

“We Have No Rights”

Arbitrary imprisonment and cruel treatment
of migrants with mental health issues in Canada



UNIVERSITY OF TORONTO
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LIST of ACRONYMS

BCCLA	British Columbia Civil Liberties Association
CIC	Citizenship and Immigration Canada
CECC	Central East Correctional Centre (Lindsay, Ontario)
COI	Commissions of Inquiry
CBSA	Canada Border Services Agency
CCB	Consent and Capacity Board
CCR	Canadian Council for Refugees
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
DFN	Designated Foreign National
DR	Designated Representative
EIDN	End Immigration Detention Network
ENF 20	Citizenship and Immigration Canada Operational Manual: Enforcement 20 - Detention
GTA	Greater Toronto Area
GTEC	Greater Toronto Enforcement Centre
ID	Immigration Division of the Immigration and Refugee Board
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
IHC	Immigration Holding Centre
IHRP	International Human Rights Program, University of Toronto Faculty of Law
IRB	Immigration and Refugee Board
IRPA	<i>Immigration and Refugee Protection Act</i>
IRPR	<i>Immigration and Refugee Protection Regulations</i>
IMAT	Intensive Management, Assessment and Treatment Unit, Vanier Centre for Women
MCSCS	Ministry of Community Safety and Correctional Services (Ontario)
MOU	Memorandum of Understanding
MP	Member of Parliament
NGO	Non-governmental organization
OIDP	Officer Induction Development Program (Canada Border Services Agency)
PRRA	Pre-Removal Risk Assessment application
PTSD	post-traumatic stress disorder
RLO	Refugee Law Office, Legal Aid Ontario
TBP	Toronto Bail Program - Immigration Division
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
WGAD	United Nations Working Group on Arbitrary Detention

FOREWORD

James C. Hathaway

There is – tragically – nothing new about the propensity of states to treat migrants as beyond the bounds of the rule of law. Writing of the callousness that often met refugees and stateless persons forced away from their homes more than a half century ago, Hannah Arendt identified,

... the germs of a deadly sickness. For the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality... the nation state dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states.¹

In this important study, authors Hanna Gros and Paloma van Groll and editor Renu Mandhane shine the light of day on a contemporary manifestation of this callousness – the detention by Canada of thousands of persons every year, a substantial number of them in common jails. Beyond its truly massive scale, the study shows that migrant incarceration by Canada often operates in something approaching a legal “black hole” – for example, that key decisions, including the decision to detain in a provincial jail, are made without legislative authority.

The study concludes that Canada’s approach to migrant detention often amounts to a violation of international duties to avoid arbitrary detention, cruel, inhuman, or degrading treatment, and discrimination; and, perhaps most important, that it fails to live up to the internationally binding commitment to ensure an effective remedy for conduct in violation of those norms.

Sadly, however, international human rights law remains embryonic in terms of its practical ability truly to compel states to live up to the legal obligations they have freely assumed. Yes, the expert bodies appointed by states to oversee relevant UN treaties can shame non-compliant states, and even issue views approximating legal judgments finding a state to be in breach. But ultimately it falls to national authorities – both legal and political – to make the rights of migrants and other vulnerable positions real.

Canada, like every country, is of course entitled to detain at least briefly persons whose identity or reasons for arrival are unknown, or who are reasonably suspected of posing a risk to its safety and security. But the detention of migrants must be purposive, never routine; and it must be shown to be truly necessary in the specific factual context, and regularly reviewed to ensure that any necessity-based argument for deprivation of every person’s internationally guaranteed right to freedom of movement remains compelling. Indeed, as Justice Glazebrook of the New Zealand Court of Appeal so aptly observed just over a decade ago,

... the greater the restriction there is to be on a [migrant's] freedom of movement, the more scrutiny should be given to the reasons for detention... Where there is to be a major restriction on the freedom of movement through detention... [there must be] an element of “fault” on the part of the claimant.²

This is to my mind the nub of the issue. States too commonly assume – completely contrary to their international legal obligations – that migrant detention is somehow a national prerogative that can be automatically exercised, and

FOREWORD

without any real regard for the usual rules of fair play. This is emphatically not the case under international law, as this study so cogently affirms.

But the wrongfulness of routine migrant detention is much more than an issue of illegality. Returning to the point made so eloquently by Arendt, when we disfranchise human beings – in particular, suffering, often desperate human beings – we act at odds with all that is best about us, and we diminish the ability of the state to act as a force for good. And that is a tragedy not just for the migrants themselves, but for all of us.

I commend the International Human Rights Program of the University of Toronto Faculty of Law for having committed themselves to this project, and more generally for their determination to speak honestly about the continuing shame of migrant detention in Canada. I hope that all Canadians will join with them in their quest to reverse this historical wrong to migrants.

James C. Hathaway

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May 2015



February 2015 protest by End Immigration Detention Network outside Central East Correctional Centre, Lindsay, Ontario
Photo Credit: End Immigration Detention Network

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Every year thousands of non-citizens (“migrants”) are detained in Canada; in 2013, for example, over 7300 migrants were detained. Nearly one third of all detention occurs in a facility intended for a criminal population. Migrants detained in provincial jails are not currently serving a criminal sentence, but are effectively serving hard time. Our research indicates that detention is sometimes prolonged, and can drag on for years. Imprisonment exacerbates existing mental health issues and often creates new ones, including suicidal ideation.

Nearly one third of all detention occurs in a facility intended for a criminal population, while the remaining occurs in dedicated immigration holding centres (IHCs) in Toronto (195 beds), Montreal (150 beds), and Vancouver (24 beds, for short stays of less than 72 hours).

Nearly 60% of all detention occurs in Ontario. A Canadian Red Cross Society report notes that, Canada Border Services Agency (CBSA) held 2247 migrants in detention in Ontario provincial jails in 2012. Unfortunately, more up-to-date statistics are not publicly available.

Immigration detention is costly. In 2011-2012, the last year for which there is publicly-available information, CBSA spent nearly \$50,000,000 on detention-related activities. In 2013, CBSA paid the provinces over \$26,000,000 to detain migrants in provincial jails – over \$20,000,000 of that was paid to the province of Ontario. CBSA states that detention in a provincial jail costs \$259 per day, per detainee.

This report finds that Canada’s detention of migrants with mental health issues in provincial jails is a violation of binding international human rights law and constitutes arbitrary detention; cruel, inhuman and degrading treatment; discrimination on the basis of disability; violates the right to health; and violates the right to an effective remedy.

We find that migrants with mental health issues are routinely detained despite their vulnerable status. Some detainees have no past criminal record, but are detained on the basis that they are a flight risk, or because their identity cannot be confirmed. Due to the overrepresentation of people with mental health issues in Canada’s criminal justice system,³ some migrants with mental health issues are detained on the basis of past criminality – this is *after* serving their criminal sentence, however minor the underlying offence. Some spend more time in jail on account of their immigration status than the underlying criminal conviction.

Despite Canada’s strong commitment to the rights of persons with disabilities, migrants with serious mental health issues are routinely imprisoned in maximum-security provincial jails (as opposed to dedicated, medium-security IHCs). Indeed, the Canadian government publicly states that one of the factors it considers in deciding to transfer a detainee from an IHC to a provincial jail is the existence of a mental health issue. Counsel and jail staff we spoke to noted that migrants are often held in provincial jails on the basis of pre-existing mental health issues (including suicidal ideation), medical issues, or because they are deemed ‘problematic’ or uncooperative by CBSA.

The government claims that detainees can better access health care services in jail, even though all our research

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indicates that mental health care in provincial jails is woefully inadequate and has been the subject of recent reports and human rights complaints.

Alarming, we could find no established criteria in law to determine when a detainee can or should be transferred from an IHC to a provincial jail – the decision is at the whim of CBSA. Detainees' counsel are not notified of the transfer in advance and do not have the right to make submissions to challenge it. Of course, outside of Toronto, Vancouver and Montreal, all detainees are held in jails since there are no dedicated facilities to house migrants.

Once a detainee finds him or herself in provincial jail, they fall into a legal black hole where neither CBSA nor the provincial jail has clear authority over their conditions of confinement. This is especially problematic since, in Ontario at least, there is no regular, independent monitoring of provincial jails that house immigration detainees.

Unfortunately, while the laws and policies on their face pay lip service to the importance of exploring alternatives to detention, the numerous counsel and experts we interviewed all identified the lack of meaningful or viable alternatives to detention for those with mental health issues due to ingrained biases of government officials and quasi-judicial decision-makers who review continued detention.

In practice, the detention review process, which is meant to mitigate the risk of indefinite detention, actually facilitates it. Ontario counsel we spoke to uniformly expressed frustration with the futility of the reviews, where a string of lay decision-makers preside over hearings that last a matter of minutes, lack due process, and presume continued detention absent “clear and compelling reasons” to depart from past decisions. It is an exercise in smoke and mirrors.

The immigration detainees we profile spent between two months and eight years imprisoned in maximum-security provincial jails, and each had a diagnosed mental health issue and/or expressed serious anxiety or suicidal ideation. Without exception, detention in a provincial jail, even for a short period, exacerbated their mental health issues, or created new ones. This is, of course, unsurprising given the overwhelming evidence that immigration detention is devastating for those with mental health issues.

Without exception, the immigration detainees we spoke to communicated incredible despair and anxiety – over their immigration status, their seemingly indefinite detention, their lack of legal rights, their conditions of confinement, and the lack of adequate mental health resources to allow them to get better. They are treated like “garbage,” “animals,” or something less than human.

The detention of migrants with mental health issues in provincial jails violates the human rights of some of the most vulnerable people in Canadian society. It violates numerous human rights treaties to which Canada is a party, including the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of Persons with Disabilities*, as well as *jus cogens* norms of customary international law.

In particular, detention of migrants with mental health issues in provincial jails violates the right to be free from arbitrary detention. First, key aspects of the immigration detention regime are not sufficiently prescribed by law.

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Second, the decision to detain is not sufficiently individualized and fails to take into account vulnerabilities, such as existing mental health issues. And, finally, for migrants whose detention is lengthy and/or indefinite, it is more likely that it is arbitrary.

We also find that such detention violates the right to be free from cruel, inhuman, and degrading treatment insofar as it routinely imprisons migrants with mental health issues in more restrictive forms of confinement (maximum security jails), fails to provide adequate health care to meet their needs, and raises the spectre of indefinite detention.

We further find that Canada's immigration detention regime discriminates against migrants with mental health issues both in terms of their liberty and security of person, and their access to health care in detention. The lack of appropriate health care in detention is also a breach of the right to health.

Finally, we find the legislative scheme for the review of detention violates the right to an effective remedy. Canada's detention review regime creates an effective presumption against release, while judicial review of detention decisions is largely ineffectual. In some cases, the end result is long-term detention that is, in practice, preventative and indefinite.

Where migrants are held in a maximum-security provincial jails, international law requires that the due process requirements be higher, approaching those in criminal law. The current detention review system certainly fails to meet this standard.

Key Findings:

The Effect of Detention on Mental Health

- Immigration detention has a significant negative impact on mental health, even when detention is for a short period of time or in a dedicated facility.
- Detention causes psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional and psychological consequences.
- Lack of knowledge about the end date of detention is one of the most stressful aspects of immigration detention, especially for migrants who cannot be removed for legal or practical reasons.
- Detention can be particularly damaging to vulnerable categories of migrants, including asylum-seeking persons with mental or physical disabilities, including mental health issues, and victims of torture.

The Lived Experience of Immigration Detainees

- Detainees experience overwhelming despair and anxiety over their immigration status; the hardship of indefinite detention has a severe impact on mental health.
- Detention reviews are one of the most disempowering aspects of the entire ordeal.

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- Detainees report disrespectful treatment by Canadian government officials at every stage of their apprehension and detention.
- Detainees believe they are held in extremely restrictive conditions, including maximum-security jails far from community supports, to incentivize them to cooperate with removal to their country of origin.

The Legal Authority to Detain Migrants and Statutory Scheme

- The entire legislative scheme is silent on mental health; decision-makers are not required by law to consider migrant's mental health at the decision to detain stage.
- While detention reviews take place regularly, there is no presumption in favour of release after a certain period of time, and detention can continue for years.
- In practice, there exists a presumption towards continued detention, and a detainee's mental health is rarely seen as a factor favouring release.
- There is no effective mechanism to legally challenge detention: there is no right of appeal, there is no independent oversight or ombudsperson, judicial review is ineffective, and *habeas corpus* is not clearly available.

The Decision to Detain in a Provincial Jail

- CBSA has complete and unfettered discretion as to the site of confinement; the statutory scheme is silent on when or for what reasons a detainee will be transferred to more restrictive conditions of confinement such as a provincial jail, does not afford counsel notice of a proposed transfer, and does not afford the detainee the right to challenge the transfer decision.
- Interviews with counsel and jail staff suggest that those with serious mental health issues are routinely, even presumptively, held in provincial jails; CBSA policy indicates that it may transfer to provincial jail those with "mental health issues" or who exhibit "disruptive behavior."
- Because detainees held in provincial jails are under both provincial and federal jurisdiction, no single government department is clearly accountable for the conditions of confinement, and health and safety of detainees.
- The contract or agreement that CBSA has apparently negotiated with various provinces, including Ontario, to allow for detention of migrants in provincial jails is not publicly available.
- There is no effective monitoring of the conditions of confinement for detainees held in provincial jails: CBSA does not monitor jail conditions, and independent monitors of detention conditions, such as the Red Cross, are often barred access to provincial jails.

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Access to Mental Health Treatment in Provincial Jails

- Mental health support and treatment in provincial jails is woefully inadequate.
- While detainees with mental health issues that are stereotypically associated with disruptive behaviour (i.e. psychotic disorders) often receive medication; those who suffer from depression, post-traumatic stress disorder, or anxiety often do not receive any treatment at all. Those with suicidal ideation are sometimes kept in solitary confinement.

Recommendations

These recommendations are meant to be a first step towards better protection of the rights of migrants with mental health issues detained in provincial jails. They were arrived at through broad consultation with civil society groups.

To the Canadian government and lawmakers:

1. Create an independent body / ombudsperson responsible for overseeing and investigating the CBSA, and to whom immigration detainees can hold the government accountable (akin to the federal Office of the Correctional Investigator).
2. Amend existing laws, and regulations to:
 - a. Make clear that, in all decisions related to the deprivation of liberty of migrants, the government must use the least restrictive measures consistent with management of a non-criminal population, and protection of the public, staff members, and other detainees;
 - b. Create a rebuttable presumption in favour of release after 90 days of detention;
 - c. Repeal provisions that require mandatory detention for “Designated Foreign Nationals”;
 - d. Specify the allowable places, sites, or facilities for detention of migrants;
 - e. Specify the factors to be considered when deciding to transfer a detainee to more restrictive conditions of confinement (i.e. a provincial jail), and create an effective process by which a detainee can challenge such a transfer;
 - f. Create a presumption against more restrictive forms of detention for migrants, especially asylum-seekers, persons with mental or physical disabilities, including mental health issues, and victims of torture;
 - g. Ensure that the Minister of Public Safety and Emergency Preparedness has ultimate authority over the conditions of confinement for treatment, and health and safety of detainees, regardless of where they are detained;

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- h. Clarify that mental health and other vulnerabilities are factors that must be considered in favour of release in detention review hearings;
 - i. Require meaningful and regular oversight by a court for any detention over 90 days.
3. Sign and ratify the Optional Protocol to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, which would allow for international inspection of all sites of detention.

To the Minister of Public Safety and Emergency Preparedness:

4. Where migrants are detained, ensure they are held in dedicated, minimum-security facilities that are geographically proximate to community supports and legal counsel.
5. Ensure regular access to and fund adequate in-person, health care (including mental health care), social workers, community supports, and spiritual and family supports at all places of detention.
6. Create a screening tool for CBSA front-line officers to assist with identification of vulnerable persons, such as asylum-seekers, those with mental health issues and victims of torture, and to accurately assess the risk posed by an individual detainee.
7. Provide training to CBSA officers on human rights, diversity, and viable alternatives to detention, and empower them to exercise their existing discretion to release persons within 48 hours.
8. Ensure that appropriate mental health assessments occur within 48 hours of the initial decision to detain, and at regular intervals thereafter, regardless of where the detainee is held.
9. Create a national committee composed of representatives of government, mental health specialists, civil society, and lawyers to develop detailed policy recommendations on how to deal with immigration detainees who are suicidal, aggressive or who have severe mental health problems.
10. Wherever possible, employ alternatives to detention. Meaningfully explore, assess, and implement **alternatives to detention that build on the** positive best practices already in place in other jurisdictions, and especially in respect of vulnerable migrants, but which do not extend enforcement measures against people who would otherwise be released.
11. Create and fund a nation-wide community release program specifically tailored to immigration detainees, without caps on the number of detainees who can be supervised in the community through the program, and premised on the inherent difference in management of criminal and non-criminal populations.

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12. Provide support for detainees released into the community, including adequate transportation, translation and interpretation services, and ensure consistency in terms of health care and treatment.
13. Make public any agreements or contracts negotiated with the provinces in relation to detention of immigration detainees in provincial jails.

To the Minister of Citizenship and Immigration:

14. Ensure that Immigration Division Members receive adequate training on human rights, diversity, and viable alternatives to detention.
15. Ensure that all migrants are able to access essential health care services, including mental health care and medication, in the community.

To provincial governments:

16. Negotiate with the federal government to ensure that:
 - a. Funding received to house immigration detainees is sufficient to ensure adequate in-person, health care (including mental health care), legal counsel, community supports, and spiritual and family supports for immigration detainees; and
 - b. CBSA staff is regularly present at all provincial facilities that house immigration detainees.
17. Ensure immigration detainees are held in the least restrictive setting consistent with management of a non-criminal population and protection of the public, staff members, and other prisoners, including in residential-treatment facilities if needed.
18. Ensure consistent and meaningful access to adequate in-person, health care (including mental health care), legal counsel, community supports, and spiritual and family supports.
19. Allow for regular, independent monitoring by the Canadian Red Cross Society of provincial jails that house immigration detainees, and commit to implementation of any recommendations received.
20. Provide training to correctional staff on immigration detention, human rights, and diversity.
21. Ensure that provincial legal aid programs are fully accessible to immigration detainees at all stages of the process, regardless of the length of detention, and that funding is sufficient to pay for independent mental health assessments.

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22. Make public any agreements or contracts negotiated with the federal government in relation to detention of immigration detainees in provincial jails.

To the Judiciary and Immigration Division Members:

23. Interpret the common law right to *habeas corpus* broadly to allow immigration detainees to challenge detention and conditions of confinement (including transfers to more restrictive conditions) in provincial Superior Courts.
24. In relation to detention review hearings:
 - a. every detention review hearing should be approached as a fresh decision to deprive **someone of their liberty**.
 - b. require Minister's counsel to meet a higher standard of proof to justify continued detention, and
 - c. ensure that evidence proffered to justify detention is of sufficient probative value.

To counsel:

25. Conduct in-person visits with clients whenever possible and at least once at the outset of the retainer.
26. Communicate with clients more effectively about the detention process (i.e. why legal counsel cannot attend every detention review) and what they are doing behind the scenes to end detention.
27. Build solidarity amongst and between immigration, refugee, and criminal lawyers to devise creative strategies to challenge the immigration detention regime.

To the United Nations and Organization of American States:

28. Raise the issue of arbitrary detention of immigration detainees and their cruel and inhuman treatment as part of the United Nations Human Rights Council's Universal Periodic Review of Canada.
29. Use all opportunities to encourage Canada to take concrete steps to end detention of migrants in provincial jails, including during Canada's review by various treaty-monitoring bodies.
30. Encourage the Special Rapporteur on migrants, Special Rapporteur on the right to health, and the Working Group of Arbitrary Detention to complete a joint-study focused on immigration detention in Canada.

INTRODUCTION

FROM MULTICULTURALISM TO CRIMMIGRATION

I. INTRODUCTION

FROM MULTICULTURALISM TO CRIMMIGRATION

Canada is a land of immigrants, a multicultural haven for people from around the world. This mantra is part of our national identity – something in which Canadians take immense pride internationally, and that every school-aged child is taught to respect and revere. It is part of what makes Canada unique, special, and privileged.

And yet, while the vast majority of Canadians are immigrants themselves or descended from immigrants, Canada has entered a new era where the norm is to treat non-citizens as interlopers, illegals, threats to security, or criminals – in short, people less deserving of basic rights. This new reality has been dubbed “cimmigration” by experts and advocates.

Nowhere is this reality more stark than in the area of immigration detention. Every year, thousands of migrants⁴ who are not serving a criminal sentence are imprisoned, sometimes for months or even years.

Of course, immigration detainees are not a homogenous group, and include people of various ages, genders, and nationalities who have varying immigration statuses.⁵ Some of these people are extremely vulnerable: asylum-seekers, pregnant women, minors, the elderly, victims of torture or trauma, and persons with physical and/or mental disabilities (including mental health issues).

While some migrants are detained due to past criminality, most are not – migrants can be detained because they are deemed a flight risk, their identity cannot be confirmed, or they are otherwise deemed to be a “danger to the public.”⁶ Those with a prior criminal record have served their time (often for relatively minor offences), and often have mental health issues that contributed to their criminalization in the first place. Of course, nothing in this report should be read

IN FOCUS: The Criminalization of Migrants with Mental Health Issues

Because detention of migrants is sometimes justified on the basis of a past criminal conviction, it is important to contextualize this against the increasing criminalization of those with mental health issues.

A 2015 report by the Public Services Foundation of Canada finds the number of prisoners with mental health issues or addictions problems has “skyrocketed.” The Foundation notes that, “as community-based mental health services have disappeared, far too many people with serious to severe mental health problems have been scooped

up into the criminal justice system.” They go on to find that “our jails have become the mental health system of last report, an inhumane way to deal with people who need treatment and supports.”⁷

An independent, 2015 report commissioned by the Ontario Ministry of Community Safety and Correctional Services to explore the treatment of female prisoners with mental health issues noted that “the presence of major mental illness among women within the correctional system has increased dramatically in recent years,” in part due to “closure of

IN FOCUS: The Criminalization of Migrants With Mental Health Issues

mental health institutions, which has led...to females with Major Mental Illness being inappropriately placed in custody for minor offences that do not present a safety risk and do not warrant incarceration.”⁸ According to numerous stakeholders consulted in preparation of that report, “the justice system...has ended up being the catch-all for those whose needs cannot be met through the existing mental health infrastructure as there is nowhere else for them to go.”⁹

A 2010 report by the Schizophrenia Society of Ontario highlighted how the criminalization of those with mental health issues has serious impacts on

migrants. The overrepresentation of those with mental health issues in the criminal justice system, coupled with the fact that migrants convicted of certain crimes are inadmissible to Canada, effectively means that those with mental health issues are at a greater risk of deportation on the grounds of criminality.¹⁰ The report also observed that immigration enforcement policies put persons with mental health issues at greater likelihood of being detained, notwithstanding the limited access to adequate health care in detention and the fact that detention is likely to exacerbate existing mental health conditions.¹¹

as endorsing the current criminal justice system which routinely over-criminalizes and over-incarcerates the most marginal members of Canadian society (including those with mental health issues, racialized people, and Aboriginal peoples).

In 2013, over 7370 migrants were detained in Canada.¹² Approximately 30% of all detentions occurred in a facility intended for a criminal population,¹³ while the remaining occurred in dedicated immigration holding centres (IHCs) in Toronto (195 beds), Montreal (150 beds), and Vancouver (24 beds).¹⁴

Nearly 60% of all detention occurs in Ontario, with 53% of detention occurring in the Greater Toronto Area (GTA) alone.¹⁵ A Canadian Red Cross Society report notes that “CBSA held 2247 persons in immigration detention in Ontario provincial correctional facilities” in 2012.¹⁶ And, according to a former senior CBSA manager that we interviewed, detention as an enforcement tool has been steadily increasing over the past 20 years.¹⁷

Immigration detention costs Canadian taxpayers tens of millions of dollars annually. In 2011-2012, the last year for which there is publicly-accessible information, CBSA spent nearly \$50,000,000 on detention related activities.¹⁸ In 2013, CBSA paid the provinces over \$26,000,000 to detain migrants in provincial jails – over \$20,000,000 of that was paid to the province of Ontario.¹⁹ CBSA states that detention costs \$259 per day, per detainee.²⁰

Even where immigration detainees have no desire to remain in Canada, they often cannot be removed to their country of citizenship, for example, because the latter will not issue travel documents. According to counsel we interviewed, CBSA’s inability to arrange for detainees’ removal is often the main cause of extremely lengthy detention cases. This is the very issue that has contributed to the longest detention profiled in this report, namely, that of Michael Mvogo who has been detained for eight years and remains detained today.²¹ Instead of recognizing that a detainee such as Mr. Mvogo is effectively irremovable from Canada, CBSA insists on continued detention rather than devising an effective community release alternative.

Some of the migrants detained have pre-existing mental health issues or diagnosed mental illnesses,²² while others develop mental health issues as a result of detention. Indeed, at least nine people have died in immigration detention since 2000, most of them while held in a provincial jail (or other non-CBSA run facility).²³ Lucía Vega Jiménez is one of them – a woman from Mexico who hanged herself while detained in British Columbia and awaiting deportation. The high profile inquest into her death brought the issue of immigration detention into the public eye.

VOICES FROM THE INSIDE:

The in-custody death of Lucía Vega Jiménez

Lucía Vega Jiminéz was a Mexican national without status in Canada.²⁴ She was working as a cleaning lady in Vancouver and sending most of her earnings back home to support her family.²⁵ She hanged herself on December 20, 2013, while in immigration detention,²⁶ and a Coroner's inquest into her death was held in British Columbia in September and October 2014.

Lucía was initially detained by South Coast British Columbia Transportation Authority Police Service²⁷ on the Skytrain in Vancouver for failure to pay a fare.²⁸ Instead of issuing a ticket, transit officials contacted CBSA's Enforcement and Intelligence Division, who dispatched a CBSA officer to the scene.²⁹ A lawyer involved in the inquest told us that Lucía was detained because she was not prepared to give her name (or was not forthright about it).³⁰ They took her to a room in the main Skytrain office, where she met with a CBSA officer.³¹ This meeting took place on December 1, 2013.³²

Lucía was not informed of the right, nor given the opportunity, to speak to counsel before a CBSA officer questioned her at the Skytrain office.³³ The CBSA officer purported to be her friend and introduced herself as a 'liaison person.'³⁴ However, she asked Lucía questions that, when answered, resulted in self-incrimination, and the resulting information was eventually used against her in a detention review hearing.³⁵

Lucía had a detention hearing the day after she was initially detained, and her detention was continued.³⁶ Lucía was issued a deportation order and told she had 15 days to file a Pre-Removal Risk Assessment, which is an application indicating that she was afraid to return to Mexico.³⁷

Lucía was taken to the IHC at the Vancouver airport, which is a windowless, "dungeon-like"³⁸ facility in the basement.³⁹ A private security guard at the IHC

completed a Detainee Medical Form, which documents distress or unusual behavior, et cetera.⁴⁰

Lucía was at the IHC three days before being transferred to Alouette Correctional Centre for Women in Maple Ridge, a provincial jail for women.⁴¹ In Alouette there is an ostensibly separate wing for immigration detainees (there are only a few of them), but they are comingled with the prison population for meals and exercise.⁴² In total, Lucía spent just over two weeks (16 days) at Alouette.⁴³

Upon her arrival at Alouette, Lucía was interviewed by a mental health screener.⁴⁴ This meeting was conducted using an interpreter over speakerphone. At the inquest this nurse admitted that it was not a suitable way to deal with the language barrier, and that there should have been an interpreter in the room.⁴⁵

Records show that Lucía made subsequent visits to the mental health services at Alouette, because she was distressed about being sent back to Mexico.⁴⁶ Another prisoner who testified at the inquest said Lucía was absolutely traumatized at the prospect of going back.⁴⁷ Following a meeting with her legal aid lawyer, Lucía met with a nurse and complained of chest pain.⁴⁸ The nurse was concerned that the pains were related to stress and emotional trauma, and made an appointment for Lucía to meet with the prison's mental health coordinator.⁴⁹ When Lucía was summoned for her appointment, the record mistakenly said she was released.⁵⁰ The appointment was not rescheduled.⁵¹

Three days later, on December 19, 2013,⁵² Lucía was taken to a detention hearing, and subsequently transferred back to the Vancouver IHC at the airport.⁵³ There was no communication between the jail and CBSA regarding her mental health.⁵⁴ According to a lawyer involved with the inquest into her death,

CBSA “didn’t even ask or care about whether she was receiving treatment.” This is despite the fact that Lucía appeared significantly distressed at her detention review hearings.⁵⁵ In fact, one of her detention hearings was cut short because she was sobbing uncontrollably.⁵⁶ The lawyer we spoke to observed that individuals in positions of authority within the immigration detention regime “are going through the motions, ... not adequately paying attention to signs of acute stress.”⁵⁷

The Vancouver airport holding centre is staffed by poorly trained private security guards who make \$15 per hour, employed by a company – Genesis – that is contracted by CBSA.⁵⁸ At the time of Lucía’s suicide, the facility was understaffed.⁵⁹ There was only one security guard at the facility and there were no female guards.⁶⁰ At the inquest, the guard on duty admitted that he did not complete his room checks that night.⁶¹ Security video footage revealed that he was playing video games.⁶²

The Vancouver airport holding centre has poor ventilation and no natural light or outside access.⁶³ There is no reading material, only a television on the wall and plastic chairs. There is one bathroom and three stark rooms for sleeping. According to counsel involved with the inquest, “there is no information available, no opportunity to contact a lawyer other than a phone in the public women’s wing.”⁶⁴ This phone is the only means through which detainees could access counsel, and immigration lawyers report that it is nearly impossible to arrange meetings with their clients at that facility.⁶⁵ Counsel involved with the inquest noted, “These people are being treated like the worst criminals.”

