly or indirectly, were not considered in detail in this report. This section highlights a few that the CCLA considers ongoing or upcoming risks to civil liberties in Canada—fires that could burn out of control.

The death of civil liberties by a thousand cuts

The pandemic has led to a thousand impositions on civil liberties that might feel minor alone, but which taken together represent an extraordinary change to civil liberties in Canada. These include mandatory masks and temperature tests in some private sector settings including retail outlets and large workplaces, limited access to public spaces, attempts to halt drive-in religious services, and new government limits on "misinformation". Each of these constrain freedoms in what some might consider small ways. But taken together, they indicate a major shift in Canada towards a more designated, circumscribed, and government-ordered way of doing things.

As the crisis progresses, CCLA will monitor what it sees as the shifting frontlines in the fight for civil liberties. Civil society should be on the lookout in the coming months for trends like diminishing workplace privacy. For out-of-home workers this might mean more surveillance in the workplace or employers demanding to know more about their workers' health. For stay-at-home workers, this could include remote access and surveillance of home computers. Public spaces may also grow more fraught, especially if jurisdictions begin to pursue so-called "immunity passports", which would enable individuals to travel or to return to work on the questionable assumption that they are protected against re-infection. So far, public discourse about immunity passports has largely neglected mobility rights under the guise of 'opening up' the economy and expanding mobility.

Governments should also be mindful of how the law in a crisis can become both more salient and less knowable. People across Canada hear about new laws, policies, and emergency regulations every day. But this news is often not well understood and can quickly go out of date. Yesterday's ticketing laws might be repealed tomorrow and rules to do with when to wear masks can seem arbitrary—and when a suggestion becomes a law is not always explicit or clear in public pronouncements. Governments must endeavor to ensure that Canada's laws remain knowable to everyone.

Refugees in a global pandemic

The world refugee crisis predates COVID. Millions of persons are forcibly displaced every year by war, domestic violence, homophobia, and other crises. Refugees have a right to seek safety and Canada has a legal and moral obligation to do its utmost to provide them safe harbour. In

response to COVID, however, the federal government enacted emergency measures to dramatically reduce the rate at which refugees are resettled in Canada.¹⁸⁶ This subject could be a report unto itself. Refugees' rights to safe haven are fundamental principles of both Canadian and international law. As the pandemic continues, Canadian governments should remain mindful of how the global crisis impacts refugees and other displaced persons. There is always a risk that a reactionary government might try to permanently close Canada's doors to refugees.

¹⁸⁶ See Immigration, Refugees, and Citizenship Canada, "COVID-19 Temporary Emergency Measures for Refugee Claims" (20 March 2020), online: <https://ccrweb.ca/sites/ccrweb.ca/files/covid_inland_claims_notice_en.pdf>.

Conclusion: Preventing a Second Wave of Civil Liberties Violations

Civil liberties are not an afterthought or luxury to be lost in the fog of emergency management. They are the guideposts and limits of legislative and governmental action. The *Charter of Rights and Freedoms* applies always, in good and bad times. The Constitution is the supreme law of the land, and as such is more, not less important during an emergency. Reasonable limits upon those rights will be judged in its context, varying on the degree of compliance that can be expected, depending on the state of the pandemic or other emergency. The notwithstanding clause remains available, albeit not for all rights (like mobility rights), to permit the rule of law to operate, pursuant to the process set out in the *Constitution Act, 1982*. We would rather it never be used, of course, but even worse is willful blindness to the Constitution by people in power.

At the time of writing, governments across Canada have begun to wind down their COVID-19 measures after successfully flattening the curve of the virus, although emergency measures remain active in most jurisdictions. Provinces such as Manitoba and British Columbia had relative success in limiting the spread of the virus and have begun to reopen their economies. Some territories saw few to no COVID infections. Viral outbreaks, however, often come in waves. Government responses to a second wave of infection may also lead to a second wave of human rights violations. Moreover, all constrictions of our civil liberties must be removed as soon as possible. They cannot be permitted to persist after the emergency.

The health of our society is not measured merely in empirical, physiological terms. Our civil liberties were infringed like never before, during COVID, leaving us all less well, a collective sense of grave unease unknown to most Canadians alive today. “Live Free or Die”, an American border state’s motto, was not Canada’s, to be sure. More like: Live Without Freedom, or Die of COVID. Both mottos are obviously hyperbolic and rhetorical. But we cannot pretend anymore that there is some elusive balance between civil liberties and public health to be found. Our civil liberties inform our public health, as much as antibody levels and body temperature. That China may enjoy a lower COVID infection rate today does not make it a society healthier than Canada, whose residents are legally entitled to enjoy freedoms unknown to that state.

No longer can Canadian governments omit the protection of civil liberties in their emergency management governance and practice. In the spring of fear, as each emergency order went out in response to COVID, civil society NGOs and other advocates sounded the alarm: the government was overreaching, neglecting vulnerable populations, and not following the law. General and specific recommendations from CCLA are forthcoming but for now we decided it better to release our report on the facts and law, and our assessment of emergency management from a civil liberties perspective. Stay tuned. A second wave is coming.

