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Immigration Detention in the Age of COVID-19

Efrat Arbel and Molly Joeck*

Draft

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Introduction

The swift global spread of COVID-19 in March 2020 disrupted almost every aspect of life in Canada, and immigration detention was no exception. In response to the pandemic, there was an immediate outcry from advocates about the particular vulnerabilities faced by detainees. The World Health Organization raised the alarm, warning that “people in prisons and other places of detention” are more vulnerable to the risk of infection, and that such places “may act as a course of infection amplification” for the spread of disease.¹ Managing COVID-19 within prisons and places of detention, the World Health Organization cautioned, is a matter of public health.² By 19 March 2020, immigration detainees in Canada had presented a petition for release in the face of the pandemic to government officials.³ Detainees at the Laval Immigration Center held a hunger strike.⁴ “We felt abandoned”, one detainee told Human Rights Watch.⁵ “We heard about the new measures that were being taken, like social distancing. But nothing changed for us in detention; it was like those measures were not meant for us, just for Canadians”.⁶ Indeed, for the most part, immigration detainees were unable to engage in social distancing measures or other recommended measures for minimizing the risk of transmission. In Canada, many immigration

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¹ World Health Organization (15 March 2020) ‘Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Internal Guidance’ <http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf>.

² *Ibid.*

³ Solidarity Across Borders (24 March 2020) ‘Communiqué from prisoners in the Laval Immigration Holding Centre: Hunger-strike until we are free’ <www.solidarityacrossborders.org/en/communique-from-prisoners-in-the-laval-immigration-holding-centre-hunger-strike-until-we-are-free>. For a copy of the petition, see: <https://drive.google.com/file/d/1a6mUOnLCQp0P9P7perYSXEtQkzH2E8Bv/view>

⁴ *Ibid.*

⁵ Human Rights Watch (7 April 2020) ‘Immigration Detainees in Canada Desperate for Release, Transparency’ <www.hrw.org/news/2020/04/07/immigration-detainees-canada-desperate-release-transparency>.

⁶ *Ibid.*

detainees are held in provincial prisons where they are double-bunked and herded into prison canteens on a daily basis with hundreds of other inmates who are serving criminal sentences or awaiting trial.

A severe outbreak of COVID-19 at a medium security federal correctional facility in British Columbia in April 2020 brought the risks posed by COVID-19 into stark relief, by demonstrating the rapidity with which the virus spreads within confinement facilities.⁷ Chief Public Health Officer Dr. Theresa Tam warned that infections in correctional facilities were “very concerning” because of their potential to spread fast, with “grave consequences” for those vulnerable populations.⁸ Public Safety Minister Bill Blair instructed the leadership of the Correctional Service of Canada and the Parole Board of Canada to develop early release mechanisms so as to mitigate the impact of COVID-19 on prison populations.⁹ According to Canada Border Services Agency (CBSA) data, the total number of immigration detainees in Canada dropped by more than half, from 333 to 127, between 15 March 2020 and 28 April 2020.¹⁰

Despite the seriousness of the pandemic, immigration detainees had limited options through which to advocate for their own release. The legal framework requires detainees to seek release in the course of regularly scheduled detention review hearings before the Immigration Division (ID) of the Immigration and Refugee Board, the independent, quasi-judicial administrative tribunal tasked with detention-related decision-making in Canada. But the review hearings are in many ways rigged against detainees. The ID hearings are structured such that detainees face a myriad of barriers to effective participation, including ineffective active adjudication by ID members, the failure of decisionmakers to decide afresh at each hearing, rigid interpretive practice, and a rushed, perfunctory process (IRB 2018, [7, 11-17, 19-23, 26-30, 37]). Most significantly for our analysis here, the ID has very limited jurisdiction to consider the location or conditions of detention (*Canada v Chhina* 2019, [57]; *Toure v Canada* 2018, [72]; *Brown v Canada* 2017, [138]). In the result, detainees are effectively precluded from raising concerns where conditions of confinement pose a threat to their safety or wellbeing. With the onset of the pandemic, therefore, advocates were

⁷ CBC News (3 May 2020) ‘B.C. rally calls for safe release of prisoners due to COVID-19 outbreak’ <www.cbc.ca/news/canada/british-columbia/b-c-rally-calls-for-safe-release-of-prisoners-due-to-covid-19-outbreak-1.5554114>.

⁸ CBC News (31 March 2020) ‘Bill Blair asks prison, parole heads to consider releasing some inmates to stop spread of COVID-19’ <<https://www.cbc.ca/news/politics/prison-covid19-csc-release-1.5516065>>.

⁹ *ibid.*

¹⁰ CTV News (1 May 2020) ‘Number of immigration detainees drops by more than half amid COVID-19 spread’ www.ctvnews.ca/politics/number-of-immigration-detainees-drops-by-more-than-half-amid-covid-19-spread-1.4921203. In a detention review hearing that took place on 12 May 2020, a CBSA representative noted that the Agency was “minimizing detentions and releasing where suitable alternatives exist because of this health crisis”, though “continuing to seek the detention of those who pose a risk to the Canadian public” (*infra* note 29, Decision J at 23); see also Global News (25 April 2020) ‘Canada is releasing immigration detainees at ‘unprecedented’ rates amid COVID-19 fears’ <<https://globalnews.ca/news/6861756/canada-releasing-immigration-detainees-coronavirus-covid-19/>>, where a CBSA representative is quoted in an email to Global News as stating: “CBSA officers are asked to focus efforts to explore all viable alternatives to detention for all cases, where there is no public safety concern.”

concerned that detainees would be unable to seek release on the basis that the conditions of their detention put them at heightened risk of COVID-19 infection.

In this chapter, we analyze the initial response of the ID to cases where immigration detainees sought release, at least in part on the basis of COVID-19, to better understand Canada's response to the global pandemic as it relates to immigration detention. Writing in the four months after pandemic measures were first introduced in Canada, our analysis is by necessity provisional. We were able to locate a relatively small sample of ID decisions, numbering seventeen in total, that were released in the two month period between mid-March and mid-May 2020, at the height of the pandemic in Canada. All of the decisions were released in Ontario and British Columbia. Our analysis of this dataset reveals an identifiable shift in ID practice. Prior to the outbreak of COVID-19, ID members generally refused to hear arguments related to conditions of detention, and rarely ordered release on that basis. With the onset of the pandemic, however, ID members have not only entertained arguments identifying COVID-19 as a condition of detention, but more significantly, have explicitly relied on this condition as a basis for release. Of the seventeen decisions we analyzed, the ID recognized COVID-19 as a condition of detention relevant to the release analysis in sixteen cases.¹¹ In eleven cases, the ID ordered release, at least in part on the basis of COVID-19.¹²

This shift in ID practice is significant. Legally, it allows detainees to argue the conditions of their own confinement before the administrative body tasked with overseeing their detention. This renders those conditions actionable, and therefore legally meaningful. Materially, this shift empowers detainees, allowing them to more effectively advocate for their own release, while lessening the violence inherent to the detention review process. Conceptually, the decisions suggest a shift in the paradigm within which legal decisions governing detention are made. Before COVID-19, the release assessment was firmly entrenched in the familiar "us/them" divide that characterizes the disciplinarity of immigration detention.¹³ Underlying many detention decisions was a basic concern with how best to protect "us", the Canadian public, from the ostensible risk posed by "them", the detainees. With the post COVID-19 shift, the line between "us" and "them" has blurred, and the location of risk seems to have temporarily shifted in relation to that line. On the whole, the decisions surveyed here are more concerned with protecting both the detainee *and* the public – the newly formed, newly vulnerable "us" – from the shared risk posed by the virus.

¹¹ See *infra* note 29, decisions A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P.

¹² See *infra* note 29, decisions A, B, C, D, E, F, G, H, I, J, P. Of the remaining five cases, the ID recognized that release may be possible given a more suitable alternative in three cases, and ordered release for one detainee in a subsequent hearing. See *infra* note 29, decisions K, L, M, N, O.

¹³ Rayner Thwaites has written about the ways in which Canada's immigration detention regime allows for lesser legal protections for noncitizens, thereby sacrificing "their" safety for "our" security (Thwaites 2009, 671). In the American context, Juliet Stumpf and Jennifer M. Chacón have written extensively about the ways in which the othering of migrants has fed into the trend towards the criminalization of migration, including the use of immigration detention (see Chacón 2014 and Stumpf 2006). In the U.K., Bridget Anderson has similarly observed the ways that borders produce immigration status, allowing for the exclusion of migrants and contributing to the perception of the "illegal" migrant in contrast with the good citizen (Anderson 2013, [2]-[5]).

This shift, however subtle, is indicative of the malleability of risk in the detention setting. In the face of the pandemic, the previous conception of the inherent riskiness of migrants was swiftly displaced by the disruptive, and risky, virus— a change that was surely buttressed by the closure of the Canadian border, in particular to asylum seekers. The onset of COVID-19 has thus revealed the ways in which the containment and confinement of noncitizens can be reconfigured in Canadian law, and the progressive possibilities hidden in that reconfiguration.

Following this introduction, we develop this argument in three parts. In Part One, we map the legal terrain governing immigration detention in Canada, focusing on the legal framework governing conditions of detention before the onset of COVID-19, to discern the particular challenges facing immigration detainees in securing release from detention on the basis of conditions of confinement. In Part Two, we examine the above-noted dataset, analyzing how ID members adjudicated requests for release in the immediate aftermath of the COVID-19 outbreak. In Part Three, we argue that COVID-19 has ushered in a meaningful shift in ID practice. We reflect on the legal, material, and conceptual implications of this shift, analyzing what COVID-19 suggests about the potentially shifting nature of the “us/them” paradigm that underpins Canadian immigration detention, and where risk is located within that paradigm. Mindful of the potentially limited nature of this shift, we identify the progressive possibilities hidden within it, and urge for the current practice to continue even as the threat posed by the pandemic begins to pass.

Part One: The Legal Terrain Pre-COVID-19

Described by Bosworth as a “volatile and contested” site (Bosworth 2014, [3]) immigration detention can be understood as a collection of practices by which the state contains and confines non-citizens. Mountz et al conceptualize detention as a “series of processes” governed by interlacing logics of bordering/exclusion and mobility/containment (Mountz et al 2013 [524-526]; see also Martin 2015 [234-236]). In Canada, this logic finds legal expression in the *Immigration and Refugee Protection Act* (IRPA), and *Immigration and Refugee Protection Regulations* (IRPR), which regulate the immigration detention regime. The legislation empowers the Canada Border Services Agency with almost unfettered discretion to arrest and detain non-citizens.¹⁴ It outlines three broad primary grounds for arrest and detention, namely, where a CBSA officer has reasonable grounds to believe that the person is inadmissible to Canada or is a danger to the public (IRPA, s. 33–42.1, 55(2)(a)),¹⁵ if they believe the person is unlikely to appear for removal or for other immigration-related proceedings (IRPA, s. 55(2)(a)), or if they are not satisfied of the person’s identity (IRPA, s. 55(2)(b)).¹⁶ Since the legislation is silent with respect to the location and conditions of

¹⁴ The IRPA also allows detention through the “designated foreign nationals” regime, which is outside the scope of the discussion here (but see Arbel 2015).

¹⁵ A foreign national may be inadmissible for human or international rights violations; various forms of criminality; misrepresentation; failure to comply with any provision of the IRPA; financial, security, or health reasons; or because a family member is inadmissible.

¹⁶ The main factor to be considered is the person’s cooperation in establishing their identity (IRPR, s. 247). The IRPA also permits detention where a CBSA officer has “reasonable grounds to suspect” that

detention, the CBSA has interpreted their authority as conferring “an unfettered discretion to detain migrants wherever and however it sees fit.” (Anstis et al, [12])

There are only three dedicated Immigration Holding Centers, or IHCs, in Canada, one each in the provinces of Ontario, Quebec, and British Columbia, located in the Toronto, Montreal, and Vancouver areas, respectively.¹⁷ When a non-citizen is arrested, they are subject to the “National Risk Assessment for Detention” (NRAD), an opaque process by which the CBSA assesses the level of risk posed by the detainee and decides the most appropriate detention placement.¹⁸ Higher risk detainees are placed in a correctional facility – usually a provincial prison – alongside individuals who are imprisoned awaiting trial, or who have been convicted and are serving a sentence. Detainees who score below a certain threshold on the NRAD – and are therefore designated as low risk – are placed in an IHC, where one is available.¹⁹ Migrants who are detained outside of Ontario, Quebec or British Columbia are detained in a correctional facility as a matter of course. In such facilities, the civil and criminal detention apparatuses intertwine most visibly. Non-citizens who are held in overcrowded provincial prisons endure lamentable conditions, with limited access to legal counsel, mental health support, and translation services, and are subjected to the same conditions as those convicted of criminal offences, including double bunking, lockdowns, restraints, and in some situations, solitary confinement (Anstis et al, [14]; see also Gros et al 2015 and Nakache 2011).

The disciplinary practice of immigration detention is embodied not only in the physical confinement it prescribes, but also through the complex legal network it enacts. Under Canadian law, there is no clear time limit on detention; there is only mandatory, periodic review undertaken by the Immigration Division (ID) of the Immigration and Refugee Board (IRPA, s. 57). The ID conducts its first review 48 hours after the initial detention decision is made, in order to determine whether the CBSA has established a basis for detention (IRPA, s. 58), to weigh the factors enumerated in the regulations, and ultimately to decide whether to continue detention or order release (IRPR, s. 248). If detention is continued, the detainee has another right to a hearing after 7 days, and every 30 days subsequent to that, until they are released or removed from Canada (IRPA, s. 57). What this means is that an individual who has spent, for example, five years in detention, has undergone at least 60 detention review hearings – and has been ordered detained at every single one of those hearings.²⁰ These

the foreign national is inadmissible on grounds of security, violating human or international rights, or various forms of criminality (IRPA, s. 55(3)).

¹⁷ A fourth facility at the Vancouver airport is only for detentions of 48 hours or less.

¹⁸ The NRAD is not disclosed to the detainee who has been subjected to it. If a detainee wants access to their NRAD, they must obtain it by filing an access to information and privacy request to the CBSA, the results of which can take months to receive.

¹⁹ CBSA’s enforcement manual on detention

(<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20-det-en.pdf>) states that: “The IHC should always be the default detention facility if risk can be mitigated, in regions where those facilities are available. Individuals detained under the IRPA who have scored 0 to 4 points and 5 to 9 points (if risk can be mitigated in an IHC) on the NRAD form [BSF754] should be held in an IHC.”

²⁰ There are many examples of individuals who have been detained for more than 90 days in Canada: see Canada Border Services Agency, “Annual Detention Statistics – 2012-2019”

periodic hearings perform the disciplinary function of detention again and again: the detainee is nominally reassessed by the state, every 30 days, with the effect of being punished anew.

The systemic flaws entrenched within the ID review process have been well documented.²¹ A recent and scathing audit of the detention review process conducted by the Immigration and Refugee Board in 2017–2018 revealed a litany of problems, including inaccuracies and inconsistencies in factual findings, uncritical reliance on statements by CBSA hearings officers, failure to hear evidence from the enforcement officer or investigator in appropriate cases, failure to allow detained persons to hear and present evidence, failure to question the CBSA on delay, barriers to participation of detained persons in the proceedings, ineffectively active adjudication in considering alternatives to detention, over-reliance on past decisions, rigid interpretations of statutory and regulator factors, and lack of consideration of mental health concerns (IRB 2018, [7, 11-17, 19-23, 26-30, 37]). In addition to the findings in the audit, critics have also described the review process as insufficiently independent, hurried, *pro forma* rather than substantive, ineffective, and perfunctory (Gros et al, [24]; Will 2016, [46-49]).

The problems with the review procedure are created, in part, by shortcomings in the legal configuration of detention. By the letter of the legislation, the ID “is not bound by any legal or technical rules of evidence” and may base its decisions on any evidence that it considers “credible or trustworthy in the circumstances” (IRPA, s. 173). Formally, the legislation requires the ID to release a detainee unless one of the statutory grounds for detention is established (IRPA, s. 58). In evaluating whether release is warranted, the ID is obligated to consider the factors delineated at section 248 of the regulations, which include the reasons for detention, length of time in detention, anticipated length of continued detention, delays or lack of diligence on the part of immigration officials or the detainee, and the availability of any alternatives to detention.²² Significantly for our purposes, conditions and location of detention are conspicuously absent from this list.

<www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html#:~:text=There%20has%20been%20drop%20in,detention%20has%20dropped%20by%2047.5%25>.

²¹ A series of court decisions that highlighted the various flaws in the immigration detention decision-making process began emerging in approximately 2015. See e.g. *Chaudhary v Canada* 2015, *Toure v Canada* 2018, *Ali v Canada* 2017, *Scotland v Canada (Attorney General)*, 2017, and *Canada v Chhina* 2019. In addition, and probably at least partially as a result of those court decisions, Canadian newspaper outlets began to demonstrate an interest in the topic, and in early 2017, the Toronto Star, a high-profile Canadian newspaper, published an investigation into Canada’s immigration detention system that involved interviewing 15 immigration lawyers, all of whom, according to the Star, “criticized the detention review hearings as procedurally unfair and stacked in the government’s favour.” See: Toronto Star (16 June 2017) ‘Heated exchange over legal rights as lawyers battle to have refugee claimant let out of jail’ <https://www.thestar.com/news/canada/2017/06/16/heated-exchange-over-legal-rights-as-lawyers-battle-to-have-refugee-claimant-let-out-of-jail.html>. Also important was the emergence of an advocacy organization known as the End Immigration Detention Network, which grew out of the well-established Canadian migrant rights organization No One Is Illegal (<https://toronto.nooneisillegal.org/>).

²² Originally developed in *Sahin* 1995, these factors have been incorporated into the IRPR at section 249. It’s worth noting that ID members are required to consider the s. 248 factors with an eye to ensuring compliance with s. 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees to everyone

Problematically therefore, while the ID is vested with the authority to oversee detention, it has limited jurisdiction over the location or conditions of that detention. In 2017, the Federal Court explained in *Brown v Canada* that ID members are “constitutionally required to consider the availability, effectiveness and appropriateness of alternatives to detention”, but that the “responsibility for the location and conditions of detention rests with the CBSA or provincial correctional authorities” (*Brown v Canada* 2017, [138]). Also in 2017, the Ontario Court of Appeal held in *Toure v Canada* that “the location of detention is a proper issue for immigration detainees to raise with the CBSA” (*Toure v Canada* 2018, [72]).²³ In 2019, the Supreme Court of Canada stated in *Chinna* that “the Immigration Division has no explicit power to examine harsh or illegal conditions”, but left open the possibility that implicit power on the part of the ID to consider conditions of the detention can be read into the statutory scheme (*Canada v Chhina* 2019, [57]). Also in 2019, the Federal Court in *Smith* stated that the Minister “agrees that the ID has the jurisdiction to consider and make findings on *Charter* violations, and to consider a detainee’s conditions of detention” (*Canada v Smith*, 2019 [60]). Since *Smith* was an interlocutory order in which the Court made no specific findings in this regard, and since the decision has not (yet) been cited, *Smith*’s precedential value is not clear. Nevertheless, *Chhina* and *Smith*, when read together, appear to leave a glimmer of hope for detainees seeking to render their harsh and disproportionate conditions of confinement legally meaningful in the context of detention review proceedings before the ID.

While the guidance offered by the courts is mixed, for the most part, ID members have interpreted these rulings as placing conditions of detention outside their jurisdiction, and generally refused to hear arguments about conditions in the course of detention review. As a result, detainees are compelled to raise such concerns through an internal complaint process with the CBSA, the very agency that has ordered their detention and set its terms. If such a complaint is dismissed, their only remaining option is to seek judicial review before the Federal Court, an opaque and procedurally limited remedy that is beyond the reach of most, and often substantively ineffective.²⁴ CBSA’s

the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

²³ The full excerpt from the *Toure* decision is as follows: “Mr. Toure had a mechanism to challenge his place of detention and to raise the conditions of the CECC with the CBSA. The jurisprudence supports this as did the Minister’s evidence on the application. The application judge failed to properly consider this evidence, including that Mr. Toure had not asked the CBSA to transfer locations: see *Brown*, at para. 38. The location of detention is a proper issue for immigration detainees to raise with the CBSA. Particularly, if the location of their detention is not consistent with how they fit within the CBSA’s own criteria. If this query is ignored, this decision is the proper subject of judicial review.”

²⁴ There are several features of the Federal Court judicial review process that make it a problematic mechanism for protection in the face of deprivations of liberty. In terms of jurisdiction, the powers of the Federal Court are limited to reviewing the reasonableness of the decision before it, and the Court has no jurisdiction to hear new evidence. Further, judicial review is discretionary in terms of access, timeline and remedy. The powers of the Federal Court on judicial review are limited to setting aside the decision at issue and referring it back for determination “with such directions as it considers to be appropriate,” a remedy that may not be adequate in the detention context. Moreover, even where the FC finds that the decision at hand is unreasonable, the issuance of a remedy is also discretionary. See *Federal Courts Act*, ss. 18.1(3) and (4), both of which use the permissive language of “may.” See also *Mission Institution v Khela* 2014, [41].

internal complaint procedure and the judicial review process in the Federal Court are woefully inadequate: costly, slow, inconvenient and ineffective. Those held in correctional facilities have even fewer options, as the CBSA loses control over conditions of detention once they transfer a detainee to a provincial jail.²⁵

Immigration detention is therefore structured such that two different institutions share carriage over one human body.²⁶ The ID is tasked with overseeing detention and deciding release, but has only limited jurisdiction to consider the material conditions of that detention, even if these conditions are oppressive or unlawful. The CBSA, in contrast, can order detention, set the location and conditions of that detention, and advocate for its continuation. As an adverse party to the proceedings in detention review hearings, the CBSA is not sufficiently independent to meaningfully respond to complaints about the very detention conditions it has authorized or prescribed, but nevertheless retains jurisdiction over those conditions.

Martin's analysis of immigration detention's disciplinarity assists in understanding the consequences of this configuration. As Martin explains, since immigration detention cannot be reduced to a single strategy or practice, its disciplinarity is not manifest only through the fact of confinement (Martin 2015, [234]). Detention, Martin suggests, is better understood as a "lived process and a bundle of textual and embodied practices meted out through everyday enactments" (Martin 2015, [236]; see also Lindley 2019). The mandatory periodic review functions as one such every day enactment. The legal framework configures the ID as a body that can mete out *de facto* punishment, but cannot respond to the material conditions of that punishment.²⁷ This configuration severs the ID's capacity to oversee, or otherwise respond to, the disciplinarity it enforces. It limits the ID's ability to function effectively as an independent administrative tribunal, and instead accrues disproportionate power to the CBSA, the very agency that has ordered the detention and set or authorized its terms. The effect is fundamentally coercive: this configuration leaves detainees at the mercy of the CBSA, deprived of meaningful legal recourse through which to challenge the material conditions of their detention before the body tasked with its oversight. In the result, this configuration strips detainees of the legal tools to render their lived experience actionable. As Martin aptly explains, when such strategies are deployed in the detention context, they operate to further isolate, contain, and exclude detainees. Assessed from this vantage point, the ID's reluctance to adjudicate conditions of detention may be seen as one of detention's most confining practices: it operates to disempower detainees, and further isolate them within their already isolated detention.

This configuration causes significant harm to detainees. In their recent study of Canadian detention, Cleveland et al concluded that the perfunctory and unpredictable nature of the 30-day review contributes to feelings of helplessness and

²⁵ For analysis see Anstis et al 2017, [fn 41] citing, *inter alia*, the memorandum of understanding between the CBSA and the Ontario Minister of Community Safety and Correctional Services regarding Immigration detainees, executed 21 January 2015. In short, even if the Federal Court finds that a detention placement decision, the criteria for which are not set out anywhere in the relevant legislation, is unreasonable, the best it can do is send the decision back to the CBSA to be reconsidered.

²⁶ We are indebted to Toby Goldbach for her insights on, and contributions to, this analysis.

²⁷ For an understanding of how the tension between the length and normative conditions of punishment are understood in prison law, see Kerr 2017.

disempowerment among detainees (Cleveland et al 2018). The researchers interviewed 81 adults detained in two Canadian detention centers, all of whom were asylum seekers, and found that immigration detention triggers feelings of powerlessness and loss of hope, contributing “significantly to post-traumatic stress, depression and anxiety symptoms” (Cleveland et al 2018, [1005]). They found that the detainees felt a profound sense of uncertainty and loss of agency while detained, and suffered significant mental health effects with lasting harm, even when detention was brief and its conditions adequate (Cleveland et al 2018, [1005]). According to the researchers, detention’s most adverse impact “appears to be largely attributable to the combined effect of two factors: symbolic violence and disempowerment” (Cleveland et al 2018, [1001]. See also Rachel Kronick et al 2011). Detainees, they concluded, felt “disempowered by the experience of waiting for an indeterminate period for the outcome of a discretionary decision over which they have little control, but which will determine their freedom and their future” (Cleveland et al 2018, [1001]). ID review decisions, the researchers found, were “often perceived as unpredictable, arbitrary, beyond their control. Hope peaked at each detention review, only to be dashed when detention was continued.” (Cleveland et al 2018, [1003]). The inability to raise conditions of detention as a basis for release contributes to such feelings of disempowerment. In this key respect, the ID’s reluctance to hear submissions about hostile or unlawful conditions reinforces the violence wrought by detention.

Part Two: The Legal Terrain in the Age of COVID-19

The above summary outlines the legal configuration of immigration detention in Canada when the COVID-19 pandemic broke out. In assessing the broader legal response to COVID-19 in immigration detention, we now turn to analyze ID decisions in which COVID-19 was raised as a justification for release. Since ID decisions are not presumptively publicly available, our sample size is relatively small. We located seventeen ID decisions where COVID-19 was raised as a factor justifying release, through either shared Access to Information and Privacy Requests or with the consent of counsel. This sample represents hearings from only two provinces: eleven of the hearings were held in Ontario, and six were held in British Columbia. All of the hearings were conducted via teleconference in the two month period between 26 March, 2020 and 21 May, 2020.²⁸

Based on this dataset, we found that on the whole, the ID has not only recognized COVID-19 as constituting a “condition of detention” – insofar as COVID-19 renders detention more dangerous to the detainee’s health and wellbeing – but has also willingly incorporated this as a factor into its reasoning. Of the seventeen decisions we analyzed, the ID explicitly recognized COVID-19 as a condition of detention in sixteen cases.²⁹ In only one decision, discussed in more detail below, the ID Member

²⁸ We obtained three decisions by way of a Freedom of Information request, as reported in Global News (25 April 25 2020) ‘Canada is releasing immigration detainees at ‘unprecedented’ rates amid COVID-19 fears’ <<https://globalnews.ca/news/6861756/canada-releasing-immigration-detainees-coronavirus-covid-19/>>, and shared with the authors. We obtained fourteen decisions with the consent of counsel.

²⁹ Decision A: March 30, 2020, Ontario. Decision B: March 26, 2020, Ontario. Decision C: March 30, 2020, Ontario. Decision D: April 22, 2020, British Columbia. Decision E: April 21, 2020, British Columbia. Decision F: April 24, 2020, 2020, Ontario. Decision G: April 23, 2020, Ontario. Decision H:

concluded that while COVID-19 was a factor impacting the length of detention, she could not consider COVID-19 as a condition of detention.³⁰ In eleven of the seventeen decisions we analyzed, the ID determined that release from detention was warranted at least in part on the basis of COVID-19, and ordered the detainee released with conditions. Of the remaining five decisions, in one the detainee was released at a subsequent review eleven days later, and in four the Member acknowledged that release may be possible given a more suitable alternative to detention. In the discussion below, we have designated the decisions by letter in order to anonymize all other identifying details. We also provide a more complete account of the decisions in the Appendix at the conclusion of this chapter.

Decision “A”, released soon after pandemic measures were first introduced in Canada, represents a convenient starting point for analysis. In this decision, the Member addressed the jurisdictional conundrum posed by the ID’s inability to consider conditions of detention head on. The case involved a refugee claimant detained at the Immigration Holding Centre in Toronto on the basis that she was unlikely to appear for immigration proceedings.³¹ The individual had been detained for almost two weeks, and sought release with the Minister’s consent. The Board Member explicitly acknowledged that while “the Immigration Division does not have control over the conditions of detention”, these conditions were still a factor to be considered pursuant to the regulations.³² She then explicitly recognized COVID-19 as a condition to be factored into the assessment, placing particular emphasis on the fact that a COVID-19 case had been diagnosed in the Holding Center.³³ She concluded that the detainee’s vulnerability to the risk of COVID-19 infection constituted “exceptional circumstances” that were relevant for consideration and weighed in favour of release.³⁴

Decisions “B”, “C” and “D”, released in March and April 2020, were similarly decided. In all three, the individual was detained on the grounds that they were unlikely to appear for immigration proceedings. In decision “B”, the Member was notably sympathetic to the realities of the pandemic, and stated that “in the midst of a global pandemic”, any time spent in detention “certainly is difficult.”³⁵ With the consent of the Minister, the Member agreed to release the individual with the support of a bondsperson, reasoning that due to COVID-19, “there is no real clear answer of when you would be removed or could be removed, and to me that favours release.”³⁶ In Decision “C”, the Member was similarly explicit in her findings, stating that “the

May 4, 2020, Ontario. Decision I: April 3, 2020, Ontario. Decision J: May 12, 2020, British Columbia. Decision K: April 20, 2020, Ontario. Decision L: April 24, 2020, British Columbia. Decision M: April 23, 2020, British Columbia. Decision N: May 21, 2020, Ontario. Decision O: April 3, 2020, Ontario. Decision P: April 14, 2020, Ontario. Decision Q: May 4, 2020, Ontario.

³⁰ Decision Q at 14.

³¹ Decision A.

³² Decision A at 4.

³³ Decision A at 5.

³⁴ Decision A at 5.

³⁵ Decision B at 4.

³⁶ Decision B at 3. The Member also factored COVID-19 into her assessment of the reasonableness of the bond, noting that “the global pandemic would impact an individual’s ability to post a significant amount of money any more than the \$5000 [*sic*].” Decision A at 4.

conditions of your detention are something that I am able to consider”.³⁷ The Member accorded “significant weight to the conditions, given the current COVID-19 pandemic, which can put your security of the person at risk.”³⁸ In Decision “D”, the Member reasoned that the “coronavirus is a relevant factor in considering [the detainee’s] conditions of detention”, and concluded that the alternative accommodation presented “not only mitigates the flight risk... but also reduces [the detainee’s] risk of exposure to COVID”, and therefore “weighs in favour of release”.³⁹

Decisions “E”, “F”, and “G”, also released in March and April 2020, all involved individuals detained on the grounds that they were unlikely to appear for their removal from Canada. In each, the Member followed a similar approach: treating COVID-19 as a condition of detention relevant to the analysis, and requiring that certain measures be in place to order release. In decision “E”, in reference to the proposal of a recovery facility as an alternative to detention, the Member reasoned that “there’s likely a greater degree of risk of transmission” in the larger facility in which the detainee was held, and this favoured release.⁴⁰ In decision “F”, the Member placed significant weight on the fact that COVID-19 had already taken hold in the correctional facility at issue, which placed the detainee at an elevated risk of infection. As a result, the Member determined that release on terms and conditions was appropriate.⁴¹ In decision “G”, the Member spoke of COVID-19 in more detail, noting that, though COVID-19 “is not a factor that is explicitly listed in Regulation 248”, it can nevertheless “be looked at and assessed as it relates to the conditions of your detention and the reason for this assessment is to ensure that your detention is in compliance with the Charter.”⁴² Unlike in the other decisions we reviewed, however, the Member found that he did not have sufficient information before him to order release on the basis of COVID-19.⁴³ Nevertheless, the Board Member determined that the support of a bondsperson and the Toronto Bail Program were sufficiently robust to offset any flight risk concerns, and ordered release on that basis.⁴⁴

The decisions involving individuals detained on the basis that they pose a danger to the public follow a slightly different analytic trajectory. In these decisions, each of the ID Members at issue engaged in a balancing exercise, to evaluate whether the risk posed to society by the detainee was greater than the overall risk posed to public health. In decision “H”, the Member accepted the detainee’s arguments that he faced a “higher likelihood of ...contracting the virus in the detention facility” due to “the lack of ability to socially distance and to engage in proper hygiene.”⁴⁵ The Member went on to conclude that the alternative to detention proposed – a halfway house – presented

³⁷ Decision C at 3.

³⁸ Decision C at 3.

³⁹ Decision D at 50-51.

⁴⁰ Decision E at 42.

⁴¹ Decision F at 25 and 27.

⁴² Decision G at 11

⁴³ *Ibid.* The information that the Board Member identified as lacking included the steps being taken by the facility to prevent the spread of the virus, whether the detainee was able to adequately self-isolate, and what medical resources and services would be available to the detainee at the facility should he become infected.

⁴⁴ *Ibid* at 12.

⁴⁵ Decision H at 22.

the detainee with a “better ability to exercise some protection against the COVID virus,”⁴⁶ and ordered release with conditions. Notably, the primary consideration in this decision seems to have been the detainee’s safety, and his ability to protect himself against the shared risk posed by the virus.

In decision “I”, the Member determined that the risk posed by the detainee to the public was at the “low end of the spectrum” because of the limited sentences he had received for his convictions, his “stated remorse” and “the fact that there had been no violence in the commission of any of the offences”.⁴⁷ The Member further noted that the length of the detainee’s continued detention was uncertain, as Canada was not enforcing removals, and his country of origin was not permitting repatriation in light of COVID-19.⁴⁸ In weighing the broader risks posed by COVID-19, the Member reasoned that the precautions taken by the Holding Center at issue were “not perfect”, and that the individual faced “a high risk of exposure and significant restrictions on [his] ability to self-isolate”.⁴⁹ The Member ultimately ordered release. Here, as in decision H, the Member’s pivot from considering the risk posed *by* the detainee to the risk posed *to* the detainee suggests a malleability in the legal understanding of risk.

In decision “J”, the individual had been detained for over three and one-half months at Fraser Regional Correctional Centre, and advanced a recovery facility as an alternative to detention. Relying on a COVID-19-focused prison law decision, the Member concluded that while the “pandemic is not a get out of jail free card”, it is “a factor that I need to take into consideration”.⁵⁰ Clarifying further, the Member stated that COVID-19 “is an important consideration”, and concluded that the detainee’s chances of contracting COVID-19 in Fraser Regional were more significant than at the recovery facility.⁵¹ Elsewhere in the decision, the Member again reiterated that “the situation with respect to COVID” is a factor to consider when deciding release.⁵² Ultimately, the Member concluded that the “likelihood of [the detainee] contracting COVID-19”, as well as the risk posed “to the general public in Canada”, nudged the analysis in favor of release. The shift away from the Member’s prior preoccupation with the risk posed by the detainee, to his consideration of the broader risk posed by COVID-19 to the general public, is notable. Like decisions H and I, this decision points to a marked shift in containment strategy, one that moves away from a concern with protecting the public *from* the detainee, towards one that seeks to protect the public *by* protecting the detainee. COVID-19 here serves a unique function: by rendering each and every one of us a potential transmission vector, the virus betrays the fundamental interconnectedness of self and other, forcing a discernable shift in the ID’s understanding of risk, public safety, and state responsibility.

⁴⁶ *Ibid.*

⁴⁷ Decision I at 4.

⁴⁸ Decision I at 5. As part of its response to COVID-19, CBSA temporarily halted deportations of people with rejected claims, with the exception of serious criminal cases that continued to be evaluated on a case by case basis. See: Global News (18 March 2020) ‘Canada hits pause on deportations because of coronavirus’ <https://globalnews.ca/news/6694503/coronavirus-canada-deportations/>.

⁴⁹ Decision I at 6.

⁵⁰ Decision J at 42.

⁵¹ *Ibid.*

⁵² *Ibid.*

Of the decisions where the ID ordered continued detention, the Board Members engaged in a similar balancing exercise. In five of the six negative decisions, the Member nonetheless recognized COVID-19 as a condition of detention that warrants consideration. In decision “K”, the Member acknowledged that jails “may be fertile ground” for COVID-19 to spread, and that the individual suffered from an underlying health condition that increased his vulnerability.⁵³ The Member nevertheless noted that no incidents of COVID-19 had been reported at the correctional center at issue, and that the risk posed by the detainee to the public in light of his past criminal offences was greater than the risk posed by the virus.⁵⁴ Similarly, in decision “L”, the Member reasoned that since the correctional facility at issue was following the recommended guidelines, and since the detainee was not at increased risk of infection, COVID-19 did “not tend to weigh in favour of release in and of itself.”⁵⁵

In decisions “M” and “N”, the Members found that the release plan proposed by counsel was insufficient to mitigate the risk to the public posed by the detainee. In decision “M”, the Member acknowledged that the detainee faced a greater risk of COVID-19 infection in the correctional facility at issue, but found that since the facility was “taking significant aggressive measures to prevent and manage any COVID-19 outbreak,”⁵⁶ and since the detainee posed a “significant risk to the general public”, continued detention was warranted.⁵⁷ Ultimately, the Member concluded that since the detainee had not proposed any alternative to detention, he was unable to evaluate “whether there would be any significantly lower risk to him upon release.”⁵⁸ In decision “N”, the Member noted that, though “the conditions of person’s detention [*sic*] is not a factor explicitly listed in regulation 248”, she was “prepared to consider it nonetheless.”⁵⁹ She then observed that the detainee had an underlying health condition that made him more susceptible to the virus, and found “that this factor does weigh every [*sic*] so slightly” in favour of release.⁶⁰ The Member then proceeded to a broader analysis of the risk posed by the pandemic that was not present in any other decision we reviewed. The individual had not arranged an alternative to detention, and his counsel suggested he would be placed in a shelter.⁶¹ The Member noted that “there have been over 300 cases, COVID-19 cases in the shelter system [*sic*].”⁶² As a result, she concluded that release did not mitigate the public health concerns posed by the pandemic.⁶³ While the Member did not order release, as with decision M, her reasoning still partakes of the same risk balancing exercise seen in decisions H, I, and J. In both decisions M and N, the definitive factor guiding the decision to continue detention was less the risk posed by the detainee, and more the absence of a viable alternative. It is

⁵³ Decision K at 29.

⁵⁴ *Ibid.*

⁵⁵ Decision L at 19.

⁵⁶ *Ibid.*

⁵⁷ Decision M at 21 and 26.

⁵⁸ *Ibid.*

⁵⁹ Decision N at 18.

⁶⁰ *Ibid* at 19.

⁶¹ *Ibid* at 20.

⁶² *Ibid* at 21.

⁶³ *Ibid* at 21.

plausible that with a more robust and developed alternative detention proposal, the Members would have ordered these particular individuals released.

Indeed, this was what happened in decision “O” and “P”, wherein the Member’s initial conclusion that continued detention was warranted was later reversed when counsel presented a more robust alternative. In decision “O”, the Member referred to COVID-19 as “an extraordinary factor” which must be considered in the release assessment, and concluded that that “like the [criminal law] judges... I should and can similarly take notice of the fact that there is a greatly elevated risk posed to detained inmates from the coronavirus.”⁶⁴ Ultimately, however, the Member noted that the detainee had been found by the Parole Board of Canada to “pose an undue risk to society” in the absence of a mandatory residency requirement, which was not part of the release plan proposed.⁶⁵ The Member ordered continued detention on the basis that the risk posed by the detainee to society was greater than the risk posed to the detainee by COVID-19. When the same detainee appeared before the ID eleven days later in decision “P”, the Member ordered release. Once again, the Member found that the detainee posed a flight risk and an “unacceptable degree of risk to the Canadian public” because of his criminal history.⁶⁶ In holding that “the impact of the COVID-19 [*sic*] in a detention setting in isolation also strongly tends to favour release from detention”, the Member noted “the generally accepted presumption that social distancing and regular hygiene and certain preventive measures have prevented this pandemic from being even more disastrous than it has been throughout the world.”⁶⁷ The Member concluded that the release plan proposed, which consisted of parole supervision by the Correctional Services of Canada, was sufficient to offset both the danger and flight risk concerns.⁶⁸ This reasoning is reminiscent of that deployed in decisions H, I and J: the perceived threat posed by COVID-19, and the broader risk of transmitting the virus, supersedes the risk to the public perceived to be posed by the detainee.

Finally, decision “Q” concerned an individual who had been detained for three days after being released from criminal custody on the ground that he posed both a danger to the public and a flight risk. This decision is notable in that it is the only one of the seventeen decisions surveyed where the Member refused to take COVID-19 into consideration as a condition of detention, stating that, “I am not persuaded that the Immigration Division has the jurisdiction to consider conditions of detention.”⁶⁹ Nevertheless, the Member did find that the pandemic would impact the forward-looking length of detention, a relevant consideration pursuant to the enumerated factors in the regulations, before concluding that release was not warranted.

While the substantive results reached in each of the cases analyzed above differs, certain key findings emerge. Most notably, the decisions point to an identifiable shift in the jurisdictional purview and practice of the ID. While it may be tempting to conclude that these decisions are anomalies, the Immigration and Refugee Board has released public statements that suggest otherwise. When interviewed by Global News,

⁶⁴ Decision O at 5

⁶⁵ Decision O at 5.

⁶⁶ Decision P at 5.

⁶⁷ *Ibid.*

⁶⁸ Decision P at 8.

⁶⁹ Decision Q at 14.

for example, a spokesperson for the Board stated that it was “open to decision-makers to consider any relevant factors in determining whether detention is justified, including COVID-19 and its potential risks to detained individuals.”⁷⁰ The spokesperson went on to note that the ID is “entertaining requests from parties for early detention reviews, for example to consider alternatives where the person detained may have a vulnerability that places them at elevated risk from the virus or any cases with an alternative to detention.”⁷¹ These very public statements suggest that the decisions referred to above, far from constituting exceptions, are part and parcel of an approach to COVID-19 in relation to immigration detention adopted by the upper echelons of the Immigration and Refugee Board. That the Minister has not yet sought to judicially review any of these decisions only reinforces this as a likelihood. The ID’s approach to COVID-19 as a relevant factor in detention decisions reveals the ways in which containment and confinement can be reconfigured in the law and practice of Canadian detention.

Part Three: The Ramifications of this New Approach

By framing COVID-19 as a condition of detention that is within its jurisdiction to review, the ID has ushered in a shift in the disciplinarity of detention. Even if the ID reverts to its prior practice as the pandemic abates, the decisions surveyed here reveal progressive possibilities that can benefit the ID review process moving forward. From the perspective of law, the ID’s apparent willingness to consider conditions of confinement as a factor relevant to release is significant. Such a shift enables detainees to bring their lived experience forward before the ID, the administrative body tasked with overseeing their detention. This has the effect of rendering that lived experience actionable, justiciable, and legally significant. This shift also helps address some of the problems associated with having both the ID and CBSA share carriage over one detainee. The ability to consider conditions of confinement endows the ID with jurisdictional authority that enhances its independence and capacity for principled adjudication, and allows it to more effectively discharge its obligations to oversee detention. This shift also resists accruing undue power to the CBSA, and more appropriately circumscribes the CBSA’s scope of authority as regards the detainee. Such a shift also makes space for future legal arguments about the ID’s jurisdiction to order release on the basis of unsafe conditions or location of detention. If this shift endures as the pandemic subsides, the jurisdictional breadth it affords the ID will be a welcome jurisprudential development.

As regards the lived experience of the detainee, the shift is also meaningful. A legal framework that enables detainees to raise conditions of confinement as relevant to the assessment of their release is fundamentally empowering. This shift provides detainees with more agency over their lives. In this way, such a shift helps address some of the key concerns identified by Cleveland et al in their study of detention: it helps render the periodic review process less perfunctory, less arbitrary, and therefore more meaningful. For some detainees, the ID’s apparent willingness to consider

⁷⁰ Global News (25 April 2020) ‘Canada is releasing immigration detainees at ‘unprecedented’ rates amid COVID-19 fears’ <<https://globalnews.ca/news/6861756/canada-releasing-immigration-detainees-coronavirus-covid-19/>>

⁷¹ *Ibid.*

conditions of detention may lead to a material improvement in their experience of confinement. By way of example, in each of the above decisions where release was ordered, the detainee was transferred to less restrictive, less punitive, and less dangerous locations to lessen their exposure to COVID-19 infection. While none were removed entirely from the detention infrastructure – each being subject to a host of restrictions characteristic of the confinement practices Martin identifies as quintessential to detention (Martin 2015)⁷² – each was nonetheless able to shift their position within that infrastructure in meaningful ways. If ID members continue to consider conditions of confinement, this shift has the potential to lessen the violence inherent in the detention review process.

Conceptually, the shift in ID practice also suggests the possibility of a subtle shift in the paradigm underpinning the detention review process. The law and practice of Canadian detention has long been steeped in discourse that depicts the non-citizen as dangerous and risky.⁷³ Both the passage of the *Immigration and Refugee Protection Act* in 2001, and extensive changes to the legislative framework since it came into effect, have been animated by a broader emphasis on national security concerns in the face of the supposed danger posed by migration.⁷⁴ As Dauvergne has aptly explained, these discourses are infused by, and infusing of, state laws, political strategies, and global forces that define the ways in which migrants, and migration, are treated and understood (Dauvergne 2008). Writing in the Australian context, Vogl describes this as the broader logic of securitization: the “discursive process by which the threats, misgivings, and dangers facing the state are constructed as a direct consequence of the ‘problem’ of migration.” (Vogl 2015, [116]) In the decisions analyzed here, the previous conception of the inherent riskiness of migrants has, at least temporarily, been displaced by the disruptive, risky, pandemic. For this brief moment in time, the threat posed by the virus seems to have superseded the perceived threat posed by the so-called dangerous migrant.

The decisions analyzed in this chapter suggest that with the onset of COVID-19, the perceived threat posed to the nation is suddenly – and temporarily – embodied by the virus. Recall decision “J”, in which the decision maker explicitly recognized that ongoing detention would pose a risk both to the detainee “and the general public in Canada”.⁷⁵ Indeed, most of the decisions analyzed above show the ID member

⁷² Such restrictions seem to be part of the CBSA’s broader approach to COVID-19: recent media reports suggest that in Ontario and Quebec – the two provinces where the most migrants are detained each year – CBSA has given some non-citizens the option of release from detention if they agree to wear electronic ankle monitors, quintessential surveillance practices deployed in and by the criminal law. CTV News (May 28, 2020) ‘Some migrants now tracked with ankle bracelets as pandemic ‘temporary measure’ <<https://montreal.ctvnews.ca/some-migrants-now-tracked-with-ankle-bracelets-as-pandemic-temporary-measure-1.4959851>>.

⁷³ Multiple theorists have identified the largely post-9/11 discursive, rhetorical, and political shifts towards the perception of migrants as “risky” and “dangerous.” See e.g. Anderson 2013; Pratt 2005; Macklin 2001.

⁷⁴ See e.g. Daniels, R.J., Macklem, P. and Roach, K. (eds), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, Toronto: University of Toronto Press.

⁷⁵ “The risk to him of that as well as the risk to the general public in Canada arising from that factor would be greater if he remains at Fraser Regional Correctional Centre than it would if he resides at [the recovery facility]” (Decision J).

explicitly balancing competing risks – that posed by the detainee versus that posed by the virus – and ordering release in the name of protecting public health. This suggests that the previously familiar “us/them” paradigm may have shifted: the line distinguishing us from them seems to have blurred in the shadow of a common threat. Rather unexpectedly, therefore, COVID-19 revealed that the risk posed *to* migrants is legally meaningful and demanding of the ID’s consideration.

Does this suggest a broader recognition from the ID that immigration detainees were never all that risky in the first place? Given that discourses depicting migrants as dangerous still shape the legal and institutional frameworks that govern ID practice, that is probably too much to hope for. But it does reveal that the legal understanding of risk and responsibility is never fixed, and in the appropriate circumstances, can be recalibrated. It may well be that as the worst of the pandemic passes, these decisions will be confined to their very particular circumstances. Moving forward, Board Members might treat COVID-19 as exceptional and be reluctant to entertain the possibility of release on the basis of conditions of confinement. Nevertheless, COVID-19 may have caused the ID to reconsider the parameters of its jurisdiction as regards conditions of detention, even if only in limited circumstances. Given the new decision-making norms established by the COVID-19 cases, it will be harder for ID Members to refuse to hear arguments about conditions of confinement – as in the pre-COVID-19 cases, or as in decision Q. The decisions surveyed here may have forged a new path in ID decision making, one that allows detainees the opportunity to raise arguments about the conditions of their confinement and compels ID members, and by implication also the Minister, to engage with these arguments in some way. In this way, COVID-19 may have rather inadvertently opened up new possibilities in the law and practice of immigration detention.

Conclusion

Whether COVID-19 will have a long-term impact on the way immigration detention is understood in Canada remains to be seen. One thing will certainly change as Canada gradually exits the worst of the pandemic period: international borders will gradually start to reopen. Canada will again be faced with migrants traversing its borders, seeking protection from persecution and other forms of mistreatment. When this happens, ID decisionmakers will no longer be operating in a context that was, at least in one significant way, rendered virtually static. With the Canadian border closed as a pandemic measure, the broader goals of border control were achieved in ways that were not possible before the onset of COVID-19. Ordering the release of immigration detainees may have seemed politically possible for a brief moment because the hardening of the border had been achieved. As Bosworth and Turnbull explain, immigration detention does not merely serve the goal of containing migrants, it also serves “broader state aims of regulating and casting out unwanted others” (Bosworth and Turnbull, [51]). The closed border has made it easier to reconfigure how the “unwanted others” among us are regulated and confined. A softer approach to a conception of the “us” within those borders may have felt, for an elusive moment, achievable.

Whether the softer approach to the conception of “us” will remain possible once the Canadian border becomes porous again remains unclear. But the broader benefits

of the ID's post COVID-19 approach to detention review compels considering why it shouldn't be. For now, COVID-19 has ushered in a shift in Canadian bordering practices and detention strategies that reflects more nuanced understanding of risk and responsibility, us and them, self and other. This is, perhaps, the sort of different expression of the "us/them" paradigm that Dauvergne has so persuasively called for (Dauvergne 2016). The broader benefits of expanding the ID's jurisdiction to consider conditions of detention as a basis for release are not specific to the COVID-19 pandemic, and one can hope that they will outlive the current crisis. Perhaps the global crisis can usher in the kind of paradigmatic change previously deemed impossible. At the very least, the shift in the ID's approach to detention reviews should challenge law and policy makers to consider the progressive possibilities revealed by COVID-19⁷⁶.

<u>DESIGNATION OF DECISION</u>	<u>DATE</u>	<u>LOCATION</u>	<u>LENGTH OF DETENTION</u>	<u>GROUND(S) for DETENTION</u>	<u>OUTCOME</u>
A	March 30	Immigration Holding Centre, Ontario	2 weeks	Unlikely to appear	Release
B	March 26	Ontario	Approximately nine days	Unlikely to appear	Release
C	March 30	Toronto	11 days	Unlikely to appear	Release
D	Apr 22	Fraser Regional Correctional Centre, British Columbia	7 months and 22 days	Unlikely to appear	Release
E	Apr 21	Central East Correctional Centre, Ontario	3 months	Unlikely to appear	Release
F	Apr 24	Immigration Holding Centre, Ontario	3 days	Unlikely to appear	Release
G	Apr 23	Central East Correctional Centre, Ontario	2.5 months	Unlikely to appear	Release
H	May 4	Central East Correctional Centre, Ontario	3 days	Danger to the public Unlikely to appear	Release
I	Apr 3	Immigration Holding Centre, Ontario	10 weeks	Danger to the public Unlikely to appear	Release
J	May 12	Fraser Regional Correctional Centre, British Columbia	3.5 months	Danger to the public Unlikely to appear	Release
K	Apr 20	Central East Correctional Centre, Ontario	3 days	Danger to public Flight risk	No release
L	Apr 24	Fraser Regional Correctional Centre, British Columbia	Approximately eight months	Danger to public Unlikely to appear	No release
M	Apr 23	Fraser Regional Correctional Centre, British Columbia	Approximately two days	Danger to public	No release
N	May 21	Maplehurst Correctional Complex, Ontario	5 weeks	Unlikely to appear	No release
O	Apr 3	Central East Correctional Centre, Ontario	4 days	Danger to public Flight risk	No release
P	Apr 14	Central East Correctional Centre, Ontario	15 days	Danger to public Flight risk	Release
Q	May 4	Central East Correctional Centre, Ontario	3 days	Danger to public Unlikely to appear	No release

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