Lucía was essentially unsupervised the morning she hanged herself in the shower—just 19 days after being first detained by CBSA.⁶⁶ She had torn the sheets from her bed into strips, and made her way to the bathroom.⁶⁷ Forty-two minutes passed before anyone opened the door,⁶⁸ and it would have been longer had it not been for three other women waiting to shower.⁶⁹ They sensed that something was wrong and called the lone guard.⁷⁰ A few agonizing minutes passed before

the guard even agreed to go into to the bathroom to check on Lucía.⁷¹ The paramedics arrived within eight minutes,⁷² but by that point, Lucía had been without oxygen long enough that her condition was fatal. She died eight days later at Mount Saint Joseph Hospital.⁷³

CBSA buried the news of Lucía’s death for over a month.⁷⁴ Lucía’s death only became apparent because of rumours that started to spread in the Mexican community through the other women who were waiting to use the shower after Lucía.⁷⁵

In October 2014, the provincial coroner’s inquest provided a long list of jury recommendations, including that Canada appoint an ombudsperson to mediate any concerns or complaints, and create a civilian organization to investigate critical incidents in CBSA custody.⁷⁶ The recommendations also called for a dedicated holding centre for immigration detainees located some distance away from the airport, which should be staffed by CBSA employees, and be above ground to allow for natural light, ventilation and outside access.⁷⁷ The jury also recommended that immigration detainees have access to legal counsel, medical services, services offered by non-governmental organizations, and spiritual and family visits;⁷⁸ that detainees should be allowed to wear civilian clothing, and telephones should be readily available for free local calls and the use of international calling cards;⁷⁹ that bathrooms and sleeping rooms should be self-harm proof.⁸⁰

More than one and a half years after Lucía’s death, the key recommendations have not been implemented.⁸¹ In fact, according to counsel involved with the inquest, “CBSA has not responded in any meaningful way.”⁸² Instead, their response “has been focused on measures to physically prevent suicide,” and the recommendations to improve conditions have been ignored.⁸³

CBSA’s most notable response to the recommendations was to introduce new requirements for common (rather than private) washrooms for detainees, which are to be first implemented in the Toronto IHC.⁸⁴ The Canadian

Council for Refugees (CCR), which participated in the coroner's inquest, is concerned that this measure actually makes conditions worse for detainees because it infringes on their privacy.⁸⁵ According to Loly Rico, President of the CCR, "suicide prevention measures should be guided by respect for human dignity and concern for the individual's mental health, not measures focused solely on physical prevention of suicide."⁸⁶

Counsel we spoke to concluded that, "every step along the way from the moment Lucía was arrested, to when she hanged herself, revealed deep systemic flaws in how the situation was handled."⁸⁷

This report examines how Canada's treatment of immigration detainees with mental health issues held in provincial jails violates Canada's international human rights law obligations. It is the result of an investigation conducted over ten months by the International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law. The issue of detention of migrants with mental health issues was first brought to our attention by counsel at the Refugee Law Office (RLO) of Legal Aid Ontario.

This report focuses on Ontario as a case study to discuss broader issues with Canada's laws, policies, and practices. Ontario is an important focus since the majority of immigration detainees are detained in this province.⁸⁸ Where possible, we highlight experiences from other jurisdictions since there is significant regional variation across the provinces. For example, outside of Ontario, British Columbia, and Quebec, there are no dedicated IHCs, which means all immigration detainees are held in provincial facilities. Moreover, publicly-disclosed CBSA data from 2013 indicates that immigration detainees outside the central region are much more likely to be released after a detention review proceeding than those housed within central region (which includes Toronto).⁸⁹ Regional variation in immigration detention is symptomatic of the lack of clear laws and policies to guide immigration detention in Canada.

In addition to extensive desk research, we interviewed ten detainees (seven who were in a provincial jail at the time of interview, and three who were recently released), and over 30 experts (including counsel, correctional staff, doctors, immigration experts, civil society groups, mental health experts, and a retired CBSA manager). Except for those already profiled extensively in the media, we have adopted pseudonyms for immigration detainees and anonymized their quotes to ensure their security and safety. We also anonymized quotes from counsel after many expressed fear that speaking out against CBSA would negatively impact their current and future clients. We also provided a draft of our recommendations to the federal and Ontario government, but did not receive any response. [For a full description of our methodology and experts consulted, see Appendix A.]

What we found is shocking. There is a marked absence of the rule of law in immigration detention decisions, including decisions about the site of detention, transfer to provincial jail, and decisions to continue detention. There are large gaps in accountability – what we call "legal black holes" – such that no governmental body is clearly responsible for detainees held in provincial jails. In terms of the day-to-day treatment of detainees in jail, CBSA "passes the buck" to the Ontario Ministry of Community Safety and Correctional Services (MCSCS), who is clearly struggling to keep up with increasing numbers of persons detained under the criminal justice system.

Perhaps most distressing, however, is the utter despair that this regime produces among detainees held in provincial jails. Each of the immigration detainees we met with communicated incredible hopelessness: "nobody cares because

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I am an immigrant here;" "we have no rights;" "they look at us ... like criminals;" "they treat us like garbage;" we are "not treated like humans." This anguish is compounded for detainees with mental health issues, who feel further marginalized and discriminated against on account of their health needs.

Anxiety over immigration status and the hardship of indefinite detention has a severe impact on the mental health of immigration detainees.⁹⁰ The uncertainty of the length of immigration detention is an enormous and constant source of stress, and detention often exacerbates or produces new mental health issues.⁹¹ Our interviews with detainees and counsel suggest that these issues are compounded by CBSA's 'hands-off approach' to the health of detainees, and the lack of adequate mental health care in jail.

This report should be a wake-up call. If Canada does not act quickly to reform the immigration detention system, more people will die in detention, while others will languish for months and years in conditions that amount to cruel, inhuman, and degrading treatment.

DEPRESSION AND DETERIORATION:

THE IMPACT OF DETENTION ON MENTAL HEALTH

II. DEPRESSION AND DETERIORATION: THE IMPACT OF DETENTION ON MENTAL HEALTH

According to one counsel we interviewed, deterioration of mental health is “one of the most significant observable phenomena in immigration detention.” Another counsel noted that the lack of contact with family and the indefinite and uncertain nature of immigration detention often causes detainees to “spiral out of control,” which she tells detainees is unfortunately “normal.”

Long-term detainees, who spend months and even years in jail, are particularly demoralized, frustrated, and anxious. Another counsel we interviewed could not think of a single client whose long-term detention did not result in mental health issues.

We interviewed three mental health experts for this report:

- Dr. Lisa Andermann, psychiatrist, Mount Sinai Hospital (Toronto); Associate Professor of Psychiatry, University of Toronto;
- Branka Agic, manager, Health Equity, Centre for Addiction and Mental Health (Toronto), and
- Michael Perlin, professor, New York Law School; internationally recognized expert on mental disability law).

We also interviewed Dr. Meb Rashid, a physician and director of the Crossroads Clinic, a clinic that treats newly-arrived refugees and refugee claimants. Dr. Rashid noted that, “mental health issues are a significant part of my practice.”⁹² He also noted:

The patients I have seen ... have been devastated by the process of being detained. One gentleman had fled a horrendous situation in his home country and was relieved to have arrived in Canada until he was detained. By the time we saw him, he was very depressed and attributed his shock of being detained as the trigger. Other patients have fled incarceration in their home country and being put into detention becomes a trigger for their mental health issues.⁹³

Finally, we consulted with the Schizophrenia Society of Ontario and Dr. Janet Cleveland regarding our key findings and recommendations.

Migrants face higher incidences of mental health issues than the general population. Even absent detention, migrants are two to three more times more likely to develop psychosis than non-migrants.⁹⁴ A recent study of the mental health of first generation migrants in Ontario notes that “the migratory experience and integration into Canada may contribute to the risk of psychotic disorders.”⁹⁵

It is not surprising then that mental health experts worldwide have documented the exceedingly harmful effects of

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immigration detention. It has been noted extensively that “detention systematically deteriorates the physical and mental condition of nearly everyone who experiences it.”⁹⁶ In 2012, François Crépeau, the UN Special Rapporteur on the human rights of migrants (and himself a Canadian), reported that “immigration detention has widespread and seriously damaging effects on the mental (and sometimes physical) health of detainees.”⁹⁷

Detention causes psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional and psychological consequences.⁹⁸ A report of the UN Special Rapporteur on the human rights of migrants observed that “prolonged detention deepens the severity of these symptoms, which are already noticeable in the first weeks of detention.”⁹⁹ Lack of knowledge about the end date of detention is one of the most stressful aspects of immigration detention, especially for migrants who cannot be removed for legal or practical reasons.¹⁰⁰

Detention can be especially problematic for the health of vulnerable migrants, including victims of torture, unaccompanied older persons, persons with mental or physical disabilities, and persons living with HIV/AIDS.¹⁰¹ A 2011 UN High Commissioner for Refugees Roundtable also noted that “limited access to lawyers, interpreters, social workers, psychologists or medical staff, as well as non-communication with the outside world, exacerbates the vulnerability and isolation of many individuals, even if they have not been officially classified as ‘vulnerable’ at the time of detention.”¹⁰²

In 2012, Dr. Janet Cleveland, a psychologist, legal scholar, and researcher on refugee health at the McGill University Health Centre, and her team noted that, “even short-term detention of adult asylum seekers leads to high levels of depression and PTSD (post-traumatic stress disorder), while longer-term detention aggravates symptoms.”¹⁰³

In a 2013 study, Dr. Cleveland conducted interviews with 122 immigration detainees held in the Toronto and Montreal IHCs, and 66 individuals who were not detained.¹⁰⁴ The team administered several standardized instruments in order to measure symptoms of anxiety, depression, PTSD, pre-migration trauma, and distress about detention experiences. There was no significant difference in trauma exposure across detained and non-detained participants, which confirms that any differences in mental health were due to detention.¹⁰⁵

The results reveal astonishing differences between detainees and non-detainees. Incarceration is a “serious stressor involving severe disempowerment, loss of agency, and uncertainty, all of which are predictors of depression and PTSD, even in people with a lower trauma burden than this population.”¹⁰⁶ After an average of 31 days in detention:

- Nearly a third of the detainees had clinical PTSD (twice as high as among non-detainees);
- Over three-quarters of the detainees were clinically depressed (compared to 52% of non-detainees); and
- Nearly two-thirds of the detainees were clinically anxious (compared to 47% of non-detainees).¹⁰⁷

Several detention-related experiences in particular were highly correlated with psychiatric symptoms of anxiety, depression, and PTSD: powerlessness, concern about family back home, nothing to do except think about problems,

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uncertainty as to length of detention, loneliness, fear of being sent back home, boredom, and the sense that detention is unfair.¹⁰⁸ Detainees also describe “feelings of shock and humiliation when handcuffed, and most felt that they were unjustly treated like criminals.”¹⁰⁹

It is important to note that the mental health of immigration detainees held in maximum-security provincial jails (as opposed to the IHCs) is likely much worse, though there is no comparable research study (likely because access to provincial jails is much more difficult to obtain).

Foreign statistics cited by Dr. Cleveland, however, demonstrate the effects of lengthier periods of detention. These figures reveal the strong and consistent link between immigration detention and mental health deterioration:

- “In the United Kingdom, after about 30 days in detention, 76% of detained asylum seekers were clinically depressed.”¹¹⁰
- “In the United States, after about 5 months in detention, 86% of refugee claimants showed clinical levels of depression, 77% clinical anxiety, and 50% clinical post-traumatic stress disorder.”¹¹¹
- “In Australia, in 2010-2011, there were over 1100 incidents of self-harm in immigration detention centres, including 6 suicides, for a population of about 6000 people, most of whom had been detained for less than a year. This is over 10 times the suicide rate in the general Canadian population. Self-harm behaviours included attempted hanging, self-cutting, drinking shampoo or detergent, and voluntary starvation.”¹¹²

The detrimental effects of immigration detention have been documented extensively in Australia. One study reviewed Commissions of Inquiry (COI) carried out in Australia regarding immigration detention. The study found that “depression has been the most widely observed mental health problem.”¹¹³ COI reports also found other forms of mental distress, such as psychotic episodes, self-harm and suicide attempts, and note that the “indeterminacy of detention” causes considerable difficulty.¹¹⁴

Furthermore, the Australian Commonwealth Ombudsman (which conducts investigations and provides oversight to government operations) noted a pattern that reflects the accounts of many of the counsel we interviewed for this report: “the length of detention contributes to the incidence of behavior problems among the detainees and may exacerbate mental health conditions. Difficult behavior by a detainee, in turn, can lead to a decision to transfer the detainee to prison.”¹¹⁵

Many of the Australian Ombudsman reports express concern about the adequacy and effectiveness of detention facilities’ medical services, noting that: “whether effective mental health care can be provided in the context of detention has been a matter of contention.”¹¹⁶

The mental health experts that we interviewed echoed this notion by emphasizing the protective role of social determinants in mental health.¹¹⁷ In many cases, psychosocial support is far more suitable than psychiatric interventions, but tends to be underestimated in favour of medication: “Mental health is built upon more than just the

psychiatrist or psychiatric nurse; having someone to talk to, to deal with problems, is also important. This could also be a counselor, community member, neighbor, clergy, family or friend.”¹¹⁸ Unfortunately, our research indicates that these supports are almost entirely non-existent in jail.

The immense uncertainty associated with indefinite detention and precarious status was a central theme in our interviews with mental health experts: “We can’t treat uncertainty with medication; it’s a situational thing where you can only do your best to support the person.”¹¹⁹ To this end, cross-cultural accommodations like language interpreters are vital, “so that you could understand why people might be behaving in a certain way, and de-escalate things that look like behavioral issues.”¹²⁰ More importantly, in order to meaningfully accommodate the necessary social supports, “treatment for mental health should happen in a hospital or in a community, not in a jail.”¹²¹

In January 2015, Australian MP Andrew Wilkie and human rights lawyer Greg Barns submitted a brief to the International Criminal Court requesting an investigation into crimes against humanity perpetrated by the Australian government against immigration detainees.¹²² The brief cites Article 7(1)(k) (crimes against humanity) of the *Rome Statute of the International Criminal Court*, claiming that it is applicable to immigration detention conditions, “which

VOICES FROM THE INSIDE: Noosha*

Detained for two months, with lasting impact on mental health

Noosha fled a repressive regime in the Middle East and came to Canada in 2007. Although Noosha has never been convicted of a criminal offence, she was held in the maximum-security wing at Vanier Institution for Women in Milton, Ontario (“Vanier”) for two months, and released on October 31, 2014. We met Noosha in Toronto four months after her release from jail.

Prior to her detention, Noosha was diagnosed with PTSD, depression, and anxiety, and was taking various medications to manage her mental health: “Without [those pills] I’m not normal,” she told us.

In September 2014, Noosha got into an altercation with her abusive ex-partner. After he called the police, she was arrested and taken to the police station where she was met by CBSA officers. When she tried to explain

her situation to the CBSA officers, they told her that they were not interested in hearing her story and that she should go back to her country. Noosha recalled the CBSA officer being very “tired and sleepy,” with his eyes half closed.

Noosha was then taken to Vanier, and granted criminal bail under the criminal justice system after one week; however, she remained detained in Vanier on immigration hold for nearly two months afterwards due to a clerical error. Due to an error at the courthouse, her release papers were never sent to the CBSA, who continued to detain her on immigration hold. However, since CBSA did not yet have her registered in their system, she also did not have any of the mandated detention reviews. The error was not caught in October 2014, and she was released ten days later.

Noosha met with a nurse within her first week at Vanier, though only for a few minutes. The nurse refused to provide the same anti-depressant medication that Noosha had been taking prior to being detained because she could not obtain proof of the prescription from her family doctor. Noosha explained that she was seriously affected by suddenly being cut off from the anti-depressants: “you can’t stop my medication right away... I’m going crazy,” she recalled.

Noosha reported that when she met with the nurse for a second time, again for only a few minutes, the nurse minimized her mental health condition, saying to her, “I understand that you are totally depressed, but this is jail life.” Noosha was eventually provided with anti-anxiety medication and sleeping pills because she was not sleeping or eating, and her “face [and] eyes [were] totally yellow.” Noosha was under the impression that there were no psychiatrists at Vanier, and she only reported meeting with a nurse.

Noosha’s depression soon became so severe that she considered committing suicide. “My heart was squeezing so much, I was crying so much, but people told me ‘if you tell the guard you’re going to try and kill yourself they will put in the punishment room, it’s the coldest room, for 3-4 days,’ and I thought, ‘I don’t want to go there.’” She never told the guards or nurses about her suicidal ideation, but she did confide in the social worker, who encouraged her to “stay strong.”

Noosha spoke positively about the social workers at Vanier, who helped her contact her family and a lawyer. With the help of her lawyer, CBSA discovered that there was a clerical error in her file, which eventually led to her release. She found out that she would be leaving Vanier on the morning of her release. CBSA picked her up and brought her to the Toronto IHC, where she had to sign a conditional release form. She was released to the supervision of a bondsperson, with whom Noosha currently lives. Additionally, Noosha must

report bi-weekly to CBSA in Mississauga. It takes her two hours to get there.

Noosha explained that the “terrible thing” about her case was that she “didn’t know how long [she] was going to stay [at Vanier].” She contrasted this to those detained through the criminal justice system at Vanier, who knew their release dates: “Some of the girls were so happy, putting make up on...maybe they had some good feeling because [they] knew when they were going to get out... For me, it was totally different... I didn’t know how long I was going to stay.” She recalled that, “it was stressful; ... anxiety gets worse when you [have] stress.”

While at Vanier, Noosha shared a room a woman serving a criminal sentence. “Immigration [authorities] should have something better than jail for those people only on immigration hold,” Noosha told us. “They just put [detainees and criminals] together and this is terrible.”

When she first met with her lawyer and explained her case, Noosha said she could not stop crying, because the way she had been treated was “really hurtful.” She explained that her mental health “was getting better” before she was detained, but after spending only two months in detention, Noosha felt that her mental health was set back to when she was first diagnosed with depression two years ago.

In recalling her ordeal, Noosha lamented: “Nobody cares, you know, even the government...nobody cares because I am an immigrant here.”

* The detainee’s name has been changed to protect her identity.

“THEY TREAT US LIKE GARBAGE”:

THE LIVED EXPERIENCE OF IMMIGRATION DETAINEES

III. “THEY TREAT US LIKE GARBAGE”:

THE LIVED EXPERIENCE OF IMMIGRATION DETAINEES

For this report, we interviewed ten immigration detainees, including seven that were incarcerated at the time of the interview, and three who had been released into the community shortly before we met them. While some of the detainees we interviewed had diagnosed mental health issues that they told us about, others did not self-identify as having a mental health issue but spoke more generally about symptoms commonly associated with depression, anxiety, and/or suicidal ideation. In other cases, detainees’ counsel advised us of their client’s mental health diagnoses.¹²⁴

The over 30 experts and professionals we interviewed and consulted consistently noted that the most important contribution our investigation could make would be to bring the voices and experiences of immigration detainees to the forefront of ongoing policy debates. Too often, because detainees held in provincial jails are difficult to access and because lawyers are focused on individual cases and bound by client confidentiality, the voices of detainees are missing from the policy debate about long-term detention of migrants.

A. Voices from the inside

This section provides a high-level summary of how immigration detention is experienced by those who are detained in provincial jails. Throughout this report, we profile individual detainees’ stories in more detail. Our hope is that, through these stories, we effectively highlight the lived experiences of migrants with mental health issues who are sometimes detained for months and years without adequate treatment and no apparent prospect of release.

Each immigration detainee we spoke to communicated helplessness and despair: “nobody cares because I am an immigrant here;” “we have no rights;” “they look at us ... like criminals;” “they treat us like garbage;” we are “not treated like humans.” Our research indicates that these feelings are justified, especially for detainees with mental health issues, who feel further marginalized and discriminated against on account of their health needs.

Anxiety over immigration status and the hardship of indefinite detention had a severe impact on the mental health of immigration detainees we spoke to. The uncertainty of the length of immigration detention is an enormous and constant source of stress. Unlike those serving criminal sentences, immigration detainees cannot countdown to a known release date. Nearly all the detainees we interviewed spoke anxiously about this uncertainty. One former detainee, who is diagnosed with schizophrenia, noted that it is much easier to deal with his mental illness outside of jail because there “isn’t as much uncertainty.” Even after being released from detention, detainees live in heightened fear of Canadian authorities – fear that even a minor by-law interaction, such as jaywalking, might result in transfer back to jail.

There are three IHCs, medium-security facilities specifically designed to house immigration detainees, across Canada. Nevertheless, even in jurisdictions with access to an IHC, immigration detainees are consistently transferred to maximum-security provincial jails. A service provider we interviewed who works at a provincial jail noted that immigration detainees are transferred to jail if they have a criminal record; due to mental health issues (including suicidal ideation) or other medical issues (including diabetes, cancer, et cetera); because they are deemed “problematic” or “non-cooperative” with CBSA’s removal arrangements; or because they are deemed a flight risk.

“THEY TREAT US LIKE GARBAGE”: THE LIVED EXPERIENCE OF IMMIGRATION DETAINEES

According to the same service provider: “The majority of the time when CBSA brings detainees in, they will say ‘suspected mental health’ or ‘odd behaviour’ or ‘aggressive behaviour.’” The service provider opined that the most common mental health issues among immigration detainees held in the jail in which she is employed are bipolar disorder, schizophrenia, depression, and/or PTSD.

CBSA’s hands-off approach to the mental health of immigration detainees, particularly once they are transferred to provincial jails, is especially problematic. If detainees have a mental health problem and are transferred to a provincial jail, CBSA does not follow up or monitor their health status (though it does have a policy regarding transfer of medical information).¹²⁵ One counsel we spoke to noted that CBSA does not view detainees as whole individuals, that is, people with complex health needs and families and children in Canada, but rather as unwanted people who need to be removed expeditiously (regardless of the risks they might face in their country of origin).

Some detainees feel that CBSA purposely makes the conditions of confinement unbearable to motivate them to “voluntarily” leave the country. However, even where immigration detainees have no desire to remain in Canada, they often cannot be removed to their country of origin, for example, because the latter will not issue travel documents. According to counsel we interviewed, CBSA’s inability to arrange for detainees’ removal is often the main reason for cases of extremely lengthy detention. Needless to say, such practices only further exacerbate detainees’ helplessness and mental health issues.

From our interviews, it appears that immigration detainees are more likely to receive medication if they suffer from such mental health issues such as schizophrenia or bipolar disorder. Our interviews with mental health experts and professionals confirmed that these mental health issues tend to be treated differently because they are stereotypically associated with potentially aggressive or disruptive behaviour that may pose a risk to staff or other prisoners.¹²⁶ By contrast, immigration detainees suffering from anxiety, depression, or PTSD are often left untreated because these mental health issues “are not likely similarly associated with risk.”¹²⁷ At all facilities, detainees we spoke to avoided seeking help from the medical staff regarding suicidal ideation: if held in an IHC, they fear being sent to a provincial jail; and, if already in jail, they fear being held in solitary confinement.

Ironically, detention reviews are one of the most disempowering aspects of immigration detention. These statutorily-mandated monthly hearings should be an opportunity to explore alternatives to detention, but our interviews with both detainees and their counsel reveal that these reviews are almost always *pro forma* rather than substantive. Immigration Division (ID) adjudicators typically accept and follow the decision from the previous detention review, unless the detainee can establish a clear change in circumstances. Troublingly, even significant deterioration of mental health is often not considered by decision-makers to be sufficiently serious to explore community release options.

In practice, this makes detention reviews a largely formal exercise. Where counsel is not present, detention reviews sometimes last fewer than ten minutes, with all parties simply going through the motions. One migrant, who had been detained for over two years, reported that reviews only take a few minutes; “imagine doing that for a year...[the] only thing [they] sometimes [ask] is my name.” One counsel characterized the reviews as the time every month where detainees have to sit quietly and listen to how “bad” they are.

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Indeed, one former detainee held at Central East Correctional Centre (CECC) observed that some immigration detention cases languish in *pro forma* detention reviews for at least three years before officials even begin to consider their release (presumably because this is the point at which the detention begins to look indefinite).

As a result of the ineffectual and perfunctory nature of these reviews, detainees' counsel, many of whom are stretched thin and retained on a legal aid certificate, do not attend the detention review hearings since there are often no substantive legal issues to discuss. An unfortunate consequence is that detainees often feel isolated and neglected, and do not understand whether or how their counsel are trying to help them.

According to counsel we interviewed, in the GTA, alternatives for those who have been in long-term detention and/or who have serious mental health issues are almost completely limited to the Toronto Bail Program - Immigration Division (TBP), such that it is nearly impossible to secure release without the TBP signing on as a bondsperson. Counsel believe that, because CBSA has a formal contract with the TBP, CBSA rarely trusts any other bond provider (such as family members). Counsel note that, as the *de facto* bond provider for those with mental health issues or who have been detained for a lengthy period, if the TBP does not agree to supervise a detainee, the chance of release to an alternative bondsperson or organization is slim to none.

Counsel note that family bondspersons and community care organizations that have proven rehabilitative care track records are routinely rejected for long-term detainees. This is problematic because TBP simply cannot take all immigration detainees that may be suitable for supervised release in the community: it is limited by its contract with CBSA to an active caseload of approximately 300 clients at any time, and must work with CBSA on a yearly basis to determine the appropriate source ratio as between provincial jails and the IHC.¹²⁸

Moreover, for detainees with mental health issues, there are significant hurdles to TBP acting as a bondsperson. Detainees with mental health issues report having to comply with taking prescribed medication in detention regularly, sometimes for months, before the TBP will agree to take them on. When the jail does not provide said medication, this can create a major roadblock to release, as counsel are obliged to “beg” the routinely unresponsive jail management to provide treatment for their clients, or spend thousands of dollars to have an independent psychiatrist conduct a mental health assessment at the jail. That said, TBP has shown a commitment to helping detainees with mental health and drug addiction issues and has hired counsellors specialized in assisting in these types of cases.

According to counsel, where ID Members agree to consider release for detainees with mental health issues, they generally insist on extensive and elaborate release plans. This is often very difficult to arrange because community care organizations usually require an in-person intake interview before they will consider accepting a detainee into the program. These in-person interviews are difficult, if not impossible, to coordinate because immigration detainees cannot be released to visit the community care organizations, and provincial jails are often geographically isolated from major urban centres.

Detainees repeatedly found their treatment by Canadian government officials, whether CBSA officers, ID Members, Minister's counsel or correctional staff, to be disrespectful. One detainee reported that ID Members and Minister's

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counsel “talk down” to detainees and view them solely as “criminal[s].” Another detainee noted that correctional staff “look at [us] like criminals,” and that “even the nurse[s]...look at me like an animal.” Yet another detainee summarized it bluntly: CBSA “doesn’t care about nobody.”

B. Conditions of confinement

We visited three Ontario jails to meet with immigration detainees (Central East Correctional Centre, Central North Correctional Centre, and Vanier Centre for Women). We also visited the Toronto IHC, but investigation of the conditions there was outside the scope of our research.

According to counsel and experts we interviewed, the main differences between the IHC and provincial jails is that the former is a dedicated medium-security facility within the GTA that allow families to be held in the same facility (albeit with men, and women and children held in separate wings), whereas the latter are often geographically distant, geared to a criminal population, do not allow families to stay in the same facility, and are maximum-security. Clearly, the deprivation of residual liberty is much greater in a provincial jail.

In this section, we provide a snapshot of the conditions of confinement for immigration detainees transferred to a provincial jail. Again, we focus on the lived experience of detainees to bring their perspectives to the forefront.

a. Central East Correctional Centre

The conditions of confinement at Central East Correctional Centre (CECC), often called “Lindsay super jail”, are deplorable. Immigration detainees we spoke to believe that CBSA is purposely holding them together in a single pod (Pod 3) and making the conditions of confinement so restrictive that they will be incentivized to leave the country “voluntarily.” According to one detainee we interviewed, long-term indefinite detention at CECC has “results” in that “people fold and do leave.”

CECC is a nearly two-hour drive northeast of Toronto, in Lindsay, Ontario. The jail itself is a large, 1,184-bed concrete correctional facility with multiple maze-link halls and wings, all surrounded by security cameras and 16-foot fences that are topped with 300 meters of razor ribbon.¹²⁹ Furthermore, all doors, windows, locks and perimeter walls are built to maximum-security standards, and feature “the most advanced security technology.”¹³⁰ The facility houses prisoners who are serving sentences of up to two years less a day, as well as those on remand awaiting court proceedings.¹³¹

Immigration detainees at CECC are kept in maximum-security conditions, as opposed to minimum or medium security, and are effectively treated like maximum-security criminal detainees, if not worse. In 2013, 353 detentions took place at CECC.¹³²

Detainees wear standard-issue orange jumpsuits at all times and are locked inside their cells for approximately 17 hours per day. According to the detainees we spoke to, each cell has a bed, toilet, sink, and steel table “and that’s it.” Detainees are strip-searched each time they enter or leave the building (for example, for medical appointments or hearings), and during facility-wide contraband searches. If a detainee refuses to participate in a strip search, he can be sent to segregation. Several detainees report that strip searches occur at least once a month.

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According to detainees, there is a CBSA officer stationed on Pod 3 five days per week, from 10:00 a.m. to 4:00 p.m., and the officer's job is to facilitate removals by, for example, helping detainees contact lawyers, embassies, or CBSA.

While we conducted our interviews in a meeting room on Pod 3, we did not tour the facility. To get to Pod 3, we walked through a metal detector and our bags were screened. Another guard escorted us down one level in an elevator, then through a series of at least five armoured doors, and down one more level before we reached the interview room. The entire process was disorienting.

Detainees described Pod 3 to us in detail. There are six ranges or wings (“A” to “F”) on Pod 3, where “A” is the segregation range (commonly referred to as “the hole”). There are two rows of eight cells on each range, with a maximum capacity of 32 men per range. The detainees are only able to interact with the men on their range. If detainees misbehave, the guards (commonly referred to as “blue shirts”) will move them to another range. While immigration detainees are all housed on Pod 3, one detainee reported that, “if you fight with a guard they can move you to the criminal side. ...It's dangerous on that side.”

One detainee describes Pod 3 as “so friggin’ cold” that they are given “three blankets right off the start,” with another detainee stating: “they purposely freeze you in there so you wouldn't like the conditions.”

The “day room” at CECC has a single television on the wall and five tables bolted to the ground. There is an outdoor room with concrete walls and mesh on the top so that you “get to see the sky.” There are “no soft chairs” and “guards get upset if you take a blanket and sit on it.”



*Aerial view of CECC
Photo Credit: Sun Media Corporation*

Several detainees reported that there is a significant mold problem in the showers on Pod 3, and while CECC has neglected to fix the problem for months, the guards are sometimes seen wearing facemasks on account of potential exposure to mold. At one point, the detainees were locked down for five days while management claimed to be addressing the problem. However, instead of fixing it, they simply removed the existing mold from the shower stalls, with a detainee recalling that they were told, “you can use the shower but have to be careful—your skin can’t touch the wall.” One detainee reports that staff said “‘don’t complain,’ otherwise they will put you in the hole.” The mold returned, and the detainees were again locked down for three days while the shower walls were washed. “The mold is not going to go,” said one detainee, “I cannot breathe.”

VOICES FROM THE INSIDE: Antonin*

Central North Correctional Centre, imprisoned for nearly 1.5 years

Antonin arrived in Canada from the Eastern Europe in 1985 after being sponsored by his grandmother. Having renounced his citizenship, and after serving a criminal sentence and losing his permanent resident status in Canada, Antonin was effectively stateless.

Despite the fact that he was no longer a citizen of his country of origin, Canada sought to deport Antonin there and transferred him directly into immigration detention at CECC after completion of his criminal sentence in September 2013. We interviewed Antonin at Central North Correctional Centre in Penetanguishene, Ontario, where he had been transferred from CECC two weeks prior to our meeting.

In response to a particularly discouraging detention review hearing while at CECC, Antonin wrote a letter stating that he would commit suicide in 30 days if the conditions of his detention did not improve. According to Antonin, this landed him in solitary confinement: “They stripped me naked ... and put me in the ice box.” He was forced to wear a “baby doll”, which he described as a stiff and sleeveless “little skirt made up of fireproof material.” “I was freezing,” Antonin recalled. After the guards allegedly refused to get him additional clothes or allow him to call a lawyer, Antonin smashed

his head on a sharp corner which resulted in profuse bleeding and caused him to lose consciousness. When he came to, he found himself in the “rubber room,” a room within CECC meant to prevent self-injury and where his actions were logged by staff every ten minutes.

Despite his attempts at self-harm, access to mental health treatment was not forthcoming: “You’d think if someone was ... smashing his head they’d make an effort to [have you] see a shrink...but [they] just had a psychologist coming in the morning and asking if I’m ready to leave the room now...I’m like ‘no’ [and] that’s it.” Antonin opined that the lack of mental health care related to his immigration status: “They are in the business of trying to deport people.”

After one week, at his request, Antonin was transferred to Central North Correctional Centre which is much closer to his two children and community supports. We met him in the maximum security unit there, where he was co-mingled with the criminal population.

* The detainee’s name has been changed to protect his identity.

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i. “Nothing to do”: Daily life at Lindsay

All of the detainees we interviewed spoke about the lack of educational, programmatic, vocational, or employment opportunities at CECC: “You’re either stuck in your room or you can go to the tiny day room.” When asked about his daily routine, a former detainee who had been at CECC for over 18 months, responded: “I sit around watch TV with nothing much to do.” Another former detainee, who spent nearly three years in immigration detention, corroborated: there is “nothing to do at Lindsay.”

There is no gym at CECC, though some detainees creatively fashion weights out of used juice containers. They have access to the outdoor range, which is “small and just concrete.” Others attend chapel for approximately 10-20 minutes per day, though we witnessed chapel being cancelled to accommodate our interviews, which took place in the same room.

According to detainees, the librarian only brings ten books to Pod 3 per month. “We fight for [new books],” said one detainee who had been at CECC for over a year. This is not surprising given that detainees spend nearly 17 hours per day in their cell, even when they are not on lockdown.

The majority of counsel we interviewed had clients who were detained at CECC, and they noted that the lack of programming builds immense boredom and stress, and contributes to a sense of powerlessness.

Even more troubling, the lack of programming may also have implications for detainees’ legal status. For example, as one counsel noted, “the longer they are detained, the weaker their Humanitarian and Compassionate application gets, because their establishment in Canada is eroded. Immigration detainees do not have access to educational, vocational or social programs, which, in combination to being cut off from family and friends erodes their establishment

IN FOCUS: 17 hours per day locked in a jail cell

7:30 a.m.	Detainees receive breakfast and eat inside their cells.
7:30-9:00 a.m.	Detainees stay inside their cells while their range is cleaned.
9:00-11:00 a.m.	Detainees are able to move around on their range, take a shower, or make phone calls to family, lawyers, et cetera.
11:00 a.m.-1:00 p.m.	Detainees are locked in their cells, lunch is served and they eat inside their cell.
1:00-4:00 p.m.	Detainees can move around on their range.
4:00-6:00 p.m.	Detainees are locked in their cells, dinner is served and they eat inside their cell.
6:00-8:30 p.m.	Detainees can move around on their range.
8:30 p.m.-7:30 a.m.	Detainees are locked in their cells for the night.

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to Canada.” He notes that, many detainees “choose to sign documents to go places that they don’t want to go, or abandon applications that have some merit, because they can’t deal with the grind of being in detention.”

ii. Frequent Lockdowns

Lockdown is a significant deprivation of prisoners’ residual liberty. While in lockdown, prisoners are confined to their cells all day, except for a short shower, and have extremely limited access to the phone. According to the detainees we interviewed, Pod 3 goes into lockdown particularly frequently, between six and 21 days per month, without any notice or reasons communicated to detainees.

Detainees find that the regular lockdowns “creates a lot of tension.” One detainee saw it as a tactic by management: “they think that as much time as you can spend in your cell will help you grow a desire to cooperate” (i.e. leave the country).

While the prison can go into lockdown due to disturbances or fights, the detainees we spoke to reported that the most common reason for lockdowns is that the facility is short-staffed. A former detainee noted that there are more lockdowns around Christmas, when staff is more likely to take vacation days.

Alarming, the detainees we interviewed noted that, when another pod is short-staffed, management will often transfer staff from Pod 3 to other pods, effectively causing Pod 3 to go into lockdown: “Every time there is one guard shorted on other pods, they lockdown our pod.” This detainee felt that Pod 3 was especially vulnerable because management knows that immigration detainees are less likely to access counsel to complain about lockdowns, compared to criminal detainees who have more regular interactions with counsel.

According to a recent report from the Public Services Foundation of Canada, Ontario jails are increasingly using lockdowns to bring critical situations under control: “Reports from staff indicate that a combination of high inmate counts and low staffing creates volatile situations where a general lockdown is the only safe course of action.”¹³³

iii. Limited community and family interaction

Half of the immigration detainees we spoke to have children who were born in Canada.¹³⁴ These detainees either did not want their children to visit them in CECC, or the trip was too far: “I don’t want them to come to a place like this,” said one detainee. Another stated, “I don’t want them to see me wearing clothes like this,” referring to the prison-issued orange jumpsuit.

It is understandable that many family members are reluctant to make the trip to CECC. If they do not have a car (or money for gas), they must take a bus that can take over two hours each way from Toronto, while the visit itself is conducted through glass for a maximum of 20 minutes. Moreover, visitors (including lawyers) who arrive during a lockdown are turned away. “Twice I went [to CECC] and wasn’t allowed to see my client,” noted one counsel, in reference to the difficulty of putting a client’s case together while the client was held at CECC.

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While detainees can call their lawyers, they do not have access to a free telephone. They can either make collect calls (which are accepted by lawyers, but less often by family members who may be struggling themselves with poverty), or put in a request with the CBSA officer to make a call for them. In the latter situation, it takes at least one week for the request to be processed, and the call is only permitted to last a few minutes. Notably, access to the phone, even to call counsel, is even more restricted when the unit is on lockdown.

iv. Treatment by staff

While a few detainees felt the CECC staff treated them appropriately or were at least neutral, the majority noted that their immigration status made them susceptible to poor treatment. A former detainee described the guards as “rude,” and felt that they would “talk down” to immigration detainees; “they look at you like you are no good.” Another detainee similarly noted that, “the guards look at [us] like criminals,” but also stated that he understood that the problems were systemic: “I cannot blame him because he is getting paid to do his job.” The detainee felt that the guards and even the nurses look at him as if he is “an animal.”

Another former detainee stated that the guards “treated us like garbage,” and that immigration detainees “have no rights at all.” He saw the guards as reluctant to help, and reported having “to ask three, four, seven times to get something,” otherwise the guards would simply “ignore” him; they would “only come if something was urgent.” The same detainee had spent time at Metro West Detention Centre in Toronto, where immigration detainees are co-mingled with the general prison population, and found that the staff treated him better at Metro West than at CECC because at the former he was “with the criminals, who have rights.”

Another detainee saw a difference in how they are treated by “blue shirts” (the correctional officers or guards) and “white shirts” (Officers in Charge or management). One detainee described the “blue shirts” as sympathetic to “what we’re going through” because they know immigration detainees are not actually serving time for a criminal sentence. This detainee went so far as to say that “blue shirts don’t like to see us locked down. It’s management and they are working for CBSA and the government.”

v. Doctor on TV

According to one of the detainees we interviewed, there is no health care unit at CECC. A standard health intake assessment is conducted when a prisoner arrives at CECC, where he is asked basic questions about family medical history, illnesses, major surgeries, et cetera. However, a few interviewees did not recall receiving a medical assessment when they first arrived, which suggests that it is sometimes perfunctory or does not occur consistently.

Access to medical professionals at CECC is scarce, service is slow, and the onus is on detainees to proactively seek medical attention. There is at least one nurse that the detainees may see in person, and doctors’ appointments are conducted by video link.

During these doctor’s “visits,” which generally last between five and 15 minutes, the nurse typically carries out the

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doctor’s instructions to examine the detainee and reports the findings to the doctor on the screen. If detainees want to see a doctor over video link, they must put in a request, and it generally takes two to four weeks for requests to be processed. One detainee reported that they never know if and when their requests will be met. They ask the guards whether the doctor is scheduled to meet with prisoners at the jail, and whether they are “on the list”; if the answer is affirmative, they will be called up to see the doctor. “Each week you hope you are on the list,” reported one former detainee, “I put in five or six requests,” he recalled, “they don’t answer you.”

Another detainee noted that, “sometimes you will get an injury and by the time you see the doctor, it’s better.” However, if serious medical attention is required, detainees may be transferred to a hospital in the community for medical care.

Aside from virtual appointments with doctors, a psychiatrist attends CECC in person at least once per month; these appointments also typically last between five and 15 minutes. One of the detainees reported that he sees a psychiatrist once per month, unless he is acting “different” or “not taking the meds,” in which case he sees the psychiatrist more often. However, having spent some time at the Toronto East Detention Centre in Scarborough, the same detainee noted that treatment there was better than at CECC because at the former he could see a psychiatrist every week. At CECC, even if detainees put in a request to see a psychiatrist, it may take a month before the request is answered. The lack of consistent access to psychiatric attention is important because it can be particularly consequential for detainees: one detainee noted that he had to take his medication in order to stay on the range, and it is often a requirement for community-supervision by TBP.

Detainees with mental health issues stereotypically perceived as potentially disruptive to the institution are given medication, while those with depression, anxiety, or PTSD appear to be ignored. “Unless you’re a threat to the institution or staff,” remarked one detainee, “they don’t give you anything.” Detainees we spoke to who were diagnosed with bipolar disorder and schizophrenia reported willingly taking their medication, and some also noted the benefits of doing so.

None of the detainees we interviewed mentioned meeting with a social worker while detained at CECC. One detainee reported that, “the social worker is not here to work with immigration detainees.”

vi. Language barriers

While we conducted all of our interviews in English, a number of detainees noted that language barriers are a problem for many of the migrants held at CECC: “There were a lot of people who don’t speak a lot of English,” recalled a former detainee. Since there are no interpreters brought in to assist immigration detainees to navigate their immigration issues (outside of formal detention reviews), they can only hope that another detainee on their range speaks their language and can informally translate for them.

vii. Far removed: detention review hearings

As required by law, even for long-term detainees, detention reviews are held every 30 days. Detainees report that the reviews sometimes last only several minutes, though they are substantially longer when counsel are present and there are substantive issues to discuss (up to 90 minutes).

VOICES FROM THE INSIDE: Samuel*

Central East Correctional Centre, detained for 1.5 years

Samuel came to Canada from the Caribbean in 1987, when he was 11 years old. His counsel indicated that he has been diagnosed with bipolar disorder (including psychosis), as well as cognitive delay.

On August 20, 2013, soon after serving a two-week sentence for a non-violent offence at Maplehurst Correctional Complex in Milton, Ontario, Samuel was placed in immigration detention, and eventually transferred to CECC. After being detained for nearly 18 months, he was released in January 2015.

When asked to compare his experience serving his criminal sentence to immigration detention, Samuel stated decisively that his immigration hold was worse. Samuel reported that the uncertainty of his immigration status was particularly stressful. "Immigration hold was a pain," he told us. "I didn't know if they were going to deport me... I'd been there for so long." He also found that the staff at CECC were "rude" and that they "talk down to you."

At CECC, Samuel reported seeing a doctor in person once per month, for about ten minutes per appointment. The doctor would notify Samuel about the medication that he prescribed. Samuel took medication in the morning and at night in order to "to keep [him] calm." He noted that the pills had side effects: they gave him "a chill" and made him "put on lots of weight." Although Samuel made requests "a few times" to meet with a psychiatrist, he stated that he never received a response.

Samuel recalled complaining to the guards that "I can't stay here this long in this jail." He also recalled complaining to the doctor that his life was "in danger" because he was around lots of people who would fight, and the doctor responded by saying that "there is nothing he could do."

At his monthly detention reviews, the ID Member and Minister's counsel "talk[ed] down to me, [they] don't

want me to get out and I used to get frustrated." When asked how they would "talk down" to him, Samuel replied, "basically you're a criminal and they got a control over your life." He spoke with his legal aid lawyer over the phone or occasionally via video link, and he met with counsel in person once in April 2014. Samuel did not have a Designated Representative (discussed below).

When asked about going back to his country of origin, Samuel indicated that that country's officials said his "life would be in danger" if he went back, because, as Samuel put it, "I got no family there and I got no ties." In November 2014, Samuel's Pre-Removal Risk Assessment (PRRA) was re-opened and he received a positive risk determination, meaning that he cannot be removed from Canada at this time. His PRRA application is currently being assessed for risk balancing.

Samuel has two kids who were born in Canada. They never visited him at CECC because it was "too far."

Eventually, Toronto Bail Program (TBP) agreed to facilitate Samuel's release, while his mother, who lives in Canada, posted a \$5000 bond. As part of his release conditions, Samuel must report to the TBP twice a week, where he also receives his medication. He is not sure how long he will have to continue to report to TBP, but he "hope[s] it's not forever."

Currently, Samuel resides at a crisis service centre in Toronto that specifically supports individuals with mental disabilities. When asked how immigration detention affected him, Samuel responded that it "makes [him] depressed," and he feels that he now has to "walk on eggshells."

* The detainee's name has been changed to protect his identity.

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At CECC, detention reviews occur via video link. There is a room set up on Pod 3 where detainees sit in front a screen against a blue background. The screen is video linked to a detention review room at the IHC in Toronto. The Immigration Division (“ID”) Member (decision-maker), Minister’s counsel, and the detainee’s lawyer are all physically present in the hearing room at the IHC.

Despite the prejudicial effect it may have on the decision-maker, detainees must wear their prison-issued orange jump suit to their hearings.

viii. Segregation, aka “the hole”

According to counsel we interviewed, if a detainee fights or argues with a guard, goes on a hunger strike, attempts self-harm, or engages in other “disruptive” behaviour, he can be segregated (i.e. kept in solitary confinement). According to one detainee who spent time in segregation after an incident of self-harm, the segregation cell at CECC is very cold. They call it “the icebox,” he said, because it is upstairs next to the yard, and two walls of the cell have outside exposure.

In segregation, prisoners are stripped naked and, instead of the prison uniforms, they wear a stiff, fire and rip-proof, short-sleeve, thigh-length gown (or “baby doll”)

b. Vanier Centre for Women

At Vanier Centre for Women in Milton, Ontario (Vanier), immigration detainees are also held in the maximum-security wing, which is where we conducted our interviews. To get to the maximum-security wing, we passed through a metal detector, went down an elevator and through at least four sets of armoured doors. The female prisoners all wear forest green sweatshirts and sweat pants. Guards keep watch at all times from a central post. Every time a prisoner leaves and enters the jail, they are subjected to a strip search.

Unlike at CECC, immigration detainees at Vanier are co-mingled with the general maximum-security population, which consists of women serving criminal sentences and those on pre-trial detention. According to one former detainee, there is a lot of fighting: “Every day they just punch each other’s face.” The same former detainee told us that women in general population joke about the fact that immigration detainees are kept in the same facility even though they are not serving criminal sentences.

We conducted our interviews in a meeting room in the Intensive Management Assessment and Treatment (IMAT) unit, a specialized unit within the maximum-security wing, where both of the immigration detainees we met were being held. We had the opportunity to go inside one of the IMAT cells. It is approximately 4’x8’, with a basic metal sink, a small desk, a toilet, and a metal bed with a thin, worn out mattress, and an accompanying thin, worn out blanket on top. There is a narrow food slot in the door to allow a food tray to pass through. According to jail staff, interviews may also be conducted through this slot if the behaviour of the prisoner so warrants. There is a small window on the wall opposite the door. In the IMAT unit, each prisoner has her own cell, whereas in general population prisoners are double-bunked.

i. “There is nothing there”

In the maximum security unit, prisoners are let out of their cells three times per day. According to a former detainee: “[Vanier is] terrible. There is nothing there.... Prisoners can only go outside twice a week for fresh air, for like 5 minutes... that’s it. We didn’t see sun, we didn’t see sky.” There is no access to a gym. In the IMAT unit, women stay inside their cells for most of the day.

Unlike in CECC, immigration detainees at Vanier appear to have access to some programming. There is a prayer program every Sunday, and a group therapy session for approximately one hour per week. There is also some ad hoc programming, including an anti-bullying session “where they tell you how not to bully and stay at ease with stress,” reported one detainee. According to staff, some immigration detainees do not speak English, which can be a barrier to participating in programs. It was our impression that the immigration detainees at Vanier were able to access programming precisely because they were co-mingled with criminal detainees, and therefore indistinguishable from them.

ii. Lockdown

According to a former detainee we interviewed, lockdowns occur weekly at Vanier, mostly because the jail is short-staffed. The same former detainee recalled being on lockdown for four days in a row. Again, this represents a significant deprivation of prisoners’ residual liberty, because it means that women cannot leave their cells (except to shower), and cannot make phone calls, or access whatever limited programming is available.

iii. Access to community and family

During our tour of Vanier, we observed the visiting room, which is a non-descript medium-sized rectangular room, with an open area in the centre and with four separate rooms at the periphery. There are visiting tables in the main open area, with a small pane of glass that separates the two sides of the table (i.e. the visitor and prisoner). The separate rooms are used for detention reviews and other meetings that require privacy. We obtained very limited information about visits since the three women we interviewed (two detainees and one former detainee) did not have family in Canada. Aside from visits, detainees may make collect calls to landlines only.

iv. Access to counsel

The former detainee we interviewed was notified of her right to counsel when first detained. However, the staff at Vanier does not provide extensive information to immigration detainees about their legal rights. The detainees we interviewed at Vanier only knew to get in touch with the Legal Aid Ontario because another prisoner at Vanier told them to do so.

v. Treatment by staff

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Our impression was that the staff at Vanier seemed more helpful, sympathetic, and friendly than at CECC. They appear to genuinely care about the well-being of the immigration detainees, with one of the correctional officers even telling us candidly that keeping immigration detainees with mental health issues in jail constitutes “human rights abuse.”

However, since immigration detainees are co-mingled with the general maximum-security population, the guards treat them no differently: “You are a total criminal and that’s it,” said the former detainee.

vi. Health care

In an independent review of mental health care available to female detainees in Ontario, Optimus / BSR, a management consulting firm, found that while mental health care at Vanier “has been designed with many good practices,” but that “...the IMAT Unit does not provide the inmates with the secure level of movement within the unit, have the level of programming, or the therapeutic milieu” of a comparable male-only correctional treatment facility.¹³⁵ The Optimus report also note that “the IMAT Unit at Vanier Centre for Women is only a single example in a large and complex system. The system is one without the level of coordination or consistency required for high-quality care.”¹³⁶

A staff person we interviewed described the health care available at Vanier; this person is quoted extensively in this section but asked to remain anonymous.

Intake and Assessment: Upon being transferred to Vanier, detainees see a nurse who takes their medical history, and who may refer them to a doctor (general practitioner) depending on the circumstances. At this point, the officers and doctors do not know whether the woman is on immigration or criminal hold, and immigration detainees are treated like “everybody else.”

The intake medical assessment is conducted by a nurse to determine whether the prisoner should be placed in general population or on the IMAT unit. However, the fact that a prisoner has a mental illness does not necessarily mean that she will be placed in the IMAT unit; if she is stable, she will usually remain in general population.

A former detainee we interviewed reported that the medical assessment was just “to make sure you’re not a problem – not contagious to somebody else.” She further stated that they did not ask her whether she was taking any medication, which was particularly relevant in her case since she needed regular medication to deal with serious depression and anxiety. She was later told that if she has a mental issue that requires medication, the jail could only supply that medication if it obtained a letter from her family doctor or by Court order. Still, the detainee noted that nurses readily provide sleeping pills.

The prison doctor determines whether a referral should be made to the prison psychiatrist for further assessment. The psychiatrist is generally at Vanier from Tuesday to Thursday, and sometimes Friday mornings if necessary. According to a staff person we spoke to, if a detainee sees the doctor on a Monday and gets a referral, they can usually see the psychiatrist within a day or two. Meeting with the psychiatrist is voluntary.

“THEY TREAT US LIKE GARBAGE”: THE LIVED EXPERIENCE OF IMMIGRATION DETAINEES

After the initial intake interview, access to a doctor is limited. There is only one doctor for all of Vanier. One detainee reported that after she saw the doctor, she asked a guard for a form to request to see the doctor again, but the guard notified her that, “you have a limit to see the doctor once a month.” Doctors’ appointments may last only a few minutes.

Mental health care: There is a “multidisciplinary team” of mental health workers at Vanier, including a part-time psychiatrist, three full-time psychologists, a full-time psychometrist, two mental health social workers (one full-time, and one part-time), and three mental health nurses (though there are only two working at any given time). There are also two mental health managers at the IMAT unit.

Detainees with mental health issues that are considered less severe (such as depression, anxiety, and PTSD) do not have ready access to the psychiatrist at Vanier. However, when the illness is considered to be more severe (such as schizophrenia or bipolar disorder), detainees may meet with a psychiatrist biweekly for about ten minutes.

One staff person we spoke to emphasized that the psychiatrists are focused on helping prisoners, not on whether a prisoner is a risk to the institution. This person also confirmed that psychiatrists cannot and do not force detainees to take medication. That said, in case of a mental health episode, a staff person confirmed that “jail safety and security [come] first.”

Where a detainee asks to speak to someone, officers generally call the social worker, psychologist, or mental health nurse. However, officers also tend to have a relationship with the detainees and may try to de-escalate the situation themselves before calling in a mental health practitioner (provided that it is during working hours when the practitioners are there).

Social workers: The women that we interviewed were positive about their interactions with the social workers at Vanier. One former detainee reported that the social worker helped her contact her family, because the latter did not know her whereabouts. The social workers provide a variety of services, including facilitating immigration detainees’ interactions with the CBSA, consulates, and counsel.

In order to access a social worker, prisoners must put in a request, which is generally answered within two or three days. Detainees are able to meet with social workers at least once per week. The meetings vary in length depending on the case, and may even last up to an hour. “Everybody puts requests for social worker[s] and they make appointment[s] for everybody,” stated one detainee. “They are helpful,” reported another.

vii. Detention review hearings

As required by law, detention reviews occur after the first 48 hours of detention, seven days later, and then every 30 days. Unlike at CECC, detention reviews at Vanier are conducted in person. The ID Member and Minister’s counsel meet with the detainee in a private room in Vanier’s visiting area. Hearings typically last around 20

VOICES FROM THE INSIDE: Anike*

Vanier Institution for Women, detained for over one year

Anike came to Canada in 2007 from West Africa to attend University. According to her counsel, Anike has been diagnosed with schizophrenia, though she did not acknowledge her mental illness during our interview. Anike has been previously hospitalized for attempted suicide through prescription-drug overdose.

Though Anike has no criminal background, she has been held in immigration detention at Vanier since April 2014 after being deemed a flight risk. She is currently in the process of claiming refugee status with the assistance of counsel. Counsel advise that the Immigration Division views Anike's fear to return to her country of origin as evidence that she is unlikely to appear for removal, and therefore makes her a flight risk.

After Anike's student visa expired, her family in her country of origin cut her off financially, and she became homeless. Anike was living in and out of shelters when someone approached her to discuss her housing situation, discovered she had no immigration status, and alerted CBSA. This person may have been a community support worker or police officer, it was not clear from our interview with Anike (this ambiguity is unsurprising given the stress of the situation and her untreated mental health issues).

CBSA took her to the Toronto IHC, where she stayed for one day before she was transferred to Vanier on account of her mental health issues. Anike finds it stressful to interact with women serving criminal sentences or charged with criminal offences. She also reported being bullied by other prisoners. She was held in a general population unit on the maximum-security wing before being moved to the more isolated IMAT unit.

Anike has not been taking the medication prescribed to her at Vanier because she does not acknowledge that she has any mental health issues. She mentioned that her counsel (whom she has met seven times) "keeps talking about medication, that [she] should take medication," but she believes it is unnecessary. She preferred not to answer our questions about her mental health.

Toronto Bail Program has refused to accept her until she takes her medication. Her lawyers confirmed that her refusal to take medication is preventing Anike from being released, and that she will not be released until she is "stable."

* The detainee's name has been changed to protect her identity.

minutes. When asked if there was any change in mood for detainees leading up to or following their detention reviews, a staff person we interviewed responded, "Some of them don't even remember when their reviews are. It's a non-event."

Like CECC, Vanier is a significant distance away from Toronto (about 45 minutes). For this reason, lawyers rarely attend detention review hearings, and there is also largely no point to attending hearings unless there is a significant change in the detainee's case (discussed below).

viii. Segregation

The detainees we interviewed felt that segregation is used as punishment at Vanier. According to one detainee who spent time in segregation, “If women get frustrated and scream in their cells, and if they will not stop screaming, or if they have delusions, they will put the woman into segregation. ... When I was in segregation I was feeling pretty much without rights.” Another former detainee noted that if a detainee reveals that she has suicidal ideation, she will be put into segregation.

IN FOCUS: “It’s Life In Jail - You Have to Watch Your Back”

CBSA notes that it works “closely with its provincial correctional partners to minimize interaction, to the fullest extent possible, between immigration detainees and individuals detained for criminal reasons.”¹³⁷ However, throughout our interviews with counsel, we found that immigration detainees are consistently comingled with those detained through the criminal justice system within provincial jails (with the exception of CECC which has a dedicated pod for immigration detainees).

Our interviews with immigration detainees confirm that they are treated no differently than those detained through the criminal justice system at Maplehurst Correctional Complex, Toronto West Detention Centre (Metro West), Central North Correctional Centre, and Vanier Centre for Women.

Indeed, although Ontario Minister of Community Safety and Correctional Services (MCSCS) policy lists immigration status as a factor in considering how inmates are classified,¹³⁸ nowhere in the relevant provincial legislation or regulations is there a provision

for strict separation of immigration detainees from those detained through the criminal justice system.

Co-mingling can have far-reaching consequences for immigration detainees. A 2012-2013 Canadian Red Cross Society report observes that comingling with criminal holds was one of the main contributing factors to immigration detainees’ stress and mental health issues.¹³⁹ As one counsel told us, “It’s life in jail—you have to watch your back.”

This is particularly difficult for immigration detainees with language barriers. As one correctional staff person told us, especially for foreign nationals, “it’s a different culture twice over – you’re coming to Canada and also going to jail, which is a different culture altogether.”

Furthermore, immigration detainees with existing mental health issues have the potential for traumatization due to comingling.¹⁴⁰ Indeed, one of the detainees we interviewed at Vanier noted that she was bullied by the other prisoners, and requested to be housed in the more secure IMAT unit as a result.

IN FOCUS: “It’s Life in Jail - You Have to Watch Your Back”

CECC is exceptional in having a separate pod for immigration detainees – and this can probably only be arranged in jails in relatively close proximity to a major city (Montreal, Vancouver, Toronto). However, while this separation prevents co-mingling, our research suggests that correctional staff may transfer immigration detainees to a criminal wing as a punitive measure.

More troubling, we were surprised to learn that housing immigration detainees in their own pod raises new human rights concerns because it fosters discrimination against immigration detainees by jail management. Whereas co-mingled

immigration detainees have access to the limited programming and services available for those detained under the criminal justice system, our research demonstrates that immigration detainees in Pod 3 at CECC have no access to any programs or services at all. Furthermore, immigration detainees in CECC are subject to significantly more frequent lockdowns because other wings are prioritized when the facility is short-staffed. There is heightened tension with persistent lockdown.

A LEGAL BLACK HOLE:

CANADA'S TREATMENT OF MIGRANTS WITH MENTAL HEALTH ISSUES

IV. A LEGAL BLACK HOLE:

CANADA'S TREATMENT OF MIGRANTS WITH MENTAL HEALTH ISSUES

In Ontario, permanent residents and foreign nationals detained by CBSA (collectively, "immigration detainees") are generally held either in the Toronto IHC (administered by CBSA) or in provincial correctional facilities ("provincial jails") managed by MCSCS.

Some immigration detainees, especially those detained for long periods of time, are essentially warehoused in correctional facilities designed to accommodate short-term criminal holds.¹⁴¹ This situation is worse for vulnerable immigration detainees who have, or develop, mental health issues while in detention. In fact, our research indicates that immigration detainees with mental health issues are routinely transferred from IHCs to provincial jails on the assumption that the latter can offer more extensive services to treat those with mental health issues. An undated internal CBSA document notes that if a detainee is "deemed not suitable to remain in the IHC due to their mental health issues they are transferred to provincial corrections where there is 24 hour health care and dedicated psychiatric staff and facilities to deal with these issues."¹⁴²

There is no indication in the laws, regulations, or publicly-accessible policies that CBSA, the detaining authority, terminates legal responsibility for immigration detainees upon their transfer to non-CBSA facilities. However, it remains unclear who is responsible for the conditions of confinement, including access to appropriate mental health care, once detainees are transferred to provincial jails, hence the legal black hole.

A. Detention of migrants in Canada

a. Legislative authority and implementation

The federal *Immigration and Refugee Protection Act* (IRPA)¹⁴³ and the *Immigration and Refugee Protection Regulations* (IRPR)¹⁴⁴ govern immigration detention in Canada.¹⁴⁵ While the Minister of Citizenship and Immigration is responsible for much of the administration of IRPA,¹⁴⁶ the Minister of Public Safety and Emergency Preparedness ("Minister of Public Safety") is responsible for arrest, detention and removal pursuant to the IRPA,¹⁴⁷ and the establishment of policies respecting inadmissibility on grounds of security, organized crime, or violation of human or international rights.¹⁴⁸

The Minister of Public Safety has delegated and designated the authority conferred by ss. 55-59 of the IRPA to CBSA,¹⁴⁹ such that CBSA is responsible for the administration and enforcement of the vast majority of arrest and detention powers contained in the Act.¹⁵⁰ The *Canada Border Services Agency Act* (CBSA Act) confirms that the CBSA President, under the direction of the Minister of Public Safety, has the control and management of CBSA and all matters connected with it.¹⁵²

CBSA's mandate is to provide "integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods..."¹⁵³ CBSA is guided by several policy instruments. A 'snapshot' of CBSA's policy on immigration detention is available online,¹⁵⁴ and an internal Enforcement Manual contains more detail.¹⁵⁵

A LEGAL BLACK HOLE: CANADA'S TREATMENT OF MIGRANTS WITH MENTAL HEALTH ISSUES

The chapter of the Enforcement Manual entitled “Care and Control of Persons in Custody Policy and Procedures,” provides “guidelines for detention procedures and the care of persons while in custody at CBSA border offices and inland enforcement offices, pending their transfer to the Criminal Investigations Division (CID), responding police agency, Immigration holding centres or their release.”¹⁵⁶

The Enforcement Manual instructs CBSA officers to “consider all persons held in custody as a potential threat to the safety of the public and staff at any CBSA facility, as well as their own physical well-being.”¹⁵⁷

Citizenship and Immigration Canada (CIC) has issued a publicly-accessible operational manual related to enforcement,¹⁵⁸ chapter 20 of which is entitled “immigration detention” (“ENF 20”).¹⁵⁹ ENF 20 offers “guidance to officers in exercising their powers of detention under IRPA.”¹⁶⁰ According to Reg Williams, the former Director of Immigration Enforcement in Toronto, CBSA is bound by ENF 20. Indeed, CBSA’s publicly-accessible policy outline echoes the language of the ENF 20 extensively. For example, CBSA’s “special considerations for vulnerable people”¹⁶¹ in the context of arrest and detention is nearly identical to the guidelines in the ENF 20 with respect to “vulnerable groups.”¹⁶²

b. The decision to detain

The IRPA outlines the circumstances under which detention of migrants is legally authorized, and the IRPR provides further factors to be considered when making detention-related assessments.¹⁶³ As outlined in Division 6 of the IRPA, the decision to detain an individual is based on four main reasons: (1) flight risk, (2) inadmissibility and danger to the public, (3) identity not established, and/or (4) for the completion of an examination.¹⁶⁴

According to Reg Williams, any CBSA officer can exercise the authority to detain: “in practical terms, detentions under IRPA are carried out by [officers] at the ports of entry when examining persons seeking admission to Canada and by officers at GTEC (or similar offices elsewhere in Canada) in relation to persons who are already in Canada and subject to arrest and detention. In theory, any [officer], anywhere in the country, has the authority to detain under IRPA.”

Mr. Williams confirmed that CBSA officers have unfettered discretion to detain, which is generally left unrestricted by management. For example, he noted that while he was the Director in the GTEC, “a risk matrix was developed as a tool to assess whether release or continued detention was appropriate. While this was not something that could be imposed on an officer to follow given that he or she has that authority directly from IRPA, it was a tool used by the managers and supervisors when reviewing a case.”

For most individuals, several variables inform the process of arrest and detention with respect to each of the four reasons listed above: the person’s immigration status, whether an arrest warrant is required in the particular circumstances, and whether the person is already resident within Canada or entering the country.¹⁶⁵

Migrants may be detained if they are deemed by a CBSA officer to be a flight risk. Flight risk may be found where the officer has reasonable grounds to believe the migrant is unlikely to appear for legal proceedings related to

IN FOCUS: “The CBSA Brand” - From Citizenship to Border Control

Reg Williams was the Director of Immigration Enforcement, at the Greater Toronto Enforcement Centre (GTEC) from 2004 until his retirement in 2012. Mr. Williams agreed to be interviewed for this report and provided important context about the “CBSA-brand.” These are his words:

“As you know, the immigration enforcement component that existed within CIC was extracted in 2003 when the Government of Canada made the decision to combine it with the Customs program, at the time attached to Revenue Canada, and create the CBSA.

The Customs component within the new CBSA was by far the largest and the upper layers of management in the newly created Agency were dominated by former Customs staff. One of the challenges in bringing together different organizational cultures is to manage the transition to ensure a common culture, recognizing and acknowledging the good practices from the predecessor organizations. There are many articles on the internet on the cultural clashes that took place when the [U.S.] Department of Homeland Security was created by bringing together the Customs and Immigration services. Unfortunately, similar integration issues plagued CBSA from the outset.

With the Customs component being over ten times larger, slowly but surely the Customs culture was re-packaged as the ‘CBSA brand’, virtually at the exclusion of the best practices and successes that existed under CIC. For staff who worked most of their professional lives at CIC it seemed as though anything that worked well under CIC was given no credit or recognition under CBSA...

Greater Toronto Enforcement Centre is the largest immigration enforcement centre in the country responsible for over 50% of the national volume. Given its size, when GTEC did well, so did the rest of the country. This, plus the fact that the majority of staff at GTEC, including myself as Director, was hired and trained at CIC afforded it some latitude in how it conducted its operations. GTEC was the last bastion of the CIC culture but [was] never embraced by senior CBSA managers; it was seen by many as bucking the ‘CBSA brand’. As the Director of GTEC since the creation of CBSA, I can say first hand there were no efforts to deliberately block or resist the ‘CBSA brand’. It was more a question of following and sticking with practices and processes that worked so successfully under CIC in such areas as: recruitment, innovation, outreach and involvement of the community, and taking a balanced and compassionate approach to immigration enforcement. As GTEC was consistently meeting or exceeding its targets, the approach I was taking was tolerated although I felt senior managers were doing what they could to de-stabilize and undermine my management in an effort to bring GTEC in line with the rest of the organization.

After the fact [i.e. since retiring], I know now that senior management were looking for excuses to have me moved from the position. With me out of the picture, the way was clear to impose the ‘CBSA brand’ and complete the shift in culture....

Sadly, there is no counter-balance and the culture is heading in one direction only -- towards a more para-militaristic organization where the emphasis is on power and force and less on interaction, cooperation and engagement.”

A LEGAL BLACK HOLE: CANADA'S TREATMENT OF MIGRANTS WITH MENTAL HEALTH ISSUES

admissibility or removal from Canada,¹⁶⁶ or where, upon entry into Canada, the officer considers detention necessary in order for the examination to be completed.¹⁶⁷ The IRPR specify various factors to be considered in determining whether an individual is a flight risk.¹⁶⁸

An individual may also be detained if found to be “inadmissible and a danger to the public”¹⁶⁹ or “inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.”¹⁷⁰

The IRPR specify the factors that inform the decision to detain an individual who is found to be a danger to the public.¹⁷¹ These include criminal convictions (within or outside Canada) for sexual assault,¹⁷² offences involving violence or weapons,¹⁷³ or drug-related offences.¹⁷⁴ Furthermore, association with criminal organization,¹⁷⁵ or engagement in human smuggling or trafficking,¹⁷⁶ also informs the decision to detain on the basis of danger to the public. Finally, the Minister of Public Safety has the discretion to form an opinion with respect to an individual constituting a danger to the public,¹⁷⁷ which effectively gives the executive wide scope to detain individuals. However, ENF 20 notes that, “specific details must support the rationale for the danger opinion,” and that “a criminal record does not necessarily mean that the individual is a threat.”¹⁷⁸

CBSA officers also have the authority to consider “all other circumstances pertaining to the case,” when considering whether or not to detain some on the basis of danger to the public, including a history of violent or threatening behaviour, violent or threatening behaviour at the time of examination or, *mentally unstable behavior at the time of examination* [emphasis added].¹⁷⁹ The ENF 20 indicates that where mental instability is involved, officers are to “secure the help of the necessary professional resources.”¹⁸⁰ However, there are no CBSA policy manuals that contemplate any mental health assessment of a potential detainee at the decision to detain stage. Mr. Williams confirmed that CBSA rarely obtained a mental health assessment prior to detention or within the 48 hours after detention, stating, “I’ve seen maybe three in 14 years.”

Foreign nationals may be arrested and detained without a warrant where their identities are unclear “in the course of any procedure under this Act.”¹⁸¹ The IRPR elaborates on factors to be considered in relation to the decision to detain based on an unclear identity, including the foreign national’s cooperation in providing evidence of identity, the provision of contradictory information with respect to identity, the existence of documents that contradict information provided by the foreign national, et cetera.¹⁸²

Finally, permanent residents or foreign nationals may also be detained upon entry to Canada if an officer considers it necessary in order for an examination to be completed.¹⁸³

It is important to note that, for Designated Foreign Nationals (DFNs), groups of people who the Minister of Citizenship and Immigration designates as “irregular arrivals,” there are specific and more restrictive rules that apply, including mandatory detention.¹⁸⁴ However, since none of the detainees we interviewed were subject to the DFN regime, specific analysis of it is outside the scope of this report.

IN FOCUS: Arming CBSA Officers

Reg Williams, the Director of Immigration Enforcement, at the GTEC from 2004-2012, shared his insights into the training and recruitment of CBSA officers. He points to CBSA training, which focuses on use of force and firearms certification, as having a significant negative impact in immigration enforcement matters.

According to Mr. Williams, in 2010 CBSA mandated that all entry level officers hold a diploma from a law enforcement and security program, complete CBSA training, and pass firearms certification. Those who passed this program were offered permanent positions.

The CBSA training is a three-part program that includes online learning, in-residence training at CBSA College in Rigaud, Quebec, and participation in the Officer Induction Development Program (OIDP) as a trainee officer at a port of entry.¹⁸⁵ According to Mr. Williams, CBSA College emphasizes “law enforcement, interdiction of goods, and collection of duties and tariffs.” According to the CBSA website, recruits also learn about “use of force, including arming;” CBSA values and ethics; decisiveness; and safety-orientation.¹⁸⁶

While Mr. Williams concedes that officers destined to positions at the airport or land borders, where most of the work involves goods, duties and tariffs, continue to be well served by the CBSA training program, he found that “officers destined to immigration-only offices such as GTEC were not so well served in that they lacked the softer skills that are so very important in dealing with immigration

cases.” He stated that, “It’s one thing interviewing a traveler to determine the number of bottles of liquor being brought into the country. It takes a different skill set to interview a potential refugee claimant.”

According to Mr. Williams, “candidates from [CBSA College] are focused more on use of force and firearms training and understandably so, in that, each officer is required to be re-certified annually. Interestingly, officers are not required to be re-certified on cultural sensitivity or refugee law training which underscores what is considered important by CBSA.”

Mr. Williams found the arming of CBSA officers particularly problematic:

The government made a decision to arm CBSA officers because of safety issues at isolated land border points with USA residents showing up with hand guns and other weapons. What started off as an effort to address that issue turned into a full-fledged initiative to arm the entire officer cadre within CBSA, thanks to a big push from the union on the premise that carrying firearms will increase the wage scale. While I could understand the case for an officer at a single-person port of entry to have a firearm, I saw no need for that in a large office such as GTEC where police back-up was readily available and where all interaction with clients at the office took place behind bullet proof glass. Similarly, I didn’t see the need for officers at an airport to carry firearms when processing passengers arriving off a plane when these passengers have already been screened multiple times prior to boarding.

IN FOCUS: Arming CBSA Officers

The requirement for CBSA officers to carry guns had multiple spin-off effects. Beyond the loss of senior managers and staff who could not meet the physical challenges of firearms certification, arming guards has changed the culture at CBSA, especially in relation to immigration enforcement. According to Mr. Williams:

For decades, CIC officers attended private residences in search of persons facing arrest. They carried radios, batons, handcuffs and pepper spray. A risk assessment was always conducted prior to attending a residence and if there was a perceived risk police were called for assistance prior to entering the residence. Thousands of home entries over the span of three decades were conducted

without officers carrying firearms. Officers relied on verbal skills, interviewing techniques and counseling to elicit cooperation with the option to disengage if they believed the situation was out of control.

Now, with the issuance of firearms, it comes down to a show of force rather than interviewing and counseling. The dynamic has changed significantly. I would argue this has impacted the mindset of the officer in how clients are treated and in their attitude towards clients.

The arming of officers is consistent with the new reality of crimmigration in Canada.

i. Alternatives to detention

CBSA officers have wide discretion when it comes to detention of migrants; however, according to Reg Williams, officers tend to be risk averse when it comes to detention because “no one wants to be the person who released a detainee who then went on to commit a crime.”

Pursuant to the IRPR, before exercising discretionary authority to detain individuals, decision-makers must consider all reasonable alternatives to detention.¹⁸⁷ This requirement is echoed in the ENF 20.¹⁸⁸

However, CBSA officers may only allow for release up until the first detention review, which takes place 48 hours after the decision to detain¹⁸⁹ (after which point it is up to an ID Member to make decisions regarding release or continued detention).¹⁹⁰ According to Mr. Williams, at least at the GTEC, “the supervisor or manager routinely review[ed] each detention and frequently offer[ed] release, prior to the 48 hours review before the ID [Member].”

CBSA officers may release an individual from detention if they are of the opinion that the reasons for the detention no longer exist.¹⁹¹ Officers may impose any conditions that they consider necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.¹⁹² The ENF 20 also lists numerous examples of conditions that may be imposed upon release at the discretion of the officer,¹⁹³ including the requirement to report for departure and removal from Canada, report to a CBSA officer or to appointments ordered by the officer, inform the CBSA of criminal charges or convictions, et cetera.¹⁹⁴

Where there is concern that, if released, the detainee will not appear at immigration proceedings (i.e. that they are a flight risk), the ENF 20 permits officers to “release the person to a guarantor who is prepared to take responsibility for the person concerned.”¹⁹⁵ CBSA officers must assess the reliability of the guarantor, and may require a security deposit if there was a failure to observe conditions of a previous performance bond.¹⁹⁶ CBSA may also release individuals to third party risk management programs, such as the TBP.¹⁹⁷

Although the ENF 20 provides that “officers must be aware that alternatives to detention exist,” it does not specify those circumstances that would require exercise of their discretion to order release.¹⁹⁸

VOICES FROM THE INSIDE: Masoud Hajivand

Central East Correction Centre, detained for one year

Despite having no criminal background, Masoud Hajivand has been held in immigration detention at CECC since June 2014. While he has no diagnosed mental health issue, Masoud told us: “I’m not okay...I cannot sleep. Sometimes I am feeling suicide [*sic*].” He has a Canadian wife and a teenage step-daughter who live in Toronto, and with whom he is very close.

In 2007, Masoud fled from Iran and sought asylum in Canada, believing that this was a “peaceful country.” He is a convert to Christianity, and for that reason “fears imprisonment, torture and possible execution if he is returned to Iran.”¹⁹⁹ When we spoke with Masoud, he was distressed and spoke with great fear: “I cannot go to Iran. If I go to Iran I’m going to die and be tortured.” Nevertheless, his refugee application was rejected.

Perversely, it is precisely this “extreme fear of returning to Iran” that makes Masoud a “flight risk” in the eyes of CBSA, and which the ID Members cite to continue his detention.²⁰⁰

It does not help that Masoud went underground for two years when he was first ordered to be deported in August 2011, after his refugee claim was rejected.²⁰¹

In June 2014, for reasons that remain unclear, Masoud reported to an appointment with a CBSA officer and was arrested and placed in immigration detention. Masoud was told that he had a right to call his embassy, even though Iran has not had an embassy in Canada since September 2012. He spent three days at the Toronto IHC, after which he was moved to Maplehurst Correctional Complex in Milton, Ontario. When Masoud inquired as to why he was being held in jail when he “[hadn’t] committed any crime,” CBSA officials told him that he was a flight risk. He spent approximately 12 days at Maplehurst before he was transferred to CECC.

Masoud, who has severe back pain, described at length the difficulty he faces in trying to get health care at CECC: “I’m taking just some pain killers. They give me that after 2.5 months - just regular Tylenol. I had to see the doctor two times; I had to say ‘please ... I have pain.’”

He grew agitated when describing his imprisonment and the frustration of not having any end in sight. “You see all my grey [hair]. I didn’t have any grey hair seven

months ago.” He is angry that he has been treated with such disregard by the Canadian government: “I apply for refugee [status] in this country, why do you treat me like that?”

While in detention, Masoud resisted two attempts to deport him. At one of Masoud’s detention reviews, Minister’s counsel used this “non-cooperation” as evidence to show that “there is no reason to believe he will cooperate if released,”²⁰² rather than as evidence of fear of persecution in Iran. According to a media story, the ID Member remarked that Masoud’s actions “show a very high level of desperation to remain in Canada.” Unfortunately, according to news reports, the adjudicator “did not consider six months lengthy in an immigration context,” and told Masoud: ““You have created the situation of your detention.””²⁰³ Masoud’s stepdaughter, present at the detention review, “sobbed quietly.”²⁰⁴

Masoud also described to us significant problems with getting adequate interpreters at his detention hearings. Although he requested a Farsi interpreter, he was provided with an interpreter from Saudi Arabia with inadequate knowledge of Farsi. According to Masoud, the ID Member told him that he could not demand the exact type of interpreter to be present at reviews.

At another detention review hearing, Masoud tried to arrange for an alternative to detention by way of an electronic monitoring system. He recalled that his “family, a surety, and an expert witness from an

electronic bracelet company all waited outside the hearing room, unaware that [the detention review] had begun until after it had ended. [An IRB spokesperson] later said the public had been excluded by mistake.”²⁰⁵

Masoud explained, “I [brought] the GPS – I pay [sic] for that.” He lamented that it costs \$600 every time the GPS spokesperson attends a detention review. “Before he [could even] come into the room, the Board Member [had] closed his file and [said] ‘flight risk’...I [had] a bondsperson and a tracker thing and they didn’t even listen to us. They didn’t even let the people come into the bail [sic] hearing. But in the report it says this hearing is public.”²⁰⁶

Masoud’s experience in Canada has been overwhelmingly negative because of his treatment by immigration authorities: “I didn’t do anything wrong. I came to this country. I applied for refugee [status] thinking this country is good. But this is the worst country in the world. I paid eight years tax and they keep me in here for nothing.”

Masoud has applied for a Pre-Removal Risk Assessment, as well as for an in-land sponsorship with his wife. He is upset that he cannot be released into the community while he waits for these applications to be processed: “You don’t give me bail but you give criminals bail.”

ii. *Mental health and the decision to detain*

The entire legislative scheme is silent on mental health; neither the IRPA nor the IRPR require decision-makers to consider migrants’ mental health at the decision to detain stage. According to Reg Williams, “there is nothing about vulnerable individuals [in the IRPA].”

However, CBSA’s policy on arrest and detention of vulnerable individuals states: “where safety or security is not an issue, detention is to be avoided or considered only as a last resort for...persons who are ill or disabled; and persons

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with behavioural or mental health issues.”²⁰⁷ CBSA policy further states that, “if detention is required (for example, it is believed that the person is unlikely to appear for immigration proceedings),...detention should be for the shortest time possible.”²⁰⁸ The ENF 20 adds that, in such cases, “alternatives to detention should always be considered.”²⁰⁹

A 2010 CBSA Evaluation Study on its Detention and Removal Program found several issues with the detention of immigration detainees with mental health issues.²¹⁰ The study found that a general “lack of a clear understanding of the various available options when dealing with vulnerable populations has resulted in inconsistency in detention practices across regions.”²¹¹ Accordingly, while individuals with mental health issues are frequently detained in Ontario, this is “extremely unlikely” to happen in the Atlantic and Prairie regions, where CBSA staff instead draw on community agencies and resources.²¹²

A reoccurring theme in our interviews with counsel was that CBSA is generally only concerned about immigration detainees’ mental health for the purposes of facilitating removal. For example, according to counsel, CBSA generally only arranges for a mental health assessment to show that the detainee is “fit to fly”, or exceptionally, to show that a detainee appreciates the nature of the proceedings. In fact, one counsel reported that, “most of the time, a DR [designated representative] will be appointed based on counsel’s request (backed up with psychiatric evidence) or a person’s obvious confusion during the course of a detention review hearing.” Another counsel noted, CBSA “has a specific mandate to remove people from Canada as soon as reasonably practicable, anything else is secondary” According to the same counsel, CBSA does not “take any responsibility to assess or deal with mental health issues unless they impact removal.” In fact, CBSA “does not appear to have a deliberate and considered plan for the mental well-being of the immigration detainees,” noted another counsel.

One counsel told us about one of his clients who suffers from PTSD who was diagnosed by medical practitioners in Canada in 1989. Despite clear evidence of this mental health issue, his client has been in immigration detention for almost five years. He had fled Somalia after being kidnapped and tortured by government forces in 1987. After seeking asylum in Canada, doctors diagnosed him with PTSD and corroborated that the scars on his body were consistent with his descriptions of being tortured. His counsel confirmed that, “CBSA... recognizes [that my client] has PTSD but he has received minimal mental health treatment while detained in a maximum security facility.”

c. The decision to continue detention (detention review hearings)

Once CBSA decides to detain a permanent resident or foreign national, the Immigration Division (ID) of the Immigration and Refugee Board (IRB) is required to carry out regular detention reviews in order to determine whether detention should continue, pursuant to IRPA.

Importantly, the Canadian legislation and regulations do not provide for a maximum length of detention or even a period after which release is presumed (unless the government can justify continued detention). Our interviews and the profiles in this report show that some migrants are detained for years.

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The ID is an independent and quasi-judicial tribunal responsible for conducting statutorily-mandated detention reviews.²¹³ The ID is guided by legislation, as well as two main policy instruments: the Immigration Division Rules²¹⁴ and the Guidelines.²¹⁵ The Rules set out the practices and procedures associated with detention reviews,²¹⁶ while the Guidelines provide principles for adjudicating and managing cases.²¹⁷ The Guidelines are “employed to achieve strategic objectives,” and although they are “not mandatory, decision-makers are expected to apply them or provide a reasoned justification for not doing so.”²¹⁸ In order to have a court review decisions of the ID, immigration detainees must obtain leave to seek judicial review in Federal Court (as is discussed below).²¹⁹

The first detention review must be held within 48 hours after the individual is detained, the second detention review must be held seven days following the first review,²²⁰ and then a review must occur every 30 days for as long as the individual is detained.²²¹ The detainee may ask for an early detention review at any time, but must present new facts to justify the request.²²² Immigration detainees have the right to be represented by counsel at detention review hearings.²²³

ID Members conduct detention reviews according to the IRB tribunal process.²²⁴ The hearing is public and is carried out as an adversarial process, involving two opposing parties: the person concerned (i.e. detainee), sometimes represented by counsel; and Minister's counsel on behalf of CBSA (i.e. lawyers from the federal Department of Justice).²²⁵ Upon hearing submissions from both parties, the ID Member may order continued detention or release.²²⁶

Notably, the ID “is not bound by any legal or technical rules of evidence,” and “may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.”²²⁷

It is mandatory for a Member to order release unless Minister's counsel satisfies the Member, on a balance of probabilities, that continued detention is justified on the grounds specified in s. 58 of the IRPA.²²⁸ It is worth noting that, despite the fact that Members are most often effectively ordering continued imprisonment in a provincial jail, the burden of proof is not the same as in a criminal case (i.e. beyond a reasonable doubt).

The immigration detainee must be released from detention unless the ID Member is satisfied that the detainee is:

- a. a danger to the public;
- b. unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister (flight risk);
- c. the Minister is taking steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
- d. the Minister is of the opinion that the identity of the foreign national (other than designated foreign nationals) has not been, but may be established, and they have not reasonably cooperated with the Minister by providing relevant information or the Minister is making reasonable efforts to establish their identity; or
- e. the Minister is of the opinion that the identity of the foreign national who is a designated foreign national has not been established.²²⁹

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IRPA requires Members to consider specific factors (enumerated in detail in the IRPR)²³⁰ for each of these grounds.²³¹

In cases where it is determined that there are grounds for continued detention, the Member shall go on to consider a further list of factors (discussed in detail below) before deciding to continue detention:

- a. the reason for detention;
- b. the length of time in detention;
- c. whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, what length of time;
- d. any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
- e. the existence of alternatives to detention.²³²

These factors are not exhaustive, and the weight given to them will depend on the circumstances of each case.²³³

It is important to note that a detention review is not an entirely new hearing (i.e. not a “hearing *de novo*”), as ID Members must consider prior decisions before deciding whether continued detention is justified.²³⁴ While Members are not required to follow the previous ID Member’s decision *per se*, they can only depart from the prior decision if they provide “clear and compelling reasons”²³⁵ for doing so.²³⁶ The “clear and compelling reasons” test is justified by courts on the rationale that detention reviews are primarily fact-based, and deference must be shown to triers of fact since they are able to assess the credibility of witnesses through observation of their demeanor.²³⁷

While deference to the trier of fact makes eminent sense in terms of an appellate court or on judicial review where the court does not have access to *viva voce* evidence, it makes less sense in the detention review setting where the ID Member is a trier of fact him or herself and has the opportunity to hear evidence directly.

Importantly, the evidentiary burden is on the detainee to establish that there are sufficiently “clear and compelling reasons” to depart from the previous detention order.²³⁸ This is a very high test for a detainee to meet, since he or she must demonstrate a change in circumstances by admitting new evidence, or by reassessing old evidence on new arguments.²³⁹ Where a detainee is imprisoned in a maximum security jail, this onus becomes almost impossible to meet absent legal counsel to communicate with community supports and potential bondspersons, arrange for alternatives to detention, and assess prior evidence with a critical eye.

Statistical information regarding release rates by ID Members across the country (discussed below) suggests that it is relatively exceptional for ID Members to find “clear and compelling reasons” to depart from a previous decision. Such reasons may be found, for example, where the evidence at the previous hearing is proven to be inaccurate,²⁴⁰ there are reasons to suspect the Minister is responsible for an unjustified delay resulting in longer detention or acted in bad faith,²⁴¹ or the presence of new family in Canada that would mitigate against flight risk.²⁴² In practice, length of detention on its own is not a sufficiently “clear and compelling reason” to depart from previous decisions.²³⁴

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Importantly, proposition of a new alternative to detention, such as electronic monitoring or a new bondsperson, is not always sufficient to meet the “clear and compelling reasons” test.²⁴⁴

Despite the clear onus placed on Minister’s counsel to establish grounds for continued detention, our interviews reveal that the “clear and compelling reasons” test effectively places the evidentiary burden on the detainee. In particular, one counsel explained:

Any time the government wants to limit a fundamental right, it should be their burden to show why that right needs to be limited. ...With respect to detention reviews, a decision-maker is required to give ‘clear and compelling reasons’ if they are deciding differently than a previous decision-maker. ...But since every previous decision is to maintain detention (otherwise the detainee would be out) the ‘clear and compelling’ doctrine effectively shifts the burden onto the detainee who has to now prove to the decision maker why there are ‘clear and compelling reasons’ to release him and depart from previous decisions. In essence, it is the detainee who has to prove why their liberty should not be curtailed.

Moreover, since in principle the burden of proof still rests with the government, the CBSA Hearing’s Officer is given the ‘right of reply’. This is clearly procedurally unfair. The detainee in fact suffers twice. First, the burden is unjustly shifted onto him; and second, he is not given the opportunity to have the last word. This results in the CBSA Hearing’s often not having to say much to justify continued detention. Indeed, despite the CBSA Hearing’s Officer’s generally cursory submissions, the Member often states in the decision, ‘I see no clear and compelling reasons to depart from previous detention reviews.’

Unfortunately, counsel we spoke to also noted that low evidentiary standards, coupled with the lower burden of proof, make it exceedingly easy for Minister’s counsel to justify continued detention. For example, in cases of individuals who are detained for being a danger to the public, one counsel noted that the Minister’s counsel can make representations that CBSA has certain evidence that establishes dangerousness without disclosing it, and the ID Member could rely on those submissions alone as dispositive. According to one lawyer, “There is no evidentiary burden; it’s just comments.”

Another counsel observed:

Basically anybody can be seen as a flight risk. If you are a refugee claimant, you’re a flight risk because you’re scared to return somewhere. If you’re a failed refugee claimant you are seen as a flight risk because maybe you are not reliable or are trying to get into Canada. If you have family here you are seen as a flight risk because obviously you want to stay with your family. If you don’t have family here, you’re a flight risk because you have no ties. Anybody can be seen as a flight risk.

Reg Williams notes that, in order for Minister’s counsel to receive instructions from a CBSA officer to consent to release,

what is need[ed] is leadership from [CBSA] management to support measured and reasonable risk taking. Absent this support from management, there was absolutely no incentive for the line officer to review

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a long-term detained case and consider release....I found that when decisions were taken as a group there was more openness to consider release. However, this model only works if [CBSA management] is seen to be involved in reviewing cases and actively solicits alternatives to detention. From a business stand point, having this monthly review process addressed the human issue around keeping a person detained and at the same time served to contain and manage costs. Without the Director's involvement or support, officers or managers will not, on their own accord, consider release of a long-term detained case.

The end result is that the decisions by ID Members lack consistency and appear *ad hoc*. 2013 data from the Immigration and Refugee Board indicates that ID Members' rates of release vary significantly both within and across regions. Within Central region, for example, one ID Member's rate of release was 5%, whereas another Member's release rate was nearly one in four.²⁴⁵ In the Western region, 38% of detainees were released in 2013, whereas only 10% were released in the Central Region (defined as Ontario, not including Ottawa and Kingston).²⁴⁶ According to the grassroots group End Immigration Detention Network, there has been a systematic decrease in release rates in Central Canada from 2008 to 2013.²⁴⁷

These inconsistencies are particularly troubling given that individuals' liberty is at stake, yet there is a sense amongst counsel that ID Members and Federal Court judges fail to appreciate the immense gravity of depriving individuals of their liberty under the law.

In *Suresh*, the Supreme Court of Canada affirmed that "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under...the *Charter [of Rights and Freedoms]*."²⁴⁸ In *Charkaoui*,²⁴⁹ the Supreme Court reiterated its statement in *Dehghani*, that "factual situations which are closer to analogous to criminal proceedings will merit greater vigilance by the courts."²⁵⁰

Similarly, in 2014, in *S (P) v Ontario*,²⁵¹ the Court of Appeal for Ontario held that "where an individual is not being detained for punishment following conviction, but rather is detained simply because he or she poses a risk to public safety, the *Charter's* guarantee of fundamental justice requires that there be a fair procedure to ensure, on a regular and ongoing basis, that: (1) the risk to public safety continues; and (2) the individual's liberty is being restricted no more than is necessary to deal with that risk."²⁵²

In *S(P)*, the applicant had a mental illness and had been involuntarily committed under the Ontario *Mental Health Act* in a maximum-security facility after he had finished serving a criminal sentence.²⁵³ An administrative review board (the Consent and Capacity Board, "CBB") held regular reviews of the applicant's detention. The Ontario Court of Appeal held that the CBB lacked jurisdiction to supervise the security level, privileges, therapy and treatment of long-term detainees and to craft orders that would ensure an appropriate balance between public protection and protection of detainees' liberty interests, and therefore did not meet the requirements of the two-prong test.²⁵⁴

S(P) is directly analogous to the immigration detention process – it concerns individuals detained in the absence of any criminal conviction – where the reviewing body has no jurisdiction to ensure that the conditions of confinement are

the least restrictive possible. The case demonstrates the need for strong due process in cases where an individual's liberty is at stake, including more strict evidentiary rules and a higher burden of proof imposed on the government where it seeks to continue detention on the grounds of public safety.

i. Accommodations for vulnerable persons

Vulnerable persons are provided with procedural accommodation in detention reviews under the IRB's *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB*.²⁵⁵ This Guideline applies to all four divisions of the IRB, including the ID.²⁵⁶

Vulnerable persons are defined as individuals whose "ability to present their cases before the IRB is severely impaired," and include those who are mentally ill, victims of torture, survivors of genocide and crimes against humanity, and victims of persecution based on sexual orientation and gender identity.²⁵⁷ Vulnerable persons must be treated with sensitivity and respect, and their cases must be processed in a way that takes into account their specific vulnerabilities.²⁵⁸

An individual may be identified as vulnerable at any stage of the proceedings, but preferably at the earliest opportunity.²⁵⁹ Wherever possible, the vulnerability must be supported by independent credible evidence filed with the IRB registry.²⁶⁰ A medical, psychiatric, psychological, or other expert report²⁶¹ regarding the vulnerable person can be of great assistance.²⁶² The IRB is "sensitive to the barriers that may be created by the formal requirements related to making applications in the case of self-represented persons and other situations and will waive or modify the requirements or time limits set out in the Rules, as appropriate".²⁶³ The IRB may also "suggest that an expert report be submitted but will not order or pay for it."²⁶⁴ However, "absence of expert evidence does not necessarily lead to a negative inference about whether the person is in fact vulnerable."²⁶⁵ Where the vulnerable person is represented by counsel, their counsel is best placed to bring the vulnerability to the attention of the IRB, and is expected to do so as soon as possible.²⁶⁶ A Member may also identify an individual as a vulnerable person.²⁶⁷

Where an individual is found to be vulnerable, the IRB has "broad discretion to tailor procedures to meet the particular needs," including:

- allowing the vulnerable person to provide evidence by videoconference or other means;
- allowing a support person to participate in a hearing;
- creating a more informal setting for a hearing;
- varying the order of questioning;
- excluding non-parties from the hearing room;
- providing a panel and interpreter of a particular gender;
- explaining IRB processes to the vulnerable person; and
- allowing any other procedural accommodations that may be reasonable in the circumstances.²⁶⁸

Once an individual is declared vulnerable, a Member will be assigned at an early stage and will be responsible for that file until the proceeding is concluded.²⁶⁹ Where uncertainty and anxiety caused by delay of proceedings is likely to be detrimental to vulnerable persons, they may be given scheduling priority.²⁷⁰ Furthermore, “decisions and reasons for decisions involving vulnerable persons will be delivered as soon as possible, and orally wherever appropriate.”²⁷¹ During questioning of a vulnerable person, “the IRB will attempt to avoid traumatizing or re-traumatizing the vulnerable person.”²⁷² Finally, vulnerable persons who are under 18 or are unable to appreciate the nature of the proceedings are appointed a designated representative (discussed in more detail below).²⁷³

While the above rules apply across all divisions of the IRB, the ID also has its own rules with respect to vulnerable persons. At detention review hearings, Minister's counsel must provide the ID with basic information pertaining to whether the person concerned is “unable to appreciate the nature of the proceedings.”²⁷⁴ Beyond this, however, there is no requirement to disclose information about the detainees' health generally or mental health specifically.

ii. Designated representatives

Where it is found that the person concerned cannot appreciate the nature of the proceedings associated with his or her case, an ID Member must assign a designated representative (DR) pursuant to IRPA.²⁷⁵

A person is “unable to appreciate the nature of the proceedings” if he or she, “cannot understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about his or her case.”²⁷⁶ Ultimately, it is up to the ID Member to determine whether the detainee fits this description based on medical reports or observed difficulties in meetings or discussion before the hearing.²⁷⁷ To this end, the Member may take various factors into consideration.²⁷⁸ Before assigning a DR, the Member should discuss the possible consequences with the person concerned (unless the nature of the illness prevents it).²⁷⁹

Minister's counsel must inform the ID if a detainee needs a DR;²⁸⁰ this should typically occur before a hearing, but if the Member sees that a person concerned requires a DR during a hearing, the hearing will be adjourned until a DR is found and can be present.²⁸¹ The duty to designate a representative lies with the Member.²⁸² If the Member fails to perform this duty at the outset of a hearing, it may invalidate the entire proceeding.²⁸³

The duty to inform the ID that a detainee requires a DR is also imposed on the detainee's counsel.²⁸⁴ Counsel must provide contact information for anyone who (in the counsel's opinion) meets the requirements of a DR (usually a parent, other family member, or friend).²⁸⁵ Once the registry office receives this information, it will ensure the prospective DR is present on the hearing date.²⁸⁶ If the parties do not know anyone who meets the requirements to be a DR, the registry office will make arrangements to find a DR.²⁸⁷ To this end, the IRB uses a list of “167(2) Representatives” called to fulfill the DR role “on a rotational basis.”²⁸⁸ It appears that these DR positions are filled through an application and screening process, culminating in a training session.²⁸⁹

A DR “must act in the best interests of the person he or she is representing by helping the person make decisions concerning the proceedings of which he or she is to be subject, especially to retain and instruct counsel.”²⁹⁰ The DR

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is responsible for both protecting the interests of the person concerned, and explaining the process to him or her.²⁹¹

The extent to which a DR intervenes in an admissibility hearing or detention review can vary.²⁹² A DR may also act as counsel at the same time, but the two roles must not be confused: the DR acts as a litigation guardian, while counsel provides legal advice, prepares the case, presents evidence and makes oral submissions.²⁹³ In cases where the DR chooses to testify, he/she cannot also act as counsel.²⁹⁴

The responsibilities of a DR include:

- deciding whether to retain counsel, then retaining and instructing counsel or assisting the minor or incompetent person in instructing counsel;
- making other decisions regarding the case or assisting the minor or incompetent person to make those decisions;
- informing the minor or incompetent person about the various stages and procedures in the processing of his or her case;
- assisting in gathering evidence to support the minor or incompetent person's case and providing evidence and being a witness at the hearing if necessary;
- generally protecting the interests of the minor or incompetent person and putting forward the best possible case to the Division.²⁹⁵

The role a DR varies depending on the represented person's level of understanding.²⁹⁶ As much as possible, the DR should explain, "in simple terms, the purpose and possible consequences of the hearing and invite the represented person to take part in the decisions that concern him or her."²⁹⁷

To be designated as a representative, a person must be:

- 18 years of age or older,
- understand the nature of the proceedings,
- be willing and able to act in the best interests of the permanent resident or foreign national, and
- not have conflicts of interest with those of the permanent resident or foreign national.²⁹⁸

Once designated, the DR should be informed of the reasons for his/her designation, his/her role, the purpose and possible consequences of the hearing for the detainee, and his/her right to retain counsel.²⁹⁹ The Member should ensure the DR has a copy of all documents that will be used at the hearing.³⁰⁰ If it becomes apparent that the DR is not performing his/her role correctly, the Member should replace him/her and give reasons for this decision.³⁰¹

In June 2012, remuneration of DRs was standardized across regions for all divisions to eliminate disparities and "improve practices linked to remuneration paid to DRs."³⁰²

Our interviews with counsel reveal several key issues with DRs. First, the decision to appoint a DR is entirely at the discretion of the Member, and it is often challenging to convince the Member that a DR is required. Members often take at face value detainees' assertions that they understand the proceedings, and almost always require a medical assessment before they consider appointing a DR.

Several counsel also reported that some of the DRs who are consistently appointed by the ID are unhelpful: "some come to detention reviews every 30 days and listen, and they don't provide any alternatives for release," noted one counsel, "a DR's remuneration does not cover any preparatory work, and yet "90% of the detention work is done before the hearing," noted another. According to counsel, some DRs never meet or speak with their client, and some do not even speak the same language.

VOICES FROM THE INSIDE: Uday*

Central East Correctional Centre, detained for nearly 3 years

Uday has been aware of his schizophrenia since he was 20 years old, and has had seizures since the age of five. Now in his thirties, Uday has been taking medication to manage his mental health well before arriving in Canada. He has no previous criminal convictions, but was held in a provincial jail for almost three years because CBSA was unable to confirm his identity or country of origin. CBSA has since acknowledged an impasse with respect to obtaining proof of his identity and nationality. As a result, Uday is *de facto* stateless.

Uday arrived in Canada in November 2011 from the Middle East via Europe. At the airport, officials stopped Uday before he had collected his suitcase, which contained his medication, and brought him to a holding room where he was questioned without an interpreter present. He repeatedly asked the officers to access his suitcase so that he could take his medication, but they refused. Having just gotten off a lengthy flight, and having no access to any food, water, or his medication, Uday became increasingly agitated. Despite Uday's persistent requests for his medication, CBSA officials refused

and insisted that he "needed to finish [his] interview." "I freaked out," Uday recalled.

He had a suspected seizure and was taken to the hospital. After he was released, he was taken to the Toronto IHC because he did not have proper documents to confirm his identity.

On November 23, 2011, Uday was taken from the IHC to the Greater Toronto Enforcement Centre (GTEC) for an interview with CBSA. He made his claim for asylum protection at this interview. At that interview, he became frustrated, slammed a phone, knocked over a computer, and was restrained. He was taken to a hospital again, and when released he was brought to Metro West Detention Centre because of his "violent outburst." "I broke the phone and computer and then [they] put me in jail," recalled Uday. He was imprisoned at Metro West for 21 months, and was eventually transferred to CECC for a further 11 months. He furthered his English language skills on his own while in jail.

He was detained in prison for nearly three years initially on grounds of unconfirmed identity and later on the related ground that he was unlikely to appear for removal.

Upon arrival at Metro West, Uday had a medical intake interview, where his medical history was recorded, and he continued to take medication there. Uday met with the psychiatrist weekly for five minutes, solely for the purpose of increasing or decreasing the dosage of his medication. He was also prescribed sleeping pills.

At Metro West, Uday was held with the general criminal population, which he described as being “very scary,” because “people are crazy – they use drugs and come down from drugs and are totally confused, they don’t know what is going on.” People fought every day, although Uday himself avoided fights. He said there were no activities, no programs, “nothing” to do. However, he thought that the staff treated him better at Metro West than at CECC, because at Metro West he was “with the criminals who have rights.”

After Uday was transferred to CECC, he felt that he “had no rights at all.” “They treat[ed] us like garbage,” he stated. He put in many requests to see a doctor, but his requests were only answered once every three to six weeks, and the appointments lasted about ten minutes. In addition, unlike at Metro West, Uday’s appointments with the doctor were conducted by video link. After making persistent complaints, Uday began to speak to a psychiatrist in person on a weekly basis.

For the first 20 months of his detention, Uday did not have a lawyer. Once his detention became lengthy, Legal Aid Ontario agreed to fund his counsel for his detention reviews.

Uday had a DR appointed for his detention reviews. When asked to comment on the DR, Uday responded plainly, “I hate this guy. ... He never gave a shit.... One time he asked for an early detention review...but he never came. I waited for him. He never came.” When the DR did attend the detention reviews, it was Uday’s

perception that “he was not helpful” and...“never sorted it out.” Uday considered the DR to be an employee of CBSA who would do whatever CBSA told him to do.

Uday was held in immigration detention for 12 months before there was any contemplation of his release. Initially, Toronto Bail Program (TBP) refused to provide supervision for his release because, as a result of the 2012 cuts to the Interim Federal Health Program (IFHP), he would not be able to get access to medication outside of detention.³⁰³ Subsequently, the TBP also refused to supervise Uday because of concerns that he was not complying with his medication. Uday acknowledged that there were periods of time when he did not take his medication, because it made him feel like a “zombie.” However, after this became an impediment to release, Uday began taking his medication regularly.

“The fact that I have schizophrenia made it more difficult for me to get out of detention,” reported Uday. His counsel also noted that “[h]is mental health condition played a large role in his inability to confirm his identity, and also posed a large barrier to securing his release due to concerns about his access to treatment.” His lawyer indicated that Uday “consistently provided background information about himself to CBSA that turned out to be false or unverifiable. CBSA claimed that he was wilfully misleading them and frustrating their investigation into his identity... he is mentally ill and that has to account, at least in part, for his inability to confirm aspects of his personal history and identity. A proper appreciation of his particular illness would not include the unreasonable expectation that he provide reliable and consistent historical information.”

“Eventually the CBSA conceded that they could not confirm his identity, meaning that he is effectively stateless,” Uday’s counsel explained. “After that concession, [TBP] eventually accepted him as a client – after many more months spent arranging health care upon release ... he was eventually released.”

The uncertainty of release from detention was a major source of stress for Uday during the nearly three years he spent in jail: “I went crazy – I felt like I was in hell. They never tell you when you are going to get out, [it is] always negative news, [they] never tell you positive news, you never know when you are going to get out.” He recounted that he was told that he would be released five times before it actually happened, and eventually, he avoided getting his hopes up about release. When Uday was finally released, he “couldn’t believe it.”

Uday finds it much easier to deal with his mental illness now that he is out of detention “because there isn’t as much uncertainty.” However, he still lives in fear of being taken back to CECC. He told us about

a recent incident where he jaywalked, and a police officer stopped him to tell him to be more careful. His first thought was that he would be sent back to jail. “I am scared of Lindsay,” he noted; “I am always walking on eggshells.”

When we mentioned to Uday that we had visited some immigration detainees who were still at CECC, he said, “I feel for the other people. I think, ‘what are they doing? Holy fuck, what are they doing? Are they still there?’”

* The detainee’s name has been changed to protect his identity.

iii. Continuing detention of migrants with mental health issues

Despite the clear nexus between prolonged detention and deterioration in mental health, we found very few publicly accessible, reported cases that fulsomely consider a detainee’s mental health issues in the context of a detention review hearing.

There is, however, a 2001 reported case that explicitly considered the impact of immigration detention on mental health. In *Chi*, the person concerned was detained on the basis of potential flight risk.³⁰⁴ The ID Member noted the fragile state of Ms. Chi’s mental health and considered a medical opinion obtained by her counsel that stated that continued incarceration was likely to exacerbate her emotional difficulties and that she was at risk of seriously hurting herself if her depression did not improve. At the time, Ms. Chi had been in custody for almost 20 months.

The Member held that the “passage of time” was an important consideration in whether changes in the facts of the case had occurred and, in this case, the passage of time and the provision of the psychological medical report allowed him to order release. This case is significant because it is the only publicly available case that finds deterioration in mental health as a relevant factor to justify departing from previous decisions to continue detention.

According to our interviews with counsel, detainees’ mental health is seldom taken into account or explicitly balanced against other grounds for detention at detention review hearings. One lawyer noted that, where counsel manage to obtain mental health assessments, they are “viewed skeptically as self-serving evidence, and therefore not objective.”

According to that same lawyer, a detainee with a mental health issue is “viewed through a lens of flight risk and danger to the public, not so much as someone who would benefit from release that has a treatment regime in place.” In fact, one lawyer noted that detainees are often viewed as inherently unreliable and lacking credibility, and that he

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usually refrains from highlighting his clients' mental health issues "because it will usually go to flight risk, or danger to the public, especially if their mental illness had to do with their criminality in the past."

Reg Williams, a retired CBSA senior manager, told us that officers may lack the sensitivity to recognize the root cause of a person's disruptive behavior: "unfortunately, once this image (uncooperative and aggressive) is created it is a hard one to dislodge and gets reinforced over and over at detention reviews thus making prospect of release or consideration of alternatives to detention improbable."

Beyond sporadic appointment of DRs, counsel find that ID Members generally refuse to take mental health issues into account when determining whether a person should be released. Mental health is not considered to be relevant in the determination of whether someone is a "flight risk" or a "danger to the public." It is also not usually considered in evaluating an alternative to detention since it is not listed as one of the factors to be considered in the legislation – despite the fact that these factors are not exhaustive. Unlike the decision in *Chi*, most Members do not view deterioration in mental health as a sufficient change in circumstances to justify release.

iv. Alternatives to detention and conditions on release

Where an ID Member finds that there is no longer a reason to continue detention, the person must be released.³⁰⁵ However, before ordering release, Members must "consider whether the imposition of certain conditions will sufficiently neutralize the danger to the public or ensure that the person concerned will appear for examination, an admissibility hearing or removal from Canada".³⁰⁶ Members must also consider the "availability, effectiveness and appropriateness of alternatives to detention".³⁰⁷ To this end, a Member may order certain terms and conditions, such as a bond or a requirement to report on a regular basis to an immigration office.³⁰⁸ As mentioned above, the ENF 20 lists a variety of conditions available for Members to impose upon release.³⁰⁹

In practice, according to our interviews with counsel, immigration detainees with mental health issues must generally have elaborate release plans in place in order for a Member to even contemplate release. This often requires relatives and friends with large sums of money to post bonds, and a placement arranged with a community organization or treatment facility. The burden falls to counsel to establish or create an adequate release plan.

According to counsel, one of the major obstacles to making such arrangements is that most community release programs are designed to accommodate criminally sentenced detainees following their release from jail, and therefore require an intake interview to assess the detainee's needs and suitability for the program. However, immigration detainees cannot be released in order to attend the intake interview, and therefore, programs rarely agree to accommodate them.

Even if counsel manage to arrange a release plan that involves a rehabilitation program, those we interviewed noted that ID Members generally refuse to allow release because these programs are "designed for people serving criminal sentences to reintegrate them back into society, and the concerns of immigration detainees are different" – the implication is that detainees are not expected to reintegrate into society but rather to cooperate with CBSA's removal efforts.

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In fact, according to counsel, in the GTA, ID Members rarely allow for release of long-term detainees, those with mental health issues, or those with a criminal record, unless the TBP has agreed to supervise the person concerned, even if alternatives to detention exist. According to counsel, even where a criminal rehabilitation program is offering to supervise a detainee "9-5 Monday to Friday," ID Members tend to prefer TBP which, according to counsel, may only meet with the detainee for "30 minutes every two weeks." The justification for this preference is that "TBP is geared towards helping people report to CBSA and removal, whereas criminal rehabilitation programs are not."

TBP and the CBSA have developed a set of general eligibility guidelines to identify those detainees suitable for the program. According to a CBSA document published online in 2010, in order to be accepted into the TBP, the person concerned must:

- be cooperating on issues related to their detention and removal
- be under a removal order
- not be the subject of an imminent removal order
- be a case facing a real prospect of removal
- not be an extradition case (supervision is not offered)
- not be a fugitive case (generally supervision is not offered)
- not be a member of a criminal organization (generally supervision is not offered)
- not have the resources to meet traditional forms of release (i.e. no family/community support; or family/community support insufficient, either financially and/or in their ability to exert control over person concerned)
- generally live in the GTA (TPB interviews are held at the Toronto IHC, Toronto West Detention Centre, Maplehurst, Don Jail, Toronto East Detention Centre, Central North Correctional Centre, and CECC)
- be able to physically report to the TBP office downtown Toronto
- be able to demonstrate that he/she can reliably support themselves in the community
- have a history of compliance with both the criminal justice system (bail conditions and probation) and the CBSA
- be willing and able to comply with a release plan
- have credibility
- not be a foreign national with outstanding charges (TPB will only consider supervision once Crown has made a decision about staying charges)
- not be an "identity project case."³¹⁰

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TBP has attracted “significant attention both nationally and internationally as a model alternative to detention,” which can “secure release for people who would otherwise remain detained.”³¹¹

However, according to the Canadian Council for Refugees (CCR), “there is a tendency for a program such as TBP to become normative, rather than exceptional,” such that other options for release, for example to relatives or family members, are discounted. CCR notes that, “in practice, it seems that the Immigration Division in Toronto looks for supervision by the program when considering release. This can mean that it is more difficult for people who do not meet the program’s criteria to be released.”³¹²

Even worse, the fact that TBP has considered and refused a person may count against the person being subsequently released despite other assurances being offered. CCR notes that such a program should be available as a last resort for people who have no other options for release. On a more practical level, CCR notes that the program’s criteria for whom they will and will not supervise lacks transparency and “may seem somewhat arbitrary.”³¹³ Another critique leveled against TBP by CCR is that it is funded by CBSA and therefore lacks independence.

Some of these concerns were reflected in our interviews with counsel. In cases where TBP refuses to supervise the person concerned, the counsel we spoke to expressed frustration with the Member’s discretion to discredit even the most meticulously organized alternatives to detention. For example, according to one counsel,

If someone has a criminal record, any bondsperson they propose can be dismissed on the ground that, ‘they knew you when you were committing these offences so they couldn’t influence you towards the right path.’ But if you bring someone new, they will say, ‘they don’t know you long enough and don’t have a close enough relationship to influence you.’ So it’s a Catch 22.

Another counsel told us about one of his clients whose sister was put forth as a bondsperson and rejected by the ID member. The ID Member rejected her because she had rescinded a bond for her brother in the past in a criminal matter: when her brother breached the conditions of his release, she immediately reported this to the police. Despite the fact that she clearly fulfilled her duty as a bondsperson when her brother breached his conditions, the ID Member concluded that she did not have enough influence on her brother and could not ensure his availability for removal from Canada.

It is important to note that there is no program similar to the TBP outside of the GTA. According to CBSA budgetary information, the supervision of a detainee through the TBP only costs \$8.50 per day, as compared to the \$259.22 per day to incarcerate a detainee in a provincial correctional facility (all figures 2013-2014).³¹⁴ It may be that programs like the TBP do not exist in smaller centres with traditionally low numbers of immigration as no significant costs savings would accrue.

Immigration detainees who require medication and mental health treatment face additional hurdles: they must prove that they can reliably access medication outside of detention. According to one counsel, this may be particularly difficult for failed refugee claimants whose health care benefits have recently been cut by the federal government. As another counsel put it, “The fact that they cannot be guaranteed treatment or coverage in the community is grounds to say that, ‘if you are untreated, you might pose a danger to the public or get involved with criminality, or at least you will be less trustworthy.’”

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Dr. Meb Rashid, co-founder of Doctors for Refugee Care, confirmed that failed refugee claimants living in the community can only receive treatment for mental health issues if deemed to be a danger to others. Dr. Rashid also noted that “many refugees and clinicians don’t understand the [Interim Federal Health] cuts, and thus, people are being turned away from care even where they are sometimes covered.” The implications of these cuts are extensive: not only are individuals being put at risk of “more advanced illness that is more difficult to treat and is more costly for taxpayers,” but “it also creates an environment where many see Canada as now being more hostile to refugees, thus tarnishing our previously well-deserved reputation as a country that has always provided a haven for people fleeing persecution.”³¹⁵

According to interviewees, ID Members also often refuse alternatives on the basis that detainees have not demonstrated rehabilitation while in detention; however, it is not clear how they can be expected to do this without any access to rehabilitative programs in detention.

Finally, the possibility of electronic monitoring as an alternative to detention was contemplated, and in fact recommended for study in a 2010 CBSA Evaluation Study on its Detention and Removals Program.³¹⁶ The evaluation study noted that while the initial infrastructure costs would be high, each additional detainee released on electronic monitoring would substantially reduce the average cost. However, counsel note that Members have been consistently resistant towards this option.

One counsel summarized the significant inadequacy of the ID’s current approach to alternatives to detention as follows:

When you’re considering alternatives to detention, the goal is to determine what is an appropriate limitation on someone’s liberty depending on their circumstances. Mental health should be taken into account; for example, is a hospital a better alternative, or is a community treatment program ... a better alternative for someone? But right now the [Member] basically says that, ‘mental health does not factor into the equation as to whether to detain someone or not.’

v. Lengthy detention, indefinite detention

Canadian courts and the UN have had to grapple with what to do when detention becomes long-term. The legislative scheme governing detention is meant to ensure that immigration detention does not become indefinite.

In *Sahin*, an oft-cited detention review case, the Federal Court of Canada acknowledged that immigration detention powers confer,

a necessary, but enormous power over individuals. The power of detention is normally within the realm of the criminal courts... [Without] finding that an individual is guilty of any offence, [ID Members] have the power to detain if [they] are of the opinion that the person may pose a danger to the public or will not appear for removal. Without intending to minimize these valid considerations, the power of detention in respect of them is, while necessary, still, extraordinary.³¹⁷

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The Court in *Sahin* held that indefinite detention may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice under section 7 of Canada's *Charter of Rights and Freedoms* (which protects life, liberty, and security of person).

In *Sahin*, the Federal Court set out a four-part test to assess whether detention has become indefinite such that the detainee should be released. The four-part test is now enshrined in s. 248 of the IRPR which states that, in considering whether to continue detention or order release, the ID Member will consider:

- (a) the reason for detention;
- (b) the length of time in detention;
- (c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
- (d) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and
- (e) the existence of alternatives to detention.³¹⁸

The considerations relevant to a specific case, and the weight to be placed on each factor, will depend on the circumstances of the case.³¹⁹

In *Sahin*, the Court found that there will be a stronger case for justifying continued detention where the individual is considered to be a danger to the public.³²⁰ Similarly in *Kamail*, the Federal Court held that refusing to sign travel documents (in that case, to facilitate the detainee's removal to Iran) constitutes "causing delay", and may count towards justifying continued detention.³²¹

In the more recent *Panahi-Dargahloo* decision, the Federal Court distinguished *Kamail* on the basis that the Iranian government refused to provide the detainee a travel document unless he signed a document stating that he would *voluntarily* return to Iran.³²² As a Convention refugee, Panahi-Dargahloo refused to sign this document for fear of persecution in Iran, and the Court did not find this refusal as constituting 'causing delay.'

In the same case, the Federal Court also held that the lengthier the detention, the more weight the 'length of detention' factor must be given. Accordingly, the Court also distinguished *Kamail* on the basis that detention was four months in that case, and 37 months in *Panahi-Dargahloo*.³²³ The ID Member had authorized release of Panahi-Dargahloo due to the length of his detention, his status as a Convention refugee, and his substantial compliance with CBSA.³²⁴ Ultimately, the Court held that the decision to release Panahi-Dargahloo was reasonable, and dismissed the Minister's application for judicial review.³²⁵

One counsel we interviewed told us about a client who has been detained for nearly five years on comparable grounds to the situation in *Panahi-Dargahloo*. Though his client's refugee claim was rejected, he was allowed to remain in

Canada due to the country conditions in Somalia. The ID Member used his extreme fear of being returned to Somalia as grounds to detain him as a “flight risk.” CBSA repeatedly requests that his client sign a “voluntary” declaration (or “statutory declaration”), stating that he is “volunteering/willing” to return to Somalia. The client persistently refused to do so due to his fear for his life. The statutory declaration is required because CBSA had chosen to arrange for deportations to Somalia via African Express Airline. It is the airline – not any government authority – that requires deportees to sign this statutory declaration. Despite the precedent in *Panahi-Dargahloo*, ID Members continue to refer to *Kamail* in deciding that refusal to sign the statutory declaration constitutes causing delay, and justifies continued detention.

IN FOCUS: Migrants Losing Patience with Lengthy Detention

While the legal parameters of indefinite detention are deliberated upon in detention reviews and courts, immigration detainees are losing patience.

In September 2013, 191 detainees imprisoned at CECC went on a hunger strike in order to retaliate against their endless detention.³²⁶ According to End Immigration Detention Network, in response, CBSA deported some of the key strike organizers, released some, moved others into prisons across Ontario, and locked up the remaining hunger strikers in segregation.³²⁷

Less than a year later, in June 2014, over 100 detainees launched a month-long boycott of their detention reviews, “insisting the process is biased, unfair and stacked against them.”³²⁸ The strike was coordinated among detainees in three provincial jails: Central East Correctional Centre, Central North Correctional Centre, and Toronto’s Metro West Detention Centre.³²⁹

Indefinite detention was subject to a *Charter* challenge in *Charkaoui*, which was a challenge to detention in the context of Canada’s security certificate regime.³³⁰ The Supreme Court of Canada found that, to pass *Charter* scrutiny, continued detention and/or the conditions of release imposed “must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case.”³³¹ The Supreme Court held that the IRPA’s certificate scheme provided a mechanism for review of detention, and for this reason, extended periods of detention under the certificate provisions did not violate ss.7 (life, liberty, and security of person) or s.12 (cruel treatment) of the *Charter*.

To pass *Charter* scrutiny, however, the Court in *Charkaoui* noted that the review must adequately take into account factors similar to those set out in s. 248 of the IRPR, namely, the (a) reasons for detention, (b) length of detention, (c) reasons for the delay in deportation, (d) anticipated future length of detention, and (e) availability of alternatives to

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detention.³³² The Court was careful to note however that this “does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter*.”³³³

The notion that the detention review system is a “meaningful process of review” would be justifiable if each detention review were a hearing *de novo* (such that a decision-maker could consider all the facts and come to his or her own decision). Instead, detention hearings are *quasi-de-novo*: an ID Member must come to a fresh conclusion on whether the person concerned should continue to be detained, but previous ID decisions concerning the detainee must be considered.³³⁴ As discussed, decision-makers must give “clear and compelling reasons” for departing from previous decisions.³³⁵ In effect, the requirement to give “clear and compelling reasons” to depart from the previous decision to detain operates as a presumption in favour of continued detention, and contributes to the problem of lengthy detention.

CBSA frequently argues that detention may be lengthy, but not indefinite, as long as there are efforts being made to process the case towards removal. However, according to counsel, this is simply not the standard in the legislation or the case law (i.e. *Sahin*).³³⁶ As noted below, considerations relating to whether detention is indefinite require a more balanced assessment of factors. As one counsel noted, “For a lot of these [detainees], how can you argue it's not indefinite if they're in there for years? Eventually, they might get removed, or maybe they won't, but in the meantime they are there for two, three years.”

Interestingly, in response to our question as to when detention comes to be considered long-term or indefinite by CBSA, Reg Williams answered, “when I was at GTEC, sixty (60) days in detention was the standard.” This implies that even some senior CBSA officials viewed detention beyond two months as long-term.

Mr. Williams noted that while he was in charge of immigration enforcement in the GTA, there would be a monthly meeting to discuss the cases of long-term detention (beyond 60 days). He noted that regular involvement of senior management in developing release plans for long-term detainees was essential to potential release since, in some instances, “the supervisor or manager when pressed would tentatively lean towards release but didn't want to take the risk without the endorsement of the Director. In other words, they would be OK with recommending release with my sign-off.” While Mr. Williams spoke about weekly meetings to discuss long-term detention cases while he was employed at CBSA, he noted that,

Subsequent to my departure, the new Directors have not participated in the monthly review process. They don't understand the process or the case flow and generally not interested in getting into details, consequently the subordinate managers won't favor detention on their own accord on the borderline cases. All of which explains why, since my departure, the detention levels have increased disproportionately to the number of cases removed.

VOICES FROM THE INSIDE: Dajuan*

Central East Correctional Centre, imprisoned for 2.5 years

Dajuan came to Canada from the Caribbean in 1997, when he was 16 years old, and was diagnosed with schizophrenia at age 20. Dajuan was a permanent resident before the government revoked his status based on criminal convictions. After serving an eight month sentence at Central North Correctional Centre (CNCC), Dajuan was immediately placed on immigration hold on grounds of being a flight risk (not a danger to the public). He was transferred from CNCC to Metro West Detention Centre, and subsequently to CECC.

Dajuan was held in immigration detention for 28 months, from October 2012, to February 2015; his immigration hold lasted more than three times as long as his criminal sentence.

Despite CBSA's efforts to deport Dajuan, in November 2014 he received a positive risk determination in his Pre-Removal Risk Assessment (PRRA), meaning that he cannot be removed from Canada at this time. His PRRA application is currently being assessed for risk balancing, and he has now been released from detention.

We interviewed Dajuan while he was still imprisoned at CECC.

During our interview, Dajuan described the mental health care he was receiving at CECC. He was taking medication regularly, both bi-weekly and nightly. "I want to take [the medication]," confirmed Dajuan. "If you want to stay on a range, you have to take the medication." He reported that he meets with the psychiatrist once a month, but may also have an appointment if he is "acting different or not taking the medication." He acknowledged that there had been periods of time when he stopped taking his medication: "sometimes nothing good goes for you here ... something like a year passes and you won't care, you give up..." Nevertheless, he explained that taking his medication is "key." "On the outside I always forget

to take my medication, but for the past three years I've taken my medication and I'm on track. A lot of people have been here for eight years and I've learned a lot from them," he told us.

Dajuan has an eight-year-old son who was born in Canada and lives in Toronto. His son, his son's mother, and sometimes his own mother come to Lindsay to visit him. They take an "immigration bus" from Toronto, a trip that can take nearly 2 hours each way. The visits last 20 minutes.

When describing his detention reviews, Dajuan noted that they only take "two minutes." "Imagine doing that for a year," he continued, "[the] only thing [they] sometimes [ask me] is my name." He received a positive first stage risk assessment in his PRRA. A risk balancing process is currently underway to determine whether he is a danger to the public. He cannot be removed from Canada during this prolonged process. As a result CBSA referred his case to the TBP and the Immigration Division agreed to release him under TBP supervision.

Although Dajuan believes that having a mental illness made it more difficult for CBSA to secure his deportation, he also noted that his schizophrenia at first made it harder for him to convince TBP to supervise him. "In a way, if I was a 'normal person', they wouldn't have to find the medication. It took almost three-four months for [TBP] to come see me because they had so much things to put in place."

Dajuan also mentioned that the restrictions the government has placed on health care for non-citizens (through cuts to the IFHP) further prolonged his stay in detention.³³⁷ The TBP would not accept him in January 2014, from his perspective, because they could not secure a source for his medication (there were other reasons as well, including his criminal record which meant that TBP required a direct referral from CBSA, not

from Dajuan and/or counsel). “TBP saw me when I was only in detention for four months, but I would not have been able to get the meds. Now they want to bail me out but I can get my medication now. I think they have community groups ... who are willing to help. There are so many people with mental illness in immigration so it's hard to help everyone at the same time.”

Although Dajuan was feeling positive about the possibility of release, he acknowledged that TBP might not come through. “After waiting for three years they tell me I have to wait six more months. [I'm] right at the door just pushing the door knob.”

* The detainee's name has been changed to protect his identity.

d. Challenging detention

Beyond monthly detention reviews, there is no right to appeal the decision to continue detention, and there is no independent body to which detainees can bring complaints.³³⁸ The only mechanism to challenge detention is through judicial review and *habeas corpus* applications. However, there are significant challenges in accessing both of these review mechanisms.

i. *Judicial review*

The ID is the competent body with respect to detention reviews, and there is no right of appeal to the Immigration Appeal Division for detention decisions.³³⁹

Immigration detainees may only seek judicial review of a decision to detain at the Federal Court.³⁴⁰ In order to do so, detainees must request and obtain leave from the Federal Court.³⁴¹ Although the Federal Court is to “dispose of the [leave] application without delay and in a summary way,”³⁴² in practice, a prominent and leading immigration and human rights lawyer noted that the leave requirement results in a delay of approximately a year, or 3-6 months if an expedited process is granted. The leave requirements make it difficult to challenge the legality of detention in Federal Court – “you can never tell if you are going to get leave or not,” noted one counsel. “For this reason,” she added, “leaving oversight on Immigration Division decisions to the Federal Court is highly flawed.”

If leave is granted, a Federal Court judge fixes the date and place for the hearing,³⁴³ which must be held between 30-90 days after leave is granted, unless the parties agree to an earlier day.³⁴⁴

ID Members who make immigration detention decisions are considered to have considerable specialized expertise,³⁴⁵ and since their decisions are based on mixed findings of fact and law, they are judicially reviewed on a standard of reasonableness (rather than correctness).³⁴⁶ This means that deference is owed to ID Members' findings of fact and assessment of the evidence.³⁴⁷ The role of the Federal Court is not to substitute its opinion for that of the ID Member.³⁴⁸

According to the counsel we interviewed, judicial reviews in the context of immigration detention are generally ineffective, even where leave is granted. Some counsel went as far as to state that there is effectively no Federal Court oversight of the ID's detention decisions. Moreover, there can be a significant delay in handing down a decision on judicial review, and often the remedy would simply be another detention review at the ID (which happens monthly anyway).

For example, in *Walker*, the Federal Court held that an ID Member's decision to order a three-year long detention

to continue was unreasonable.³⁴⁹ The effect of this judgment was that the matter was “remitted to the Board for consideration by a differently constituted panel.”³⁵⁰ The Federal Court lacks jurisdiction to issue a writ of *habeas corpus* ancillary to judicial review,³⁵¹ which effectively means the Court cannot order release but only redetermination by the ID. One counsel noted that: “when judicial review is sought in a promising case, Minister’s counsel often consents to a new detention review, which prevents strong cases from reaching the courts, and only results in another detention review (to which the detainee is entitled every 30 days in any event).” Finally, judicial reviews cost about \$4000-5000, which, as one counsel noted, could be better spent on other applications.

ii. *Habeas corpus*

Habeas corpus is the constitutional right to challenge the lawfulness of detention before a court.³⁵² A successful application for *habeas corpus* requires establishing: (1) a deprivation of liberty (where the onus is on the applicant), and (2) proof that the deprivation was unlawful (where the onus rests on the detaining authority to prove lawfulness).³⁵³ Importantly, a successful *habeas corpus* application results in release from detention (or ‘release’ from the more restrictive form of detention to a less restrictive one).

Despite the power of *habeas corpus* as a remedy for those who are detained, there are significant hurdles to applying for it in immigration detention cases. The Supreme Court of Canada in *May v Ferndale Institution*,³⁵⁴ a leading case on *habeas corpus* in Canada, established that provincial superior courts should generally decline to exercise their *habeas corpus* jurisdiction in immigration cases because the Federal Court provides a “complete, comprehensive and expert procedure for review of an administrative decision.”³⁵⁵ This finding was reiterated by the Supreme Court in the 2014 decision in *Mission Institution v Khela*.³⁵⁶

The Ontario Superior Court and various appellate courts have followed *May v Ferndale*,³⁵⁷ and the vast majority of cases where immigration detainees apply for *habeas corpus* are dismissed. In the recent *Chaudhary et al. v Minister of Public Safety et al.* decision, the Ontario Superior Court of Justice again affirmed this position, holding that the “comprehensive statutory mechanism that is in place for the review of the detention of individuals in connection with pending immigration matters provides the appropriate procedural vehicle for the prompt judicial review of the lawfulness of detention orders in immigration matters.”³⁵⁸ Accordingly, the court declined to exercise its *habeas corpus* jurisdiction to review the lawfulness of the detention.³⁵⁹ *Chaudhary* is currently on appeal to the Court of Appeal for Ontario.³⁶⁰

According to counsel for the appellants in *Chaudhary*, Barbara Jackman, for the court to say that the immigration detention review system is a “complete and comprehensive scheme” and provides an adequate remedy is simply “wrong.” The ID “is not a court, it is a tribunal,” and as such any judicial review can only assess decisions for their reasonableness rather than their correctness. Recalling *Singh*,³⁶¹ Ms. Jackman noted that the Court held that non-citizens have the same constitutional rights as Canadians, and to deny immigration detainees’ access to *habeas corpus* is to deny them a constitutional right.³⁶²

Despite the extremely limited success in using the remedy of *habeas corpus* to challenge immigration detention, it has been used to challenge the legality of conditions of confinement. *Habeas corpus* can be applied to challenge

VOICES FROM THE INSIDE: Clement*

Detained for 8 months

Clement, now 31 years old, came to Canada from the Caribbean when he was eight years old. He was a permanent resident before the government revoked his immigration status for having committed a crime.

Clement was taken into custody following a meeting with immigration officials. He spent one month at Maplehurst Correctional Complex, and seven months at CECC, which was longer than his criminal sentence: “This is the most time I’ve ever done,” he confirmed. In speaking about how he ended up in immigration detention, Clement noted, “I’m just kind of lost.”

We met with Clement while he was detained at CECC, and he has since been released (in February 2015). He is currently staying at a shelter in Hamilton.

Clement was diagnosed with bipolar disorder in 2006, and suffered a stroke in 2011. As a result of his stroke, he walks with a limp and also “suffer[s] from neurological damage;” “my speech is a little slow,” he told us. Clement confirmed that he had met with a psychiatrist at CECC for “around 15 minutes,” although he felt that the psychiatrist was just “going through the motions...I don’t think he took seriously anything that I was saying,” he told us. Due to his stroke, Clement has lost some motor function on the left side of his body: “I wish I had some therapy...I’m still trying to get my hand, left leg, and ankle back.” When asked whether he would want to have somebody to talk to, he replied: “Someone who would actually take me seriously? Sure, yes.”

Clement confirmed that he takes medication every night, but noted that it does not help: “Not while I’m in here. ... Nothing really is helping right now.” We asked Clement whether he felt anxious: “Every day,” he replied. “I’m here, I’m dressed in orange ... and I don’t know when it’s going to end. ... Right now I’m trying to refrain from sinking back into that black hole.” When asked whether there are any consequences of refusing the medication, he replied, “It’s a must-take.”

Clement has two kids who were born and raised in Canada. They have never visited him in jail because he “[doesn’t] want them to come to a place like this.”

“Everybody I know lives [in Canada],” he told us. When asked about any ties to his country of origin, he said, “I don’t know much about [it] ... from what I hear most people don’t make it a month down there.”

Immediately prior to meeting us, Clement had attended a detention review hearing. We saw him enter the room where detention reviews take place, and only had to wait approximately seven minutes before the review was over and Clement joined us for the interview. Evidently, the detention review was very brief, which Clement indicated was not unusual. Despite their brevity, however, Clement reported that detention reviews are particularly stressful. He described sitting passively in his orange jumpsuit, on camera, and watching the hearing unfold on a TV screen; “they don’t know that inside I’m going absolutely crazy wondering if I’m going to get out or what’s going on,” he told us.

Clement’s counsel informed us that his detention was prolonged because he could not get access to psychiatric medication. The TBP was only willing to supervise Clement if he was taking medication regularly. However, despite repeated requests over the span of nearly seven months, the psychiatrist at CECC refused to see Clement, for reasons unknown to his counsel. According to his counsel, “[Clement’s] [case is] a great encapsulation of how difficult it is for counsel to pursue and arrange for a psychiatric evaluation. Unless we pay for our own [psychiatrist] to drive there – [which] costs thousands of dollars, if anyone is even willing [to do so] – [we have to] beg and plead the CBSA to arrange for one. It was incredibly difficult for [Clement].”

Eventually, Clement’s counsel was able to send the jail staff a list of medications that he had been on prior to his detention, in the hopes that the medical staff would provide these for him. Finally, the jail psychiatrist met with Clement, and he was given the necessary medication. Clement’s counsel reported that no one at the jail gave any justification for why they had refused to see Clement for so long.

* The detainee’s name has been changed to protect his identity.

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the situation where a detainee is subjected to increasingly restrictive conditions when already confined, including the transfer from a minimum to a maximum security setting.³⁶³

In *Almrei*, the Ontario Superior Court of Justice allowed an immigration detainee held in Toronto West Detention Centre to use *habeas corpus* to challenge the conditions of his confinement: "Release from the unlawful detention might be sought even if that release is not a full release but rather a release from a particularly restrictive form of detention."³⁶⁴ In that case, Mr. Almrei was being kept in segregation without footwear, and the Court held that he was to be provided with standard-issue footwear.³⁶⁵ Mr. Almrei's counsel, Barbara Jackman, who we spoke to maintains that the case was successful because it specifically challenged the conditions within a provincial jail rather than challenging immigration detention itself.

B. The site of detention: immigration holding centre or provincial jail?

Once the decision is made to detain a migrant or to continue detention, the authority to detain lies within the sole discretion of the Minister of Public Safety (who delegates this authority to "CBSA only") to determine where the migrant will be confined.³⁶⁶

In the GTA, where the majority of detainees are held, there are two main options for confinement, within an IHC (medium-security) or within a provincial jail. According to Reg Williams, whom we interviewed, "the decision to transfer a person from the CBSA-run facility to a provincial facility is made by an officer and concurred in by CBSA manager at the facility."

However, there is significant regional variation across the provinces. For example, outside of Ontario, British Columbia, and Quebec, there are no dedicated IHCs, which means that all immigration detainees are held in provincial facilities. Moreover, publicly-disclosed information from 2013 indicates that immigration detainees outside the Central region are much more likely to be released after a detention review proceeding than those housed within Central region (which includes Toronto).³⁶⁷ Regional variation in immigration detention can be viewed as symptomatic of the lack of clear laws and policies to guide immigration detention in Canada.

a. Legal authority to detain in provincial jails and associated costs

In carrying out its mandate to administer immigration detention, CBSA forms agreements with provinces to house some immigration detainees in provincial jails.³⁶⁸ CBSA pays the provinces an agreed-upon per diem rate to imprison immigration detainees.³⁶⁹ CBSA states that detention in provincial jails costs \$259 per day per day.³⁷⁰

The amount paid by CBSA to each province reflects the extent to which CBSA relies on provinces to administer detention across Canada. Information obtained pursuant to access to information legislation provides the "amount of money paid to each province by Canada Border Service Agency to pay that province to detain immigrants under immigration holds in provincial facilities for 2013":³⁷¹

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Province	2013 CBSA detention costs	Proportion of Total
Ontario	\$20,628,772.71	77.9%
Atlantic	\$67,671.75	0.3%
British Columbia	\$1,950,901.90	7.4%
Quebec	\$1,386,440.00	5.2%
Alberta	\$1,685,097.65	6.4%
Saskatchewan	\$87,806.66	0.3%
Manitoba	\$598,660.87	2.3%
New Brunswick	\$50,443.39	0.2%
Nova Scotia	\$13,800.00	0.1%
Newfoundland	\$3,428.36	0.0%
Total	\$26,473,023.29	100.0%

As of 2010, CBSA had a Memorandum of Understanding (MOU) with the provinces of Quebec and Alberta, a Letter of Understanding with British Columbia, and was in the process of negotiating a MOU with Ontario.³⁷² As of 2013, CBSA was still apparently negotiating a MOU with Ontario,³⁷³ though one source, who wished to remain anonymous, told us that the Ontario government had recently signed an MOU with CBSA. We asked the government for a copy of this MOU but did not receive it.

Immigration detention is very expensive. A request for files pursuant to access to information demonstrates rising costs likely correlated to increasing “detention days”:³⁷⁴

Fiscal Year	Volume of Detention Days	CBSA Annual Cost of Detention
2005-2006	170,759	\$34,989,849
2006-2007	179,097	\$36,272,198
2007-2008	181,050	\$41,788,980
2008-2009	193,553	\$47,281,223
2009-2010	180,510	\$48,298,750
2010-2011	220,897	\$43,108,526
2011-2012	184,920	\$50,555,200
2012-2013	196,271	\$51,376,269
2013-2014	196,050	\$57,326,412

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As the table indicates, over the span of nine fiscal years, the annual cost associated with the administration of detention have risen over \$20 million, with nearly 30,000 more detention days per year.

In an interview with us, Reg Williams opined that it would be in the federal government's interest to negotiate a clear MOU with Ontario, especially in terms of long-standing issues such as co-mingling of immigration detainees with criminal holds, increased access to visitors and counsel, and regular phone access to reach community supports, but also due to cost. He went as far as to suggest that,

...if no agreement with Ontario to allow for proper monitoring [by the Red Cross] and implementing of recommendations, my proposal is that, at least in the GTA, there should be consideration given to:

- (a) Building a CBSA-run facility for high-risk cases and not using the provincial jails at all; or
- (b) Using existing provincial facilities by leasing portions from the province so that there is no-co-mingling with the persons held under the criminal justice system. These areas would be separate from the rest of the jail and meet CBSA specifications...

I have made several proposals for CBSA building its own facilities. In the long-run it is much more cost effective than paying the province a per diem of \$230. I've managed to get some traction on this concept but when all is said and done, people at CBSA-HQ [Headquarters] look at the work involved and the need to seek Cabinet approval and simply back down and say that the Government of Canada 'doesn't want to be in the detention business.'

Ironically, through the extensive use of provincial facilities to house detainees, the government is willfully blind if it does not view itself as already in the 'detention business.'

b. Migrants with mental health issues routinely imprisoned in provincial jails

While the factors that inform the decision to detain individuals are outlined in the IRPA and the IRPR (and discussed above), the reasons for holding immigration detainees in provincial jails (as opposed to IHCs in jurisdictions in which these are available) are not addressed within the legislative scheme. One counsel observed, "there is no policy, no set procedure to send them to jail. ... There are no written decisions or justifications for moving people around," while another counsel found "there is no oversight."

The decision to transfer a detainee to a jail is entirely discretionary. Drawing on his past experiences as Director of Immigration Enforcement at the GTEC, Reg William told us:

I will admit that, without the hands-on approach [by management], things can get arbitrary and the officer/manager is prone to making unsupportable decisions regarding transfers. In a law enforcement environment, it is my opinion that, if left unchecked or un-monitored, officers tend to push the envelope. I believe this is a natural consequence of being in such an environment even if the intent is not necessarily to act in bad faith. That for me is reason for the Director or delegate to be engaged and be seen to be interested in these types of decisions.

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CBSA's publicly-accessible documents state that provincial jails are used to hold "higher-risk detainees" (i.e. violent criminal background), "lower-risk detainees" in areas not served by an IHC, and detainees held for over 72 hours in the Vancouver area³⁷⁵ (as the Vancouver IHC, located in the basement of the airport, is designed for short stays only).³⁷⁶

Another internal CBSA document provides a few more details regarding the discretionary decision to transfer to a jail: "CBSA officers and management consider a variety of factors to determine in an individual is suitable for a lower or higher-risk facility. These factors include behavior, medical needs, mental health issues, criminality, impairment, and/or a history of violence or substance abuse."³⁷⁷ Another document listed transfer to a jail as an appropriate disciplinary measure if a staff member witnesses "unacceptable behaviour."³⁷⁸ None of these factors are set out in the IRPA or IRPR.

Reg Williams told us that GTEC "had developed some guidelines for transferring to a provincial facility," and that, "the main factors are: behavioral issues (escape threat or physically aggressive), [or] serious medical issues where the person would be better treated medically in a provincial facility." In response to a question about whether there is a presumption that someone with a serious mental health issue would be held in a jail versus an IHC, Mr. Williams stated: "The provincial jails have doctors, psychiatrists and psychologists available to provide services and write prescriptions. The jails also have specific cells if isolation is required. On balance the detainee with mental health issues can receive better care at a provincial facility."

In the *Information for People Detained under the IRPA*, CBSA notifies immigration detainees that "disruptive behavior ... may result in your being placed in isolation or transferred to a more secure detention facility."³⁷⁹ Furthermore, CBSA "may transfer an individual with mental health issues from an immigration holding center to a provincial detention facility that provides access to necessary mental health services."³⁸⁰ According to Reg Williams,

Lacking the sensitivity to recognize that the root cause of a person's behavior may be mental illness, [CBSA] officers are left with only one option: to erroneously conclude that the person is being uncooperative or aggressive. Unfortunately, once this image (uncooperative and aggressive) is created it is a hard one to dislodge and gets reinforced over and over at detention reviews thus making prospect of release or consideration of alternatives to detention improbable.

A 2011 study completed for the UN High Commissioner for Refugees (UNHCR) notes that, if a detainee's psychotic symptoms can be controlled by medication prescribed by the CBSA-run facility physician, the person will sometimes remain in the IHC.³⁸¹ However, detainees with such symptoms are usually transferred to a provincial jail, "especially if the detainee is agitated or aggressive".³⁸² Indeed, the study notes that detainees who are considered aggressive may be transferred to a penal institution even if they do not have mental health problems.³⁸³

The routine transfer of those with mental health issues to provincial jail was confirmed in our interviews with counsel. Counsel noted that, 'disruptive behaviors' that could result in transfer to a provincial jail include: "acting out or hindering other people," "giving attitude," "not cooperating" "refusing to eat," and even refusing to sign travel documents to facilitate their removal.

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According to counsel, the considerable discretion associated with transfers gives IHC guards leverage to threaten immigration detainees with transfer to jail in order to coerce compliance.

According to those we spoke to, counsel only learn that their clients have been transferred to jail when their clients contact them from jail; CBSA does not notify counsel directly, let alone afford the clients the opportunity to consult a lawyer prior to transfer, or challenge the decision to transfer.

The idea that detained persons will presumptively receive better mental health treatment in jail must be critically analyzed and weighed against the severe negative impact that restrictive forms of confinement have on detainees' mental health. It also must be analyzed against the fact that IHCs have the capacity to treat detainees with mental health issues. According to Mr. Williams,

At CBSA-run facilities there is a doctor on-site with set hours attending at the facility. In addition there are nurses. Any medical needs outside the doctor's hours are dealt with by taking the detainee to the local hospital. Mental health issues are supposed to be identified by the doctor at the CBSA-run facility and referred accordingly.

At CBSA facilities with over 50 detainees, a physician is on site two days per week for four hours per day to prescribe medication, refer detainees for further treatment, and to advise the enforcement detention officer of any potential medical or security issues.³⁸⁴ Indeed, CBSA's own documents confirm that "detainees have access to medical services as required and as a result of their detention, qualify for the Interim Federal Health Program if unable to pay for essential treatment, or are otherwise covered by provincial health care programs."³⁸⁵

c. The Scope of detention in provincial jails

The lack of publicly-accessible data makes it difficult to determine the number and proportion of total detainees held in IHCs versus provincial jails at any given time.

In 2013, over 7370 migrants were detained in Canada.³⁸⁶ Approximately 30% of all detention occurred in a facility intended for a criminal population, while the remaining occurred in dedicated immigration holding centres (IHCs) in Toronto, Montreal (Laval), and Vancouver.³⁸⁷ A Red Cross Society report notes that, "CBSA held 2247 persons in immigration detention in Ontario provincial correctional facilities" in 2012.³⁸⁸

Nearly 60% of all detention occurs in Ontario, with 53% of detention occurring in the Greater Toronto Area (GTA) alone,³⁸⁹ a fact which was confirmed in our interview with Reg Williams.

d. Jurisdictional overlap or black hole

Immigration detainees held in provincial jails are under both provincial and federal jurisdiction.³⁹⁰ This leads to myriad issues in terms of who is ultimately accountable for the conditions of confinement, including access to mental health care.

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Whereas CBSA is clearly authorized by the CBSA Act to enter into agreements with the provinces,³⁹¹ there is no indication in the legislation that, as a result of this cooperation, CBSA is somehow relieved of its responsibilities with respect to immigration detainees who are transferred to provincial jails. Indeed, an internal CBSA document that we obtained notes that “the CBSA is responsible for the health and welfare of all detainees held under IRPA.”³⁹² In a confidential 2012-2013 report, “Canadian Red Cross Society Annual Report on Detention Monitoring Activities in Canada,” the Canadian Red Cross Society (Red Cross) confirmed that CBSA retains full and ultimate legal responsibility for persons detained pursuant to the IRPA.³⁹³

On the other hand, the superintendents of correctional institutions in Ontario, for example, are responsible for the care, health, discipline, safety and custody of all inmates (where “inmate” is defined to include anyone in custody at the institution.)³⁹⁴ Neither Ontario’s *Ministry of Correctional Service Act*³⁹⁵ nor the corresponding regulations³⁹⁶ mention immigration detention or immigration detainees. However, the MCSCS notes on its website that, in carrying out its correctional services mandate, the Ministry maintains jurisdiction over “adults held for immigration hearing or deportation.”³⁹⁷ The website also notes that immigration status is a factor that is considered when determining prisoner security classification.³⁹⁸

Indeed, Reg Williams told us that, “from the province’s perspective, the last thing they want is to have two separate streams of detainees within their facility. Their preference is to have uniform policies and practices applicable to all persons detained within their facility with no special preference given to immigration detainees.” When asked whether CBSA retains jurisdiction and responsibility over the conditions of detention for those held in provincial jails, in contrast the CBSA’s internal documents, he responded: “CBSA has no jurisdiction or responsibility at provincial jails. Zero.”

According to the Red Cross report, as the legal detaining authority, CBSA “must ensure that all immigration detainees enjoy similar rights and support services and are not subjected to variable detention conditions as a result of their place of detention and capacity constraints.”³⁹⁹

For this reason, MCSCS’s extensive day-to-day responsibility over immigration detainees is troubling. In fact, according to a 2011 report by the UNHCR, CBSA has no control over where immigration detainees are held once they are transferred to provincial jails, nor can CBSA intervene in provincial jail management or detention standards.⁴⁰⁰ In addition, CBSA is rarely notified about segregation,⁴⁰¹ punishment, or transfer of immigration detainees to other facilities.⁴⁰²

This unclear delineation of responsibility between CBSA and provincial jails, despite CBSA’s overarching legal responsibility as the detaining authority, was confirmed in our interviews with counsel. CBSA assumes that provincial jails are responsible for the care and custody of immigration detainees (what we have called the “conditions of confinement”), and jails tend to adopt a “hands-off approach” that does not go beyond a “minimal obligation to care for immigration detainees by providing meals and some form of security within this confined space.” According to one counsel:

Immigration detainees are handed over almost completely to [the] provincial correctional service and there is one CBSA officer who is positioned there, who seems to have a straight up administrative

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role (arranging for review hearings, et cetera), but doesn't provide any sort of service or supervision. The CBSA has more or less washed their hands of the day-to-day issues that affect detainees in their actual environment.

CBSA does not intervene with "conditions of the jail and how immigration detainees are treated there," noted another counsel. Even Reg Williams, who was Director of Immigration Enforcement in Toronto for eight years, opined that "the jurisdiction to manage the detainee population rests with the province."

There is a legal black hole in terms of jurisdiction over the conditions of confinement for immigration detainees held in provincial jails. This black hole is particularly harmful for vulnerable immigration detainees who have mental health issues. Immigration detainees with existing or suspected mental health issues are generally held in provincial jails, and as noted above, CBSA justifies this on the grounds that jails offer more extensive medical treatment than IHCs. This is despite the overwhelming evidence outlined above that, as one counsel put it, "the jail setting is more likely than not to make the symptoms worse, and make them deteriorate more."

The lack of communication between CBSA and provincial jails is best illustrated by the fact that, on at least one occasion, Minister's counsel showed up to the detention review hearing for a deceased man.⁴⁰³ Shawn Dwight Cole, a Jamaican national who had a history of seizures and had been held in Toronto East Detention Centre for 106 days, died on Boxing Day in 2012.⁴⁰⁴ Because CBSA was not informed by the jail of Mr. Cole's death, Minister's counsel showed up for a detention hearing in January 2013, between one to two weeks after his death.⁴⁰⁵ Clearly, CBSA does not keep close tabs on immigration detainees held in provincial jails.

e. Challenging detention in provincial jail

The ID only has jurisdiction to make a determination as to whether detention shall continue, not *where* it shall be carried out; the latter jurisdiction lies solely with the Minister.⁴⁰⁶ This is significant because it means that the detainee cannot challenge the place or site of confinement at a detention review hearing. In *Jama*, counsel for the detainee argued that a detainee with a severe mental illness should be held in a psychiatric institution rather in the IHC or a provincial jail, and the ID Member refused to make such an order on the basis that he or she lacked the jurisdiction to do so.⁴⁰⁷ Nevertheless, where a detainee is already being held in a secure psychiatric facility, a Member may consider flight risk and danger to the public to be sufficiently mitigated.⁴⁰⁸

C. Relevant laws and policies re: confinement in Ontario jails

In this section, we outline the laws and policies that govern the conditions of confinement for immigration detainees held in provincial jails in Ontario. We focus specifically on conditions that affect those with mental health issues.

a. Access to healthcare

Within the MCSCS legislative and regulatory framework, the provisions relevant to physical and mental health apply

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to immigration detainees on the basis that they are covered under the definition of “inmate” in the MCSA.⁴⁰⁹

Regulation 778 provides that there *shall* be one or more health care professionals in each institution responsible for the provision of health care services and treatment,⁴¹⁰ including a medical examination upon admission,⁴¹¹ and reporting serious illness immediately to the superintendent.⁴¹² Where an inmate requires medical treatment that cannot be supplied at the correctional institution, the superintendent must arrange for the inmate to be transferred to a hospital or other health facility,⁴¹³ or to a psychiatric facility pursuant to the Ontario *Mental Health Act*.⁴¹⁴ The superintendent may direct that an inmate undergo an examination by a psychiatrist or psychologist for the purpose of assessing his/her emotional and mental condition.⁴¹⁵

A central theme of our interviews with counsel is that mental health support in provincial jails is woefully inadequate. This view is confirmed by recent independent studies. In April 2015, the Public Services Foundation of Canada's report, “Crisis in Correctional Services: Overcrowding and inmates with mental health problems in provincial correctional facilities,” found that “incarcerated individuals are primarily serving out their time without access to any programs or assistance”⁴¹⁶ and that “for those inmates with mental health and addictions problems the environment is almost guaranteed to further exacerbate these problems.”⁴¹⁷

In 2013, Ontario settled a complaint filed by prisoner Christina Jahn to the Ontario Human Rights Tribunal wherein she alleged that she was placed in segregation for over 210 days at the Ottawa-Carleton Detention Centre because of her mental health issues, and was discriminated against on the basis of her mental health-related needs.⁴¹⁸ As part of the settlement, MCSCS commissioned an independent study by Optimus/SBR Management Consultants on how to best serve female inmates with mental health issues [Optimus report].

The Optimus report notes that “the prevalence of mental health issues in correctional facilities represents a challenge for correctional facilities across Canada,” and that “there is general acceptance that a high percentage of inmates in Canada have a mental health issue, and that the percentage is continuing to increase.”⁴¹⁹ The report was based in part on consultations with numerous stakeholders within and outside government, and states that, “across stakeholder groups it was recognized that there have been numerous challenges in responding to the needs of females with Major Mental Illness within the correctional system, and that currently, the system is not equipped to effectively meet the needs and provide the right ‘care’ for these women.”

The Optimus report further noted that provincial jails were overly focused on control over care:

Acknowledging that the focus of corrections is ‘care, custody and control’, stakeholders across the board felt that too much emphasis was placed on ‘control.’ Control was seen by stakeholders as a trigger to the maladaptive behaviours that are often symptomatic of Major Mental Illness, which in turn, it was suggested, leads to ineffective responses such as seclusion and restraint. Behaviours, attitudes, and the overall approach and framework need, it was suggested, to be reframed and transitioned from a punitive and custodial model to one that focused on recovery, rehabilitation, and engagement.⁴²⁰

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Importantly, the stakeholders noted that “the first call of action should be to provide appropriate resources, prevention and support in the community, and to divert these women out of the correctional system.”⁴²¹ While the Optimus report was particularly focused on female prisoners, it is arguable that the findings regarding the culture of provincial corrections are equally applicable to men.

Transfer of migrants to provincial jails is also problematic because the social science evidence suggests that mental health deterioration among detainees in jails is widespread; this was unanimously confirmed by the counsel we interviewed. Access to programs and medical services lacks consistency. Furthermore, even where treatment is provided, it often consists of management of disruptive behavior through sedatives or antipsychotics, as opposed to addressing the underlying mental health issue. The focus is not on detainees' well-being, but on controlling them for the purposes of managing the institution.

b. Segregation

Ministry of Correctional Services Act Regulation 778 outlines the rules for the segregation of an inmate in a provincial jail from the rest of the jail population.⁴²² The Superintendent has the discretion to place an inmate in segregation for several reasons: if the inmate is in need of protection; for the purpose of protecting the security of the institution or the safety of other inmates; for alleged misconduct of a serious nature; or at the inmate's request.⁴²³

Where an inmate is placed in segregation for alleged misconduct, the Superintendent shall review the case within 24 hours, and may release the inmate from segregation if it is no longer warranted.⁴²⁴ If segregation continues after this preliminary review, the Superintendent shall review the case at least once every five-day period to determine whether continued segregation is warranted.⁴²⁵ Where an inmate is not released from segregation after thirty days, the case must be reported to the Minister.⁴²⁶ Importantly, an inmate who is placed in segregation must retain, “as far as practicable, the same benefits and privileges as if [he or she] were not placed in segregation.”⁴²⁷

A 2015 report from Amnesty International investigating immigration detention in the Netherlands notes:

Isolation is problematic both from a human rights and a medical perspective – especially in immigration detention. Human rights standards impose strict requirements on the use of isolation. It may only be applied in exceptional circumstances, if it is absolutely necessary, proportionate and non-discriminatory. Moreover, such cases require consistently good accountability. Medical research shows that isolation – even if short-term – can be detrimental to mental health. For this reason the mental health sector aims to reduce and eventually eliminate the use of isolation.⁴²⁸

As noted above, detainees with deteriorating mental health issues are sometimes placed in segregation, and they may only be returned to general population when a psychiatrist determines that they are fit to do so. One counsel noted, “it seems bizarre that if you're paranoid and hallucinating, they stick you in a hole.”

D. Independent monitoring of immigration detention facilities

There are no provisions for independent monitoring of places of detention in the IRPA or IRPR, Canada has not agreed to independent monitoring by the UN through the Optional Protocol to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and there no independent ombudsperson to whom immigration detainees can complain about conditions of confinement.

Indeed, when asked about how CBSA monitors the conditions of confinement in jails, including use of segregation, lockdowns, and strip searches, Reg Williams definitely stated: "CBSA has no jurisdiction over these items at provincial jails and does not have authority to monitor conditions therein."

However, an agreement to monitor immigration detention conditions was first established between the Canadian Red Cross Society and Citizenship and Immigration Canada (CIC) in 2002.⁴²⁹ In 2006, the Red Cross entered into an MOU with CBSA, which mandates that it monitor the conditions of persons detained under the IRPA.⁴³⁰ Unfortunately, the reports of the Red Cross are confidential and not publicly accessible (though some have been obtained through requests made pursuant to access to information legislation).

The MOU provides that the Red Cross is responsible for monitoring "compliance with all applicable domestic standards and international instruments to which Canada is a signatory."⁴³¹ The MOU also specifically provides for independent monitoring in situations where a person is deemed unable to appreciate the nature of the proceedings.⁴³² When notified, the Red Cross will "gather the necessary information from the CBSA to determine whether all the relevant and appropriate support agencies and organizations are aware of the individual."⁴³³

The 2012-2013 report on Canada's immigration detention notes that the Red Cross received these notifications "very infrequently" in some regions in Canada, and in other regions, "not at all."⁴³⁴

In the 2012-2013 reporting year, the Red Cross did not visit any correctional facility in Ontario,⁴³⁵ because it had not been granted access to do so.⁴³⁶ This is despite Article 2.1.2 of the MOU, which states that "The CBSA will endeavor, to the fullest extent possible and subject to any lawful limitations, to enable the Red Cross access to persons detained pursuant to the IRPA at detention facilities under the control and management of other Federal, Provincial, Territorial or Municipal authorities."⁴³⁷ In 2012-2013, the Red Cross had access to all IHCs and some provincial jails (e.g. in British Columbia, Alberta, and Quebec), but none in Ontario.⁴³⁸ Similarly, in 2011, the Red Cross did not visit any correctional facility in Ontario,⁴³⁹ again due to lack of access by correctional authorities.

Red Cross' lack of access to monitoring of provincial jails in Ontario is especially problematic. In the 2011 report, the Red Cross notes: "Lack of access to Ontario correctional facilities is of great concern given that in 2011, 4087 detainees were housed in these facilities accounting for approximately 40% of all detained persons in Ontario. This lack of access has been raised by [the Red Cross] with CBSA since 2005."⁴⁴⁰ Mr. Williams noted that, "the Red Cross is the only mechanism CBSA has to get feedback on [conditions of confinement] at the provincial jails" and that effective access by the Red Cross to Ontario jails is "key."

Indeed, many of the NGOs, researchers, and journalists we spoke to noted that access to detainees held in provincial jails is a major challenge when trying to understand Canada's treatment of immigration detainees. We were only able to interview detainees held in provincial jails as law students accompanying the executive director of the IHRP, who is a practicing lawyer and able to enter as counsel (after obtaining permission of the detainees and their immigration counsel).

IN FOCUS: The Difficulty of Obtaining Mental Health Assessments

Both CBSA and the jail superintendent have the authority to order mental health assessments; however, these parties have different interests in play. As one counsel observed, from the jail's "perspective, a psychiatric assessment would only be required for the safety of the prison population (in order to ensure proper treatment and therefore better behavior while in jail), whereas from CBSA's perspective, they might want an assessment in order to know whether the detainee can appreciate the nature of what's going on in the immigration process." Neither of these perspectives accommodates the detainee's purpose of getting evaluated: in order to get treatment and ultimately be released into the community with appropriate conditions. Several counsel noted that some doctors have downplayed the mental health symptoms of their clients, or altogether refused to make referrals to psychiatrists.

The counsel we interviewed highlighted two ways to arrange for detainees' mental health assessments: convince the medical staff at the jail to make a referral to a psychiatrist, or arrange for a psychiatrist to visit

the facility. There are logistical barriers to arranging an independent assessment, including obtaining approval from the correctional facility. However, the most significant barriers are cost (thousands of dollars) and distance: most psychiatrists and psychologists would not travel to Lindsay, for example, on legal aid rates. Nevertheless, this is often necessary because detainees' repeated requests for referrals to the jail psychiatrists are consistently refused or go unanswered.

The relatively limited visiting hours and frequent lockdowns at CECC, and the significant distance from Toronto, also pose considerable barriers not only for arranging doctors' visits, but also for counsel and family visits. Detainees who are held in other provincial jails that are located a distance from major urban centres, face similar difficulties.

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ISSUES VIOLATES
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V. CANADA'S TREATMENT OF IMMIGRATION DETAINEES WITH MENTAL HEALTH ISSUES VIOLATES INTERNATIONAL LAW

One of the objectives of the IRPA is to “fulfill Canada’s international legal obligations with respect to refugees.”⁴⁴¹ The IRPA also explicitly states that the Act “is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory.”⁴⁴²

Nevertheless, our research indicates that Canada’s treatment of immigration detainees with mental health issues violates international human rights law. In particular, we find that, contrary to various international treaties to which Canada is bound as a state party, Canada’s immigration detention regime constitutes:

- arbitrary detention;
- cruel, inhuman and degrading treatment;
- discrimination on the basis of disability;
- a violation of the right to health; and
- a violation of the right to an effective remedy.

A. Arbitrary detention

Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR)⁴⁴³ protects liberty and security of the person and protects against arbitrary detention:

Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The right to liberty and security of the person is enshrined in other international⁴⁴⁴ treaties to which Canada is a party, and is the first substantive right protected in the *Universal Declaration of Human Rights*,⁴⁴⁵ which demonstrates its importance.

Moreover, the UN Working Group on Arbitrary Detention (WGAD) has found that the prohibition of all forms of arbitrary deprivation of liberty is part of international customary law and constitutes a *jus cogens* norm that binds all states regardless of whether or not they have signed and ratified the ICCPR. This is especially significant in the Canadian context since, in *R v Hape*, the Supreme Court of Canada found that “prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.”⁴⁴⁷

Article 9 of the ICCPR applies equally to citizens and non-citizens detained by a state party.⁴⁴⁸ Moreover, the UN Human Rights Committee (HRC), which monitors state implementation of the ICCPR, established more than three decades ago that the right to liberty and security of person is applicable to all deprivations of liberty, including

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immigration control.⁴⁴⁹ This continues to be supported in recent decisions of the HRC.⁴⁵⁰ Moreover, deprivation of liberty encompasses the “prison within a prison” concept by including certain further restrictions of liberty on a person who is already detained.⁴⁵¹

While the right to liberty and security of the person is protected in international law, it is not absolute. Pursuant to Article 9(1), any deprivation of liberty, to be justified, must not be arbitrary and must be prescribed by law.

“Arbitrariness” includes elements of inappropriateness, injustice, lack of predictability, or without due process of law.⁴⁵² Detention may be arbitrary if it lacks reasonableness, necessity, or proportionality.⁴⁵³ Arrest or detention that lacks a legal basis is also arbitrary. Accordingly, any deprivation of liberty must be in accordance with grounds and procedures that are established by law.⁴⁵⁵

Extensive analysis of the *Charter* is outside the scope of this report; however, we note that the *Charter* protects against arbitrary detention through s. 9.

a. Aspects of regime not sufficiently prescribed by law

Detention must be prescribed by law in a precise manner to avoid overly broad or arbitrary interpretation or application.⁴⁵⁶ Therefore, detention may be authorized by law and nonetheless be arbitrary.⁴⁵⁷ Legislation that allows wide executive discretion in authorizing or reviewing detention may be an insufficiently precise basis for deprivation of liberty.⁴⁵⁸

Precise laws imposing deprivation of liberty must also be accessible, and foreseeable in their application, in order to avoid all risk of arbitrariness.⁴⁵⁹ In the case of migrants, detaining authorities are required to take steps to ensure that sufficient information is available to the detained persons in a language they understand, regarding the nature of their detention, the reasons for it, and the process for reviewing or challenging the decision to detain.⁴⁶⁰

Three key aspects of Canada's immigration detention regime are not adequately prescribed by law, and therefore arbitrary and constitute a violation of immigration detainees' rights to liberty and security of the person.

i. *Site of detention*

Canadian law does not explicitly confer the Minister of Public Safety with the authority to determine the facility, site or place of detention and is therefore arbitrary.

Indeed, the IRPA and IRPR do not explicitly grant the Minister of Public Safety with the power to establish IHCs or any other place of detention. Although CBSA has been given responsibility to “administer” arrest and detention in Canada,⁴⁶¹ and CBSA has legal authority to form contracts with governmental branches (including the provinces) in order to “carry out its programs,”⁴⁶² the facility, site or place of detention is not prescribed by law. Nowhere in the IRPA or IRPR does it define where detainees will be held, the factors that will be considered in determining the appropriate place of detention, nor are any aspects of the conditions of detention outlined.

ii. Transfer from IHC to jail

The authority to transfer detainees from IHCs to provincial jails is not prescribed by law, and is therefore arbitrary.

There is nothing in the IRPA or IRPR about transfer of immigration detainees from one type of facility to another (i.e. IHC to provincial jail). In particular, there is nothing authorizing this kind of transfer on the basis of immigration detainees' health status, whether mental or physical. However, as indicated on the CBSA's website,⁴⁶³ and confirmed in our interviews, detainees with mental health issues are routinely transferred to provincial jails, especially if they display "disruptive behaviour."

iii. Jurisdiction over immigration detainees in provincial jail

Canadian law is silent as to which legal entity has jurisdiction over immigration detainees held in non-CBSA run facilities – in particular, their conditions of confinement, health and safety. This results in arbitrary treatment.

Ten years ago, the WGAD visited Canada and reported that there was poor communication between CBSA and provincial jails,⁴⁶⁴ and highlighted the need for Memorandums of Understanding.⁴⁶⁵ MOUs between CBSA and the provincial jails that have since been negotiated have not been made public, and are not accessible to immigration detainees or their counsel. Even if these agreements were made public, however, they would be insufficient to meet the standard of being "prescribed by law."

The CBSA's lack of clear jurisdiction over immigration detainees held in provincial jails is highlighted by the fact that the independent organization specifically contracted to monitor immigration detention in Canada (namely, the Canadian Red Cross Society), reported in 2013 that it had "not been granted access to monitor immigration detainees in any provincial correctional facility in Ontario."⁴⁶⁶

b. Decision to detain not sufficiently individualized

Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt.⁴⁶⁷ To continue detention beyond this period is arbitrary, unless there are particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of committing crimes against others, or a risk of acts against national security,⁴⁶⁸ or risk of interference with collecting evidence.⁴⁶⁹ The reasons for detention must also be necessary, reasonable, and proportional to the legitimate purpose for which it is being used.⁴⁷⁰ This is echoed in UNCHR Detention Guideline 4.2.⁴⁷¹ Detention without this appropriate justification is arbitrary.⁴⁷²

To establish necessity and proportionality of detention, the government must show that less intrusive measures were considered and were found to be insufficient.⁴⁷³ Less invasive means of achieving the same ends may include reporting obligations, sureties, or other conditions to prevent absconding.⁴⁷⁴ Consideration of alternatives to detention is part of an overall assessment of the necessity, reasonableness and proportionality of detention.⁴⁷⁵ Appropriate

screening and assessment methods can aid decision makers in determining whether detention is appropriate in a particular circumstance.⁴⁷⁶

The UNHCR Detention Guidelines recommend that alternatives to detention should be given especially active consideration for persons for whom detention is likely to have a particularly serious effect on psychological well-being.⁴⁷⁷ Victims of trauma or torture, and asylum seekers with disabilities are especially vulnerable.⁴⁷⁸ The UNHCR Guidelines provide that “as a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments should not be detained.”⁴⁷⁹

There is a legislative requirement to consider alternatives to detention in s. 248(e) of the *IRPR*,⁴⁸⁰ and CBSA policy indicates that, if there are no safety and security concerns, detention should be a last resort for individuals with mental health issues.⁴⁸¹ Although the ENF 20 provides that “officers must be aware that alternatives to detention exist,” it does not specify what circumstance would *require* CBSA officers to exercise their discretion to use these least restrictive alternatives.⁴⁸²

While the law on its face creates a presumption in favour of alternatives to detention, in practice, our research establishes that very little weight is given to alternatives in cases of long-term detention or for those with serious mental health issues. In the GTA, it is almost impossible to secure release from lengthy detention without the assistance of the TBP. Other bond providers (such as family members), or other methods of supervision (such as electronic monitoring), are routinely rejected. Flight risk and danger to the public routinely outweigh the consideration of alternatives to detention, even where detainees have mental health concerns and detention has become lengthy.

This disregard for alternatives to detention occurs even in, and in spite of, cases where detainees have severe mental health issues. There is no legislative or regulatory presumption against detention for those with mental health issues, or individuals whose condition worsens in detention. In practice, these vulnerable persons are detained regularly. These issues are compounded by the fact that immigration detainees with mental health issues are routinely held in maximum-security conditions in provincial jails. Nearly all of the detainees we interviewed had a diagnosed mental health issue, and most of them had been in detention for over 6 months in a maximum-security jail.

This common practice of detaining individuals with mental health issues fails to meet the international standard of avoiding detention for individuals with mental health issues, and constitutes arbitrariness under Article 9 of the ICCPR.

c. Lengthy and indefinite detention is arbitrary

Prolonged detention is more likely to be considered arbitrary.⁴⁸³ The HRC and regional courts maintain that, in order to avoid arbitrariness, the law must provide for time limits that apply to detention,⁴⁸⁴ and clear procedures for imposing, reviewing and extending detention.⁴⁸⁵

The WGAD affirms that when a person is detained due to his or her irregular immigration status, “a maximum period

CANADA'S TREATMENT OF IMMIGRATION DETAINEES WITH MENTAL HEALTH ISSUES VIOLATES INTERNATIONAL LAW

should be set by law and the custody may in no case be unlimited or of excessive length."⁴⁸⁶ A time limit on immigration detention is called a "presumptive period" and varies between 90 and 180 days in the US⁴⁸⁷ and across Europe.⁴⁸⁸

The WGAD also states that provisions should be made to "render detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory does not lie within their sphere, for example, when the consular representation of the country of origin does not cooperate, or legal considerations" (e.g. a refugee cannot be removed because of the principle of non-*refoulement*), "or factual obstacles, such as the unavailability of means of transportation – render expulsion impossible."⁴⁸⁹

Canada has no maximum length of immigration detention or "presumptive period" prescribed in law, and is therefore arbitrary. Moreover, the detention review process does not, in practice, prevent long-term and indefinite detention.

The UN Working Group on Arbitrary Detention found that Canada is arbitrarily detaining Michael Mvogo, a Cameroon national, who at the time of their 2014 report, had been in detention for over 7 years⁴⁹⁰ Michael was detained based by CBSA's inability to confirm his identity, and the lack of cooperation by Cameroon's consulate.⁴⁹¹ The WGAD held that, even if the reasons for his detention "could have been attributed to Michael...in any way," in their view, it provided "insufficient justification for his continued detention."⁴⁹² The WGAD concluded that the Canadian Government failed to demonstrate that his detention was necessary and proportionate, and further, that alternatives to detention had not been adequately considered and exhausted.⁴⁹³

B. Cruel, inhuman and degrading treatment

Canada's immigration detention regime constitutes cruel, inhuman and degrading treatment insofar as it: (a) routinely imprisons migrants with mental health issues in provincial jails, (b) fails to provide adequate health care to immigration detainees, and (c) raises the spectre of indefinite detention.

a. Routine imprisonment of immigration detainees with mental health issues in provincial jails

Canada's continued detention of migrants with mental health issues in provincial jails constitutes cruel, inhuman and degrading treatment, which is prohibited under Article 7 of the ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...⁴⁹⁴

The aim of this provision is to "protect both the dignity and the physical and mental integrity of the individual."⁴⁹⁵ The prohibition in Article 7 is "complemented"⁴⁹⁶ by the positive obligations in Article 10, which provides that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 is a more specific application of the general right to freedom from torture or other cruel, inhuman or

CANADA'S TREATMENT OF IMMIGRATION DETAINEES WITH MENTAL HEALTH ISSUES VIOLATES INTERNATIONAL LAW

degrading treatment or punishment.⁴⁹⁷ This right applies to anyone deprived of their liberty under the laws and authority of the State in prisons, hospitals, detention camps, correctional institutes or elsewhere.⁴⁹⁸

The HRC has found that the continued detention of a migrant when the state was aware of his or her mental condition, and the failure to take steps to ameliorate his or her mental deterioration, constitutes a violation of Article 7 of the ICCPR.⁴⁹⁹

The Special Rapporteur on the human rights of migrants, himself a Canadian, has stated that migrants with a mental or physical disability are a particularly vulnerable group for whom detention should only be used as a last resort, and who should be provided with adequate medical and psychological assistance.⁵⁰⁰ To protect these individuals from cruel, inhuman or degrading treatment and to protect their right to humane conditions of detention, serious consideration should be given to alternatives to detention that are better suited to meeting their treatment needs.⁵⁰¹

According to the HRC, "any necessary detention [of migrants] should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons."⁵⁰² To protect against ill treatment, as well as arbitrary detention, detainees should be held only in facilities "officially acknowledged as places of detention."⁵⁰³

Our research indicates that CBSA routinely detains individuals with severe mental illnesses – including individuals diagnosed with schizophrenia, bipolar disorder, severe depression, and suicidal ideation – in provincial jails. In many of these cases, CBSA is aware of detainees' mental health status; indeed, it is often the very reason they are sent to maximum-security provincial jails in the first place.

Furthermore, even when detainees' counsel presents clear evidence of their clients' mental deterioration in detention, this does not trigger any process of review of conditions and location of detention since it is not within the jurisdiction of the ID to consider mental health deterioration as a factor weighing in favour of release. This is even more problematic in light of the fact that there are very limited mental health services available to detainees beyond medication aimed for management of disruptive behavior.

While extensive analysis of the *Charter* is outside the scope of this report, we note that the *Charter* protects against cruel and unusual treatment or punishment under s. 12.

b. Lack of adequate healthcare

The prohibition of cruel, inhuman or degrading treatment places an obligation on states to ensure that individuals whose liberty is deprived are held in humane conditions. This means that facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy.⁵⁰⁴ The *Standard Minimum Rules for the Treatment of Prisoners* provide that individuals who suffer from mental illnesses shall be observed and treated in specialized institutions under medical management.⁵⁰⁵

Inadequate healthcare or access to essential medicines for detainees may violate the right to freedom from cruel, inhuman or degrading treatment. States have an obligation to protect immigration detainees' physical and mental health

while in detention by providing access to prompt medical examinations, medicine, and access to medical professionals, whose evaluation can be used to make recommendations regarding continued detention.⁵⁰⁶ This is particularly important in light of the clear evidence that detention leads to significantly deteriorated physical and mental health.⁵⁰⁷

Upon entering detention, detainees must be given prompt access to a doctor of their choice, who can assess for physical health conditions as well as mental health issues that may affect jurisdiction of any detention, place of detention, or medical treatment or psychological support required during detention.⁵⁰⁸ While in detention, detained asylum seekers should be provided medical treatment where needed, including psychological counseling where it is appropriate.⁵⁰⁹ The UNHCR Detention Guidelines state: "Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release."⁵¹⁰

Our research indicates that Canadian law and policy does not provide an adequate health care framework for immigration detainees. As outlined, there is nothing in the IRPA or IRPR about detainees' mental health, nor does CBSA policy guarantee access to adequate health care. CBSA's policy guidelines for officers regarding the health of detainees are largely administrative rather than health-focused, for example directing staff to ensure that the medical file is transferred to a non-CBSA facility at the same time as the detainee.⁵¹¹ In practice, we found that CBSA does not prioritize or even provide for the health and well-being of the detainees in its custody, except to the extent of emergency care or in order to facilitate deportation.

For detainees housed in provincial jails, access to health care remains inadequate. Detainees' access to doctors or psychiatrists is severely restricted. In terms of access to medication, our research indicates that detainees with more severe mental illness (e.g. schizophrenia and bipolar disorder) are medicated, whereas detainees with anxiety, depression, and PTSD often go untreated. Our research clearly indicates that the aim of health care for immigration detainees is to keep the institution orderly – for the 'convenience of others'; the aim is *not* to provide treatment to vulnerable persons. The lack of coordinated and effective treatment for immigration detainees with mental health issues, including both counselling and medication, constitutes cruel treatment.

c. Indefinite detention

Excessive length of detention or uncertainty as to its duration may raise issues of cruel, inhuman or degrading treatment.⁵¹² According to the UN Committee Against Torture, providing for a maximum length of detention in law is an important safeguard against indefinite detention.⁵¹³ The longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment.⁵¹⁴ In particular, States must take the mental health of immigration detainees into account in the context of prolonged or indefinite detention.⁵¹⁵ In two cases⁵¹⁶ concerning asylum seekers who arrived by boat to Australia, the Human Rights Committee found that health care and mental health support services provided to detainees "do not take away the force of the [negative impact] that prolonged and indefinite detention [can] have on the mental health of detainees."⁵¹⁷

Immigration detention in Canada is sometimes excessively lengthy and often renders detainees in the limbo of

uncertainty as to its duration. CBSA sometimes detains immigration detainees with mental health issues for lengthy, and sometimes indefinite periods. Nearly all the detainees we spoke to with serious mental illness had been in detention for more than six months, many had been in for over a year. The uncertainty, lengthy, and often-indefinite nature of immigration detention in Canada amounts to ill treatment, especially in cases where detainees have mental health issues.

C. Discrimination on the basis of disability

We find that Canada's immigration detention regime discriminates against migrants with mental health issues both in terms of their liberty and security of person and their access to health care in detention. While extensive analysis of the *Charter* is outside the scope of this report, we note that it protects against discrimination on the grounds of mental disability under s. 15.

a. Deprivation of liberty on account of mental disability

According to the HRC, Article 9 of the ICCPR prohibits the justification of a deprivation of liberty on the basis of disability.⁵¹⁸ Moreover, Article 14 of the *Convention on the Rights of Persons with Disabilities (CRPD)*,⁵¹⁹ protects liberty and security of the person, and affirms that there can be no deprivation of liberty due to disability.⁵²⁰ Individuals with mental health issues are explicitly included in the scope of the term "disability" in CRPD Article 1.⁵²¹

Even when measures are only partly justified by the person's disability, they are discriminatory and violate Article 14 of the CRPD:⁵²² it is unlawful when a deprivation of liberty is "grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment."⁵²³ The CRPD Committee maintains that the legal basis for any restriction of liberty must be de-linked from disability and "neutrally defined so as to apply to all persons on an equal basis."⁵²⁴

Our research establishes that detainees with mental health issues are routinely transferred from medium-security IHCs to maximum-security provincial jails *because of their mental health issues*. Indeed, the CBSA website clearly indicates that it "may transfer an individual with mental health issues...to a provincial detention facility that provides access to necessary mental health services."⁵²⁵ "Disruptive behaviour," which our research indicates is often stereotypically linked to mental health issues, has also been declared a reason for transferring detainees "to a more secure" facility.⁵²⁶ Our interviewees, including correctional staff, were clear that detainees with a noticeable or diagnosed mental health issue are almost always sent to provincial jails.

Our research further demonstrates that in practice, having a mental health issue is often a significant barrier to release from immigration detention, either because a detainee cannot establish reliable access to medication or because they cannot secure a spot in a community treatment facility (which are predominantly reserved for former criminal detainees). Spaces in these programs are extremely limited and insufficient to meet demand. These are all significant practical barriers to arranging a release plan for immigration detainees with mental health issues, and violate their right to liberty and security of the person.

VOICES FROM THE INSIDE: Anna*

Vanier Centre for Women, imprisoned for six months and still detained

Anna is originally from the Eastern Europe, but lived in the United States for 15 years until she was deported. Her medical records show that she is diagnosed with schizophrenia, but during our interview, she denied that she has any mental health issues. She has been in immigration detention at Vanier since December 2014, on grounds that she is unlikely to appear for legal proceedings related to admissibility of removal from Canada. Anna does not have a criminal record. Toronto Bail Program has refused to supervise Anna's release because she has been refusing to take her medication.

Upon her arrival at the airport in Canada, Anna claimed refugee protection due to her fear of persecution in psychiatric facilities in her country of origin. Immigration officials immediately detained Anna and brought her to the Toronto IHC. She stayed at the IHC for two days before being transferred to Vanier.

During her first week at Vanier, Anna was kept in segregation before she was moved to the IMAT unit. We met her on the IMAT range in February 2015. Anna described her experience in segregation: "when I was in segregation, I was feeling pretty much without rights, like a person who is not treated like a human." She recalled that during this time, she was only able to shower once every three days. "I was trying to write and read, but I could not concentrate, and I screamed in my cell and said, 'why are you treating me like an animal?' and they said, 'you have to be quiet.'"

Anna reported that she was not taking medication to treat her schizophrenia, only a sleeping pill at night. She meets with a psychiatrist bi-weekly for about ten

minutes per session. She also noted that every week she tries to visit a social worker, who sometimes helps her make phone calls. Her meetings with the social worker typically last around 15-20 minutes. Anna reported participating in group therapy at Vanier, which she found helpful: "During the group, your mood comes up and you have a little access to new people, new things."

Anna expressed anguish at being kept at Vanier: "[J]ail for me is very hard, I am not a criminal, I am not here because of any sentence or any criminal problems like the other girls, and I am also in their faces looking like a strange alien, they look at me like 'this girl, she doesn't belong to jail.'" She expressed hope that she could move to a better facility where "it's much more like freedom ... where there is a possibility to go to classes during the day and you have also a better environment ... you don't have to stay in that jail twenty-four hours locked up, going crazy, saying 'why [am I] here? ...I'm not a criminal, why [am I] here?'"

* The detainee's name has been changed to protect her identity.

The clear link between detainees' mental disability and their transfer to maximum-security provincial jail and difficulties securing release is a clear violation of liberty and security of the person, and constitutes discrimination on the basis of disability.

b. Discrimination in health service provision

Taken together, Articles 4 and 5 of the CRPD provide for equality for persons with disabilities, and non-discrimination on the basis of disability (which includes the right to reasonable accommodation). Reasonable accommodation consists of the duty "of a public or private entity to make the modifications or changes that are required by a person with a disability ... to ensure the equal access of the person to the service or to the activity."⁵²⁷ Failure to adopt relevant measures and to provide sufficient reasonable accommodation in cases where detained persons with disabilities require them may constitute a violation of the CRPD.⁵²⁸

The fact that immigration detainees in Canada are sent to provincial jails (where their liberty is significantly more constricted than it would be in an IHC) because of their mental health issues, violates of Articles 4 and 5 of the CRPD. These Articles require CBSA to undertake positive measures to address discrimination against detainees with mental health issues. The requirement for reasonable accommodation demands that detainees with mental health issues be provided with adequate mental health care in the context of community supervision or within the least restrictive detention facility (i.e. IHC), instead of being transferred to provincial jails. This is especially important because, as noted above, detention in provincial jails has been shown to cause significant deterioration in mental health.

D. Violation of the right to health

Health is defined in international law as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."⁵²⁹ The right to the highest attainable standard of physical and mental health is enshrined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,⁵³⁰ to which Canada is a party, and in Article 25 of the *CRPD*.⁵³¹ It is also affirmed in various other international and regional treaties.⁵³²

Article 12(1) of the ICESCR defines the right to health, while Article 12(2) enumerates illustrative, non-exhaustive examples of States parties' obligations.⁵³³ The right includes both freedoms and entitlements. The Economic Social and Cultural Rights Committee, which monitors compliance with the ICESCR, has held that health services "must be accessible to all, especially the most vulnerable or marginalized [groups], in law and in fact, without discrimination on any of the prohibited grounds" (which include national origin and physical or mental disability).⁵³⁴

Indeed, the right to health extends to detainees, asylum seekers, and immigrants.⁵³⁵ States must respect the right of non-citizens to an "adequate standard of physical and mental health,"⁵³⁶ and must not deny non-citizens "access to preventative, curative and palliative health services."⁵³⁷ All health care provision "must be respectful of medical ethics and culturally appropriate."⁵³⁸ According to the then-Special Rapporteur on the right to health, Anand Grover, immigration detention regimes should provide detainees with "adequate living conditions, consensual medical check-ups and make quality and confidential physical and mental health facilities available and accessible in a timely manner."⁵³⁹

The lack of appropriate health care resources available to detainees with mental health issues is a breach of the right to health, for the same reasons that it amounts to cruel, inhuman and degrading treatment. Taken together, there is a clear violation of the right to health of immigration detainees with mental health issues.

E. Violation of the right to an effective remedy

Article 9(4) of the ICCPR protects the right for anyone deprived of their liberty to take proceedings before a court, and this applies to all deprivations of liberty, including immigration control.⁵⁴⁰ The object of the right is release from ongoing unlawful detention, either unconditional or conditional.⁵⁴¹ Therefore, the reviewing court must have the power to order release from the unlawful detention.⁵⁴²

The “court” should ordinarily be a court within the judiciary.⁵⁴³ Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.⁵⁴⁴ The review must have a “judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.”⁵⁴⁵ Therefore, it is not always necessary that the review meet the same standard as is required for criminal or civil litigation.⁵⁴⁶ In order to determine whether a particular proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceedings takes place.⁵⁴⁷

European⁵⁴⁸ and Inter-American courts of human rights have held that proceedings must be adversarial and must always ensure “equality of arms” between the parties – these are the “fundamental guarantees of procedure” in matters of deprivation of liberty.⁵⁴⁹ Legal assistance must be provided to the extent necessary for an effective application for release.⁵⁵⁰

Notably, where detention may be for a long period (especially if it appears to be indefinite), procedural guarantees should be close to those for criminal procedures.⁵⁵¹ Furthermore, the more the consequences of a proceeding resemble criminal sanction, the stronger the protections must be.⁵⁵² In *De Wilde, Ooms and Versyp v Belgium*, the European Court of Human Rights held that, with vagrancy cases, the administrative nature of decisions did not ensure guarantees comparable to detention in criminal cases, notwithstanding the fact that the deprivation of liberty of vagrants was very similar to that imposed by a criminal court (the court referred to the “seriousness” of what was at stake, namely a long deprivation of liberty and various associated shameful consequences).⁵⁵³ In concluding, the Court held that there was a resulting violation of the right to take proceedings before a court.⁵⁵⁴

Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.⁵⁵⁵ However, where an individual becomes mentally ill during his detention, this is “a sufficient ground for a prompt and substantive review of his detention.”⁵⁵⁶

To facilitate effective review, detainees should be afforded prompt and regular access to counsel.⁵⁵⁷ However, access to legal counsel that is inconvenienced by the fact that the place of detention is in a remote location does not violate

CANADA'S TREATMENT OF IMMIGRATION DETAINEES WITH MENTAL HEALTH ISSUES VIOLATES INTERNATIONAL LAW

Article 9 of the ICCPR.⁵⁵⁸ Detainees should be informed (in a language they understand) of their right to initiate proceedings for a decision on the lawfulness of their detention.⁵⁵⁹

Canada has a statutory detention review regime that, at least on its face, complies with international legal principles; namely, the Canadian regime provides for statutorily mandated detention reviews and the procedure to judicially review a detention decision.⁵⁶⁰ However, as our interviews have made clear, the system is broken.

While Canadian detention review regulations provide that reviewers must come to a “fresh conclusion” when deciding whether an individual should remain in detention, in practice the evidentiary burden is on the detainee to establish “clear and compelling reasons” that the ID Member should depart from previous decisions.⁵⁶¹ In practice, this creates an actual presumption against release from detention, and makes it difficult to secure a release from detention. Furthermore, the existence of a detainee’s mental illness does not automatically constitute sufficient grounds for prompt review of detention, as required by international law.

While immigration detainees in Canada do have the legal right to judicial review of detention decisions, the remedy is ineffectual. Firstly, application for judicial review requires leave,⁵⁶² which results in delay of between three months to a year,⁵⁶³ all while the detainee remains in custody. Secondly, the Federal Court does not have the authority to order release of an individual from detention; the Court can only order another detention review. In practice, counsel report that judicial review of detention is rarely sought because it is incredibly resource intensive, and the remedy is ineffective.

Finally, where an immigration detainee is held in a maximum-security provincial jail, international (and indeed, Canadian) law requires that the due process requirements be higher, approaching those in criminal cases. Indeed, given that some detainees are spending years in prison, it is arguable that the decision to detain should resemble a criminal proceeding with a higher burden of proof. The current detention review system certainly fails to meet this standard.

RECOMMENDATIONS

VI. RECOMMENDATIONS

These recommendations are meant to be a first step towards better protection of the rights of migrants with mental health issues detained in professional jails. They were arrived at through broad consultation with civil society groups.

To the Canadian government and lawmakers:

1. Create an independent body / ombudsperson responsible for overseeing and investigating the CBSA, and to whom immigration detainees can hold the government accountable (akin to the federal Office of the Correctional Investigator).
2. Amend existing laws and regulations to:
 - a. Make clear that, in all decisions related to the deprivation of liberty of migrants, the government must use the least restrictive measures consistent with management of a non-criminal population, and protection of the public, staff members, and other detainees;
 - b. Create a rebuttable presumption in favour of release after 90 days of detention;
 - c. Repeal provisions that require mandatory detention for “Designated Foreign Nationals”;
 - d. Specify the allowable places, sites, or facilities for detention of migrants;
 - e. Specify the factors to be considered when deciding to transfer a detainee to more restrictive conditions of confinement (i.e. a provincial jail), and create an effective process by which a detainee can challenge such a transfer;
 - f. Create a presumption against more restrictive forms of detention for migrants, especially asylum seekers, persons with mental or physical disabilities, including mental health issues, and victims of torture;
 - g. Ensure that the Minister of Public Safety and Emergency Preparedness has ultimate authority over the conditions of confinement for treatment, and health and safety of detainees, regardless of where they are detained;
 - h. Clarify that mental health and other vulnerabilities are factors that must be considered in favour of release in detention review hearings;
 - i. Require meaningful and regular oversight by a court for any detention over 90 days.
3. Sign and ratify the Optional Protocol to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, which would allow for international inspection of all sites of detention.

RECOMMENDATIONS

To the Minister of Public Safety and Emergency Preparedness:

4. Where migrants are detained, ensure they are held in dedicated, minimum-security facilities that are geographically proximate to community supports and legal counsel.
5. Ensure regular access to and fund adequate in-person, health care (including mental health care), social workers, community supports, and spiritual and family supports at all places of detention.
6. Create a screening tool for CBSA front-line officers to assist with identification of vulnerable persons, such as asylum seekers, those with mental health issues and victims of torture and to accurately assess the risk posed by an individual detainee.
7. Provide training to CBSA officers on human rights, diversity, and viable alternatives to detention, and empower them to exercise their existing discretion to release persons within 48 hours.
8. Ensure that appropriate mental health assessments occur within 48 hours of the initial decision to detain, and at regular intervals thereafter, regardless of where the detainee is held.
9. Create a national committee composed of representatives of government, mental health specialists, civil society, and lawyers to develop detailed policy recommendations on how to deal with immigration detainees who are suicidal, aggressive or who have severe mental health problems.
10. Wherever possible, employ alternatives to detention. Meaningfully explore, assess, and implement alternatives to detention that build on the positive best practices already in place in other jurisdictions, and especially in respect of vulnerable migrants, but which do not extend enforcement measures against people who would otherwise be released.
11. Create and fund a nation-wide community release program specifically tailored to immigration detainees, without caps on the number of detainees who can be supervised in the community through the program, and premised on the inherent difference in management of criminal and non-criminal populations.
12. Provide support for detainees released into the community, including adequate transportation, translation and interpretation services, and ensure consistency in terms of health care and treatment.
13. Make public any agreements or contracts negotiated with the provinces in relation to detention of immigration detainees in provincial jails.

RECOMMENDATIONS

To the Minister of Citizenship and Immigration:

14. Ensure that Immigration Division Members receive adequate training on mental health, human rights, diversity, and viable alternatives to detention.
15. Ensure that all migrants are able to access essential health care services, including mental health care and medication, in the community.

To provincial governments:

16. Negotiate with the federal government to ensure that:
 - a. Funding received to house immigration detainees is sufficient to ensure adequate in-person, health care (including mental health care), legal counsel, community supports, and spiritual and family supports for immigration detainees; and
 - b. CBSA staff is regularly present at all provincial facilities that house immigration detainees.
17. Ensure immigration detainees are held in the least restrictive setting consistent with management of a non-criminal population and protection of the public, staff members, and other prisoners, including in residential-treatment facilities if needed.
18. Ensure consistent and meaningful access to adequate in-person, health care (including mental health care), legal counsel, community supports, and spiritual and family supports.
19. Allow for regular, independent monitoring by the Canadian Red Cross Society of provincial jails that house immigration detainees, and commit to implementation of any recommendations received.
20. Provide training to correctional staff on immigration detention, mental health, human rights, and diversity.
21. Ensure that provincial legal aid programs are fully accessible to immigration detainees at all stages of the process, regardless of the length of detention, and that funding is sufficient to pay for independent mental health assessments.
22. Make public any agreements or contracts negotiated with the federal government in relation to detention of immigration detainees in provincial jails.

To the Judiciary and Immigration Division Members:

23. Interpret the common law right to *habeas corpus* broadly to allow immigration detainees to challenge detention and conditions of confinement (including transfers to more restrictive

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conditions) in provincial Superior Courts.

24. In relation to detention review hearings:
 - a. Every detention review hearing should be approached as a fresh decision to deprive someone of their liberty
 - b. require Minister's counsel to meet a higher standard of proof to justify continued detention, and
 - c. ensure that evidence proffered to justify detention is of sufficient probative value.

To counsel:

25. Conduct in-person visits with clients whenever possible and at least once at the outset of the retainer.
26. Communicate with clients more effectively about the detention process (i.e. why legal counsel cannot attend every detention review) and what they are doing behind the scenes to end detention.
27. Build solidarity amongst and between immigration, refugee, and criminal lawyers to devise creative strategies to challenge the immigration detention regime.

To the United Nations and Organization of American States:

28. Raise the issue of arbitrary detention of immigration detainees, and their cruel and inhuman treatment as part of the United Nations Human Rights Council's Universal Periodic Review of Canada.
29. Use all opportunities to encourage Canada to take concrete steps to end detention of migrants in provincial jails, including during Canada's review by various treaty-monitoring bodies.
30. Encourage the Special Rapporteur on migrants, Special Rapporteur on the right to health, and the Working Group of Arbitrary Detention to complete a joint-study focused on immigration detention in Canada.

APPENDIX A:

METHODOLOGY

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This report is the result of approximately ten months of field and desk research conducted by law students enrolled in the IHRP's multiple award-winning human rights legal clinic within the University of Toronto, Faculty of Law. These students were supervised by the Executive Director of the IHRP, Renu Mandhane.

A. Interviews

In total, we interviewed 30 individuals for this report, including lawyers, paralegals, correctional staff, doctors, mental health experts, immigration detainees, and former detainees. The interviewees were fully informed about the nature and purpose of our report, and the way their information would be used. They were also explicitly provided the option of not participating or remaining anonymous in the final report. Detainees and former detainees signed consent forms to this effect, and the rest of the interviewees provided verbal consent. All of the interviewees agreed to share their experiences and participate in the research.

None of the interviewees were provided incentives in exchange for their participation. The interviews were conducted in-person (with the exception of five interviews, which were conducted either by phone or over e-mail), in private, and by at least two of the researchers; all of the detainees and former detainees were interviewed privately and in-person, and by all three researchers. The interviews consisted of open-ended questions that, particularly for detainees and former detainees, allowed for elaboration on personal experiences. However, researchers made sure to avoid discussions that may trigger re-traumatization.

The following are the counsel we interviewed or who reviewed a draft of the report:

- Prasanna Balasundaram (lawyer, Downtown Legal Services, Toronto)
- Subodh Bharati (lawyer)
- Laura Brittain ((lawyer, Refugee Law Office of Legal Aid Ontario, Toronto)
- Andrew Brouwer (lawyer, Refugee Law Office of Legal Aid Ontario, Toronto)
- Neil Chantler (lawyer, Chantler & Company, Vancouver; counsel to BCCLA at Lucía Vega Jiménez inquest)
- Barbara Jackman (lawyer, Jackman Nazami & Associates, Toronto)
- Joo Eun Kim (lawyer, Refugee Law Office of Legal Aid Ontario, Toronto)
- Ben Liston (lawyer, Refugee Law Office of Legal Aid Ontario, Toronto)
- Samuel Loeb (lawyer, Refugee Law Office of Legal Aid Ontario, Toronto)
- Anthony Navaneelan (lawyer, Mamann, Sandaluk & Kingwell LLP, Toronto)
- Phil Rankin (lawyer, Rankin and Bond, Vancouver)
- Nasrin Tabibzadeh (paralegal, Refugee Law Office of Legal Aid Ontario, Toronto)
- Erica Ward (paralegal, Refugee Law Office of Legal Aid Ontario, Toronto)
- Virginia Wilson (community legal worker, Refugee Law Office of Legal Aid Ontario, Toronto)

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The following are the mental health experts and service providers we interviewed or consulted:

- Dr. Branka Agic, MD, PhD, Manager of Health Equity, Centre for Addiction and Mental Health (CAMH)
- Dr. Lisa Andermann, psychiatrist at Mount Sinai Hospital, Associate Professor of Psychiatry at University of Toronto
- Dr. Janet Cleveland, psychologist, legal scholar, and researcher on refugee health at the McGill University Health Centre
- Michael Perlin, Professor of Law (Emeritus) at New York University, internationally recognized expert on mental disability law
- Dr. Meb Rashid, Medical Doctor and Director at Crossroads Clinic; co-founder of the Canadian Doctors for Refugee Care; co-founder of Christie Refugee Health Clinic

In addition to a correctional staff person who wished to remain anonymous, we interviewed Reg Williams, Director, Immigration Enforcement, Greater Toronto Enforcement Centre (2004-2012).

Finally, we conducted interviews with seven immigration detainees in three provincial jails: Central East Correctional Centre (Lindsay), Central North Correctional Centre (Penetanguishene), and the Vanier Centre for Women (Milton). During one of these visits, we were also able to tour the facility extensively, and speak with several correctional officers who informally shared their views on the difficulties posed by detention of migrants with mental health issues in provincial jails. We also interviewed three former immigration detainees, two of whom were previously held in CECC and one in Vanier. We arranged these interviews with the assistance and consent of the interviewees' lawyers.

With the exception of individuals whose cases have already received publicity, immigration detainees and former immigration detainees are named using pseudonyms, and some of the details of their cases were redacted in order to protect their identities. In addition to interviewing detainees and former detainees, we also reviewed the high profile case of Lucía Vega Jiménez, who committed suicide while in CBSA custody. The tragic case was followed up with a Coroner's Inquest that revealed a multitude of severely problematic measures taken by CBSA.

In order to ensure that our recommendations are aligned with other advocacy efforts in this field, we consulted various organizations and experts, including:

- Sedonia Couto (Canadian Centre for Victims of Torture, Toronto)
- Janet Dench (Canadian Counsel for Refugees, Montreal)
- Syed Hussan (End Immigration Detention Network, Toronto)
- Rana Khan (UNHCR, Toronto)
- Rachel Kronick (Canadian Centre for Victims of Torture, Toronto)
- Audrey Macklin (Professor of Law, University of Toronto)
- Gloria Nafziger (Amnesty International, Canada)
- Anthony Navaneelan (Canadian Association of Refugee Lawyers)

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- Andy Peterson (National Union for Public and General Employees, Ottawa)
- Robyn Sampson (International Detention Coalition, Australia)
- Macdonald Scott (End Immigration Detention Network, Toronto)
- Stephanie Silverman (Centre for Ethics, University of Toronto)
- Salam Yohannes (Canadian Centre for Victims of Torture, Toronto)

We provided an advanced copy of the report's draft recommendations to the Ontario Minister of Community Safety and Correctional Services, the federal Minister of Public Safety and Emergency Preparedness, the federal Minister of Citizenship and Immigration Canada, and the President of CBSA. We contacted David Scott, Executive Director of Toronto Bail Program-Immigration Division who was unable to speak with us on the record due to a prohibition in the TBP's contract with CBSA.

B. Desk research

We consulted a variety of publically available materials to inform our analysis and findings. Most of these sources are referenced in the endnotes to this report.

a. Access to information requests

In preparation of the report, we submitted three access to information requests pursuant to relevant legislation. This was a time-consuming and resource-intensive effort to obtain relevant information from CBSA and MCSCS.

In October 2014, we submitted requests for information from both CBSA and MCSCS. The requests were comprehensive, seeking all information within the possession or control of CBSA and MCSCS relating to non-citizens detained under IRPA, who are held in IHCs or provincial jails. The requests also referred to specific types of information, including jurisdiction, diagnoses, treatment, procedure, discipline, and accommodation. In May 2015, CBSA provided documents totaling 299 pages as an apparently complete response to our request.

In November 2014 and May 2015, we submitted two additional access to information requests to CBSA, by way of an 'informal process', which provides access to documents that are part of previously completed access to information requests. We received the documents requested quickly in both cases.

In March, we received letter from MCSCS, stating that the total estimated fee for the information sought was \$1500. Our request for a fee-waiver was rejected. To date, we have not received any documents from the MCSCS.

Finally, we received CBSA documents previously disclosed to EIDN and CCR directly from individuals at these organizations. We also received documents related to mental health treatment in Ontario jails from counsel.

APPENDIX B:

CANADA'S RELEVANT HUMAN RIGHTS LAW OBLIGATIONS

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Treaty Name	Relevant Articles	Entry into Force	Canadian Ratification, Acceptance (A), Accession (a), Succession (d)
Convention relating to the Status of Refugees	16, 26, 31, 32, 33, 34, 45	22 April 1954	4 Jun 1969 a
Protocol relating to the Status of Refugees		4 Oct 1967	4 Jun 1969 a
International Covenant on Civil and Political Rights	7, 9, 10, 12, 13, 17, 26	23 March 1976	19 May 1976 a
Optional Protocol to the International Covenant on Civil and Political Rights		23 March 1976	19 May 1976 a
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10, 11, 12, 13, 16	26 June 1987	Signature: 23 Aug 1985; 24 Jun 1987
Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment	3, 4, 14,	18 December 2002	Not a party
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime	5	28 Jan 2004	Signature: 14 Dec 2000; 13 May 2002

Appendix B: Canada's Relevant Human Rights Law Obligations

Convention on the Rights of Persons with Disabilities	5, 14, 15, 18	3 May 2008	Signature: 30 Mar 2007; 11 Mar 2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities		3 May 2008	Not a party
Convention Relating to the Status of Stateless Persons	26	5 June 1960	Not a party
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	1, 3, 5, 10, 14, 16, 17, 19	1 July 2003	Not a party
Convention to Eliminate All Forms of Discrimination Against Women		3 Sept 1981	Signature: 17 Jul 1980; 10 Dec 1981
American Declaration on the Rights and Duties of Man	XI, XVIII, XXV	2 May 1948 (adoption)	Declaration is binding on all members of the OAS
American Convention on Human Rights	5, 7, 8, 22	18 July 1978	Not a party

¹ Hannah Arendt, "The Decline of the Nation-State and the End of the Rights of Man," in *The origins of totalitarianism* (New York: Harcourt, Brace and Co, 1966), at 34.

² *Attorney General v. Refugee Council of New Zealand and "D"*, [2003] 2 NZLR 577 (NZCA, Apr. 16, 2003).

³ *Understanding Mental Illness: A Review and Recommendations for Police Education & Training in Canada*, Dr. D. Cotton and T. Coleman for the Canadian Alliance on Mental Illness and Mental Health (2010), online: <www.mentalhealthcommission.ca/.../Law_Police_Academy_Training_Education_Mental_Illness_Study_ENG_0.pdf>. For more general information regarding mental illness and historical disadvantage, see: Ontario, Ontario Human Rights Commission, *Minds that matter: Report on the consultation on human rights, mental health, and addictions*, Executive Summary, (2012), online: <<http://www.ohrc.on.ca/en/minds-matter-report-consultation-human-rights-mental-health-and-addictions>>; *Battlefords and District Co operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 31.

⁴ For the purposes of this report, the term "migrant" includes all non-citizens, including refugees, refugee claimants, failed refugee claimants, permanent residents, and permanent residents who have been deemed "inadmissible" or stripped of their status.

⁵ Canadian Red Cross Society, *Research proposal on the impact of detention on immigration detainees' mental health* (undated) (obtained through access to information request by the IHRP, A-2014-12993)

⁶ Canada Border Services Agency, "Detainee – Legislative Grounds" (2004-2013) (obtained through access to information request by MacDonald Scott, A-2014-04644/STH)

⁷ Public Services Foundation of Canada, *Services: Overcrowding and inmates with mental health problems in provincial correctional facilities* (2015), online: PSFC <http://publicservicesfoundation.ca/sites/publicservicesfoundation.ca/files/documents/crisis_in_correctional_services_april_2015.pdf> at 5 [PSFC, *Overcrowding and Inmates*].

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- ⁸ Optimus[SBR, *Facility and Service Delivery Options, Analysis and Recommendations Report: Prepared for the Ministry of Community Safety and Correctional Services* (2015) at 20 [Optimus[SBR, *Facility and Service Delivery Options*].
- ⁹ *Ibid* at 20.
- ¹⁰ Schizophrenia Society of Ontario, *Double Jeopardy: Deportation of the Criminalized Mentally Ill* (March 2010), at 6.
- ¹¹ *Ibid* at 19.
- ¹² Canada Border Services Agency, "Detainees Disaggregated by Age, Gender and Calendar Year" (obtained through access to information request by MacDonald Scott) [CBSA, *Detainees Disaggregated*].
- ¹³ Canada Border Services Agency, "Number of Detentions for CY 2013" (obtained through access to information request by MacDonald Scott, A-2014-00078/MXG) [CBSA, *Number of Detentions 2013*]; Canada Border Services Agency, "Detentions at a Glance," (2013-2014) (obtained through access to information request by Canadian Council for Refugees)[CBSA, *Detentions at a Glance*].
- ¹⁴ CBSA, *Detentions at a Glance*, *supra* note 13.
- ¹⁵ CBSA, *Number of Detentions 2013*, *supra* note 13.
- ¹⁶ Canadian Red Cross Society, *Annual Report on Detention Monitoring Activities in Canada, Confidential* (2012-2013), at 16 [CRCS, *Annual Report 2012-2013*].
- ¹⁷ Email Interview of Reg Williams, former Director, Immigration Enforcement at the Greater Toronto Enforcement Centre (23 April 2015 and 7 May 2015).
- ¹⁸ Canada Border Services Agency, "Chart of the yearly cost of CBSA removals and detentions, 2004-2013" (obtained through access to information request by IHRP, A-2012-08579 QC RP).
- ¹⁹ Canada Border Services Agency, "2013 CBSA detention costs by province" (obtained through access to information request by MacDonald Scott, A-2014-00077/STH) [CBSA, *2013 Detention cost by province*].
- ²⁰ Canada Border Services Agency, "Detentions Program Financial Report: High Level Unit Cost by Facility Type" (undated), (obtained through access to information request by IHRP, A-2014-13107) [CBSA, *Unit cost by facility type*].
- ²¹ Complaint/Petition on behalf of Michael Mvogo to the Working Group on Arbitrary Detention, UNHCR (2013).
- ²² For the purposes of this report, we apply the World Health Organization's definition of mental disorders as "generally characterized by a combination of abnormal thoughts, perceptions, emotions, behavior and relationships with others. Mental disorders include: depression, bipolar affective disorder, schizophrenia and other psychoses, dementia, intellectual disabilities and developmental disorders, including autism." (WHO, "Fact Sheet No 396: Mental disorders" (2014) online: <<http://www.who.int/mediacentre/factsheets/fs396/en/>>.) Furthermore, "mental health is more than the absence of mental disorders. ... Multiple social, psychological, and biological factors determine the level of mental health of a person at any given point." (WHO, "Fact Sheet No 220: Mental Health: strengthening our response" (2014), online: <<http://www.who.int/mediacentre/factsheets/fs220/en/>>.)
- ²³ Leslie Young, "Deaths in detention CBSA's fatal failure to learn from its mistakes," Global News, Nov 5 2015, <<http://globalnews.ca/news/1649523/deaths-in-detention-cbsas-fatal-failure-to-learn-from-its-mistakes/>>.
- ²⁴ Telephone interview of Neil Chantler, Counsel for British Columbia Civil Liberties Association during Lucía Vega Jiménez Inquest (19 January 2015) [Telephone interview of Neil Chantler].
- ²⁵ *Ibid*.
- ²⁶ Canada Border Services Agency, "Regional Due Diligence Report: Summary of the facts surrounding the in-custody death of Lucía Vega Jiménez dated 21 January 2015" (obtained through access to information request by the IHRP, redacted, A-2014-11555) at 3 [CBSA, "Regional Due Diligence Report"].
- ²⁷ *Ibid* at 9.
- ²⁸ Telephone interview of Neil Chantler, *supra* note 24.
- ²⁹ CBSA, "Regional Due Diligence Report", *supra* note 26 at 9.
- ³⁰ Telephone interview of Neil Chantler, *supra* note 24.
- ³¹ *Ibid*.
- ³² CBSA, "Regional Due Diligence Report", *supra* note 26 at 5.
- ³³ Telephone interview of Neil Chantler, *supra* note 24.
- ³⁴ *Ibid*.
- ³⁵ *Ibid*.
- ³⁶ "Lucia Vega Jimenez: Timeline of tragedy," Vancouver Sun, Oct 2, 2014, online at: <<http://www.vancouversun.com/health/Lucia+Vega+Jimenez+Timeline+tragedy/10253737/story.html>> [Vancouver Sun, "Timeline of tragedy"] .
- ³⁷ *Ibid*.
- ³⁸ Telephone interview of Phil Rankin, Counsel for Canadian Council for Refugees during Lucía Jiménez Inquest (23 Feb 2015).
- ³⁹ Telephone interview of Neil Chantler, *supra* note 24.
- ⁴⁰ CBSA, "Regional Due Diligence Report", *supra* note 26 at 9.
- ⁴¹ Telephone interview of Neil Chantler, *supra* note 24.
- ⁴² *Ibid*.
- ⁴³ Vancouver Sun, "Timeline of tragedy", