Submissions to the Senate Committee on National Security and Defence

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1. Thank you to the Committee for the opportunity to appear before you today, on behalf of the Canadian Civil Liberties Association. We have serious concerns regarding the policies, practices and collaborative efforts of the Canadian Border Services Agency (CBSA), which is the focus of this afternoon’s hearing, and we appreciate the opportunity to share these serious concerns with you.

a) Need for Independent Review

2. Our first concern relates to the absence of any appropriate and independent review mechanism. The CBSA is an agency that enjoys sweeping powers including law enforcement powers. CBSA officers can arrest, with or without warrants, permanent residents or foreigners if they believe these individuals pose a threat to public safety, or are illegally in the country -- i.e. inadmissible. CBSA also has the power to detain foreigners and permanent residents, including asylum seekers. The CBSA also works closely with the RCMP and CSIS in information sharing that the CBSA may rely upon in determining who may be a threat or who may be illegally in the country and therefore inadmissible. Indeed, as Justice O’Connor noted, the CBSA “prevents entry by people not legally allowed into Canada (inadmissible persons), collects intelligence, and detects, arrests, detains and removes people who are in Canada illegally.” In this regard we respectfully remind the Committee that the CBSA also engages in information collection and dissemination with foreign agencies, with impact upon the actions (decisions, conclusions, investigations, apprehensions) of individuals within its jurisdiction.

3. These widesweeping powers of the CBSA are highly intrusive and coercive, and have the impact to seriously, adversely and deleteriously affect the lives of individuals. They are also sweeping powers which must be subject to independent review in order to ensure they comply with Canadian constitutional safeguards, and also the relevant legal obligations binding upon Canada pursuant to international law.
4. Justice O’Connor recommended in his second report pursuant to the auspices of the Arar Commission, that there should be an independent review, including complaints investigation and self-initiated review, to review the RCMP’s national security activities [Independent Complaints and National Security Review Agency “ICRA”]. He recommended that this independent review mechanism should also review the activities of the CBSA (law enforcement powers, arrest, detention, removal, intelligence etc). The CCLA strongly recommends that Justice O’Connor’s recommendations be implemented without delay – we have been arguing for this for years and are very concerned that eight years after these recommendations were made – there has been no movement on these issues. The CCLA cannot underscore enough the importance in a free and democratic society, of the principles of accountability and transparency, secured through independent review, of power – or more to the point, the dangers posed to human rights and dignity – including to life, to liberty, to security of the person -- by unchecked power.

5. The CCLA repeats its submissions in other forums, that any Independent Review should also review the intelligence activities of the CBSA. We are particularly concerned that the CBSA passes on information that has formed the basis of security certificates, and believe that this review process of intelligence gathering and sharing is vital.

Review with respect to assessment of refugee claims is also vital.

Example: one refugee claimant from Egypt claimed that he was seeking asylum because he faced the death penalty in Egypt. He was told by a CBSA officer that Egypt had informed that the individual was not subject to a death sentence. The CCLA has argued previously, in keeping with Justice O’Connor’s recommendations in the Arar Commission that Canadian agencies cannot recycle imported intelligence without assessing its accuracy. The merits of an Independent Review process in this regard are crucial.

Outbound intelligence practices and specifics must also be subject to Independent Review. Some of the recommendations I would repeat here are that the CBSA must never pass on information to foreign agencies that is not qualified; and CBSA has the duty to ensure the investigative nature of any information it passes on. Caveats must contained relating to use and dissemination among domestic and foreign agencies.

b) INTERVIEWS AND NOTE-TAKING of OFFICERS
6. CBSA officers conducting interviews must take careful notes, that are free of bias, ensure that these notes are not devoid of context. Notes can form the basis of IRB hearings and other proceedings down the road and as such are an important ‘link’ in the “due process” chain.

7. We also wish to comment here that officers should not be intimidating in their demeanour towards refugee claimants and foreign nationals. We are aware of an example of a refugee who due to specific circumstances held an Ethiopian passport, but was actually an Eritrean and had lived his life in Eritrea from which he was fleeing a well-founded fear of persecution. The CBSA officer, reportedly, behaved in an intimidating manner towards the asylum-seeker, and erroneously recorded in his notes that the asylum seeker was from Ethiopia and was not fleeing persecution.

8. We respectfully reiterate, for this Committee, that refugees and asylum-seekers are among the most vulnerable people on the planet. They no longer enjoy the protection of their home state and are fleeing seeking asylum in another country. It is not uncommon for them to travel with false identification as in many cases, escaping the country in which one is being persecuted is in itself fraught with perilous risk.

9. We also note that there should be clear distinctions between asylum-seekers and bona fide refugees – individuals who are deserving of protection – and failed refugee claimants, as well as foreign nationals. Refugees and asylum seekers are in a specialized category warranting protection, and they should not be conflated with human smugglers, or even other migrants – in practice, in detention, and even for that matter in the maintaining of statistics.

10. Given the serious repercussions for the individual emanating from CBSA interviews, the CCLA would recommend that all CBSA interviews be videotaped

c) Detention

11. Pursuant to the Immigration and Refugee Protection Act (“IRPA”), the CBSA is responsible for detention and the conditions of detention even when detention occurs at corrections facilities.
12. The CCLA is seriously concerned by the treatment of individuals held in Immigration Holding Centres – including the barbed wire fences, the separation of families, the detention of children and the separation of children from one parent – even the proposed options of placing children in foster care is problematic when the parent – far from being a threat to a child – may actually be a comfort to the child who has just experienced the trauma of persecution and fleeing persecution, only to arrive in Canada to face family separation and/or detention.

13. The CCLA is also seriously concerned about the conditions of correctional facilities. We have no doubt that this Committee is aware of the hunger strike at Lindsey. We also point out that as a matter of international refugee law, refugees are not to be detained with criminals, yet we understand that this is happening in some correctional facilities.

14. We are also seriously concerned by reports that refugee claimants who are detained and who are experiencing mental health issues, are being segregated for prolonged periods, and/or that adequate mental health treatment is not available to them. The CCLA has a long-standing record of speaking out against the deleterious consequences of segregation for any individual, and particularly for individuals experiencing mental health issues. We are aware of a disturbing example of a criminally inadmissible person in detention who suffered severe mental health issues and had deteriorated to being “catatonic” and consuming his own waste – it took a team of lawyer and a psychiatrist to have this individual removed from the prison and into a psychiatric hospital. One lawyer told me “I frequently represent people in detention under the (IRPA) who suffer serious mental health issues”. The CCLA is seriously concerned about the conditions of detention for all individuals, and in particular the treatment of those with mental health issues – as the scope of this hearing examines CBSA practices, we recommend that something must be done about detention conditions and special attention for those requiring mental health intervention.

d) Detention and Barriers to Access to Justice

15. The CCLA is also concerned about the reports of individuals who have been detained for years under the authority of Section 54 of IRPA. We believe that such prolonged and indefinite detention is non-compliant with principles of due process and habeas corpus. We understand that many of the people who are detained pursuant to s54 are disenfranchised and must rely upon Legal Aid for representation – however, while the Legal Aid system for example here in Ontario, may provide representation for one detention review, counsel will only appear at one detention review yet the complexities of the case require several
detention reviews – in such cases we understand that the detained individual has little chances of being released.

16. We are also concerned that the CBSA can transfer individuals – refugee claimants or the criminally inadmissible – away from their counsel – for example, transferring an individual from a correctional facility near Ottawa, to Toronto. This makes it very difficult for counsel to continue to represent the individual in his or her detention reviews. We are aware of circumstances in which counsel was in one city appearing by teleconference, the individual detainee was in a correctional facility appearing by videoconference, and the CBSA and IRB officers were in yet a third place – and counsel could not hear the responses of his client. The CCLA is concerned that such circumstances present a serious barrier to access to justice.

e) Discretion and Inadmissibility Reports

17. Section 44(1) of the IRPA enables a CBSA officer “who is of the opinion” that a permanent resident or foreign national is inadmissible, to prepare a report and send it to the Minister to determine admissibility. There is also concern over discretion on application of conditions of detention in s 44(3), particularly given the circumstances of many indigent and disenfranchised persons.

18. The CCLA is seriously concerned about the broad discretion inherent in this provision. There is no oversight and there are no independent review mechanisms in place – broad discretion is prone to abuse and misuse. In this case, abusive processes can result in individuals being questionably targeted, and of course the impact upon an individual who is facing deportation is immense. Taken in totality with the many powers of CBSA including, as I stated at the outset the unchecked intelligence gathering and sharing powers, the potential for abuse and deleterious consequences to an individual is immense, and we argue must be subject to review.