Appendix – Emergency Measures by Province and Territory as of August 7, 2020

The following table is a list of emergency measures, divided by province and territory. It is not intended to be a comprehensive list of emergency orders, which has been collated elsewhere. It is designed to highlight three classifications of orders that have had the most impact on civil liberties: restrictions on gatherings, business closures, and travel restrictions. Citations can be found at the bottom of the table.

	Closures	Gatherings	Travel	Other
AB	<u>Almost all businesses open, except high-risk ones such as buffet-style restaurants, amusement parks, and nightclubs</u> <i>July 17, 2020</i>	<u>Up to 50 persons may attend an indoor event, 100 for most types of outdoor events, and 200 for special outdoor events such as concerts</u> <i>June 12, 2020</i>	<u>Persons who travelled outside of Canada or were in close contact with someone with COVID must self-isolate for 14 days</u> <i>March 25, 2020 – no expiry</i>	<u>Alberta’s Minister for Health can compel healthcare facilities to disclose personal information about workers in healthcare facilities to ensure that they only work in one facility</u> <i>April 16th, 2020 – Aug 14th, 2020</i> <u>Alberta’s public health authority is authorized to share an individual’s COVID-19 status if that individual “deliberately tried to expose an officer to droplets by coughing or spitting at the officer and indicating they were COVID-19 positive.”</u> <i>May 4th, 2020 – August 14th, 2020</i> <u>Bill 13 comes into force, giving police enhanced authority and allowing the Government of Alberta to supersede municipal authorities’ actions</u> <i>May 12th, 2020</i>
BC	<u>Restaurants, coffee shops, cafes, pubs, bars, clubs, lounges and etc. may operate with restrictions</u> <i>July 31, 2020 – No Expiry</i>	<u>Up to 50 patrons may attend an event if conditions are met, a maximum of 5 individuals may attend a social gathering or an event in vacation accommodation</u> <i>July 27, 2020 – No Expiry</i>	<u>Persons who travelled outside of Canada and returned on or after March 12 must self-isolate, with limited exceptions for workers in essential services</u> <i>March 12th, 2020 – no expiry</i>	<u>Enforcement officers can issue \$2,000 tickets for price gouging or resale of essential supplies</u> <i>April 20, 2020 – no expiry</i> <u>BC extends temporary ministerial order to continue to allow healthcare workers and other public sector staff to use tools not normally permitted for use during state of emergency</u> <i>June 5, 2020 – Dec. 31, 2020</i> <u>BC introduces COVID-19 Related Measures Act, which will allow for provisions created for citizens and businesses in response to pandemic to be formalized/unwound after state of emergency ends</u> <i>June 23, 2020</i> <u>Temporary layoff provisions for workers, employers extended</u> <i>June 26, 2020 – August 30, 2020</i>
MB	<u>All businesses permitted to open, with some restrictions such as restaurants cannot offer buffet-style food</u> <i>June 25th 2020</i>	<u>Up to 50 people for indoor premises and 100 for outdoor areas, providing social distancing measures are in place.</u> <i>June 25th, 2020</i>	<u>All those entering Manitoba must self-isolate, with exceptions including those from Western Canada and Northwestern Ontario</u> <i>July 24, 2020</i>	<u>Penalties for violating public health orders announced, and enforcement by police and bylaw officers authorized.</u> <i>April 9th, 2020 – no expiry</i> <u>Manitoba’s Minister for Health can compel healthcare facilities to disclose personal information about workers in healthcare facilities to ensure that they only work in one facility</u> <i>May 1st, 2020 – no expiry</i> <u>Provincial officials such as health inspectors and park patrol officers granted authority to enforce emergency orders</u> <i>May 14th, 2020 – no expiry</i>
NB	<u>Most businesses permitted to open, albeit with distancing restrictions</u> <i>August 6, 2020</i>	<u>Gatherings will be limited to 50 people with physical distancing</u> <i>August 6, 2020</i>	<u>Non-essential travel into NB from outside of the Atlantic provinces and some parts of Quebec is restricted; those who are allowed in must self-isolate</u> <i>August 6, 2020</i>	

NL	<u>Most businesses permitted to open, albeit with distancing restrictions</u> <i>June 24, 2020</i>	<u>Gatherings of up to 50 persons allowed with physical distancing</u> <i>June 24, 2020</i>	<u>Non-essential travel into NL from outside of Atlantic Canada or Canada is restricted; those who are allowed in must self-isolate</u> <i>August 7, 2020</i>	
NU	<u>All businesses can re-open with restrictions (e.g. no group sessions at museums)</u> <i>July 20, 2020</i>	<u>Indoor gatherings of 10 allowed, outdoor gatherings of up to 50 will be allowed with physical distancing.</u> <i>June 29th, 2020</i>	<u>Anyone travelling to Nunavut by air must have authorization by Nunavut public health. Before entry, travellers must undergo self-isolation in Ottawa, Winnipeg, Edmonton, or Yellowknife. Those who were recently in NWT and Churchill, MB are exempt from self-isolation requirements.</u> <i>July 13, 2020</i>	
NS	<u>Almost all businesses can re-open if they can observe physical distancing, with exceptions such as residential summer camps</u> <i>July 31st, 2020</i>	<u>Social distancing must be maintained; maximum gathering size is 50, except special events such as weddings or festivals held by a business, where the maximum sizes are 200 (indoor) or 250 (outdoor)</u> <i>July 31st, 2020</i>	<u>Non-essential travel into NS from outside of Atlantic Canada or Canada is restricted; those who are allowed in must self-isolate</u> <i>July 31st, 2020</i>	<u>Masks must be worn in public</u> <i>July 31st, 2020</i>
NWT	<u>Numerous businesses can open such as bars, lounges, and restaurants, although with a max capacity of 25; festivals still not permitted</u> <i>June 12th, 2020</i>	<u>Indoor gatherings can go up to 25, outdoor gatherings up to 50</u> <i>June 12th, 2020</i>	<u>Those entering the NWT from places other than Nunavut must self-isolate in four specific urban centres</u> <i>March 21, 2020 – no expiry</i>	
ON	<u>Almost all businesses open, except high-risk ones such as buffet-style restaurants, amusement parks, and residential camps</u> <i>July 17, 2020</i>	<u>Rules for areas in stage 3: Any event is not permitted to exceed 50 persons (if indoor) or 100 persons (if outdoor) (and this includes in-person teaching), etc.</u> <i>July 31, 2020</i>	<u>Persons who travelled outside of Canada and returned on or after March 12 must self-isolate, with limited exceptions for workers in essential services</u> <i>March 12th, 2020 – no expiry</i>	<u>Persons charged with violating an emergency order must identify themselves to officers as defined under the provincial offences act, which includes by-law enforcement officers.</u> <i>March 31st, 2020 – no expiry</i> <u>The provincial government can install new management at long-term care homes on a temporary basis</u> <i>May 12th, 2020 – no expiry</i> <u>Prohibition on certain persons charging unconscionable prices for sales of necessary goods</u> <i>July 15, 2020</i> <u>Bill 195 comes into force – State of emergency is over but certain orders are continued under the COVID-19 emergency legislation for one year</u> <i>July 24, 2020</i> <u>Toronto makes masks or face coverings mandatory in enclosed public spaces</u> <i>June 30, 2020 – Expires Sept. 30, 2020 unless extended by Council</i>
PEI	<u>Many businesses, including retail outlets and personal service establishments, can reopen, with social distancing precautions.</u>	<u>Gatherings will be limited to no more than 15 people indoors and 20 people outdoors</u> <i>Starting June 1st, 2020</i>	<u>Non-essential travel into PEI from outside Atlantic Canada is restricted, although with exceptions. Those who are allowed in must self-isolate</u> <i>July 27, 2020</i>	

	<p><u>Starting May 22nd</u> <u>Indoor dining will be permitted with a maximum seating capacity of 50 patrons indoors, no maximum outdoors.</u> <u>Starting June 1st</u></p>			
QC	<p><u>All sectors re-opened except residential summer camps</u> <u>August 5, 2020</u></p>	<p><u>Outdoor gatherings of up to ten people from a maximum of three households permitted, provided social distancing is observed</u> <u>Starting May 22nd, 2020</u> <u>Between 1-2m of physical distancing required, depending on context; 10-person maximum in a private residence, tourist homes; not more than 10 seated at a table; minimum distance of 1.5 meters in classrooms, etc.</u> <u>June 25, 2020</u> <u>Gatherings of more than 250 people in an outdoor public space are prohibited</u> <u>August 5, 2020</u></p>	<p><u>Checkpoints limiting non-essential travel and self-isolation in place for those entering Nunavik and Cree territory of James Bay</u> <u>May 21, 2020</u></p>	<p><u>Foreign students will be allowed to stay past the expiry of their permit to complete studies.</u> <u>From April 30th, 2020 – December 31st, 2020</u> <u>Government of Quebec announced it will be mandatory for people over 12 years of age to wear face masks on public transport</u> <u>July 13, 2020</u> <u>SAQ customers must wear a face covering when entering a branch</u> <u>July 18, 2020</u> <u>Shared transportation service operators are prohibited from admitting a person who is not wearing a face covering (with exceptions)</u> <u>July 22, 2020</u></p>
SK	<p><u>Most businesses are open but must observe physical distancing</u> <u>June 22</u></p>	<p><u>Not more than 30 people, with exceptions for workplaces with multiple rooms, businesses and essential services</u> <u>July 28, 2020</u></p>		
YK	<p><u>Most businesses are open, restaurants can offer full dine-in services if physical distancing can be maintained</u> <u>August 1, 2020</u></p>	<p><u>Indoor events of up to 50, outdoor events of up to 100</u> <u>August 1, 2020</u></p>	<p><u>All Canadian residents can enter, but those not from BC or the territories must self-isolate for 14 days on arrival</u> <u>August 1, 2020</u></p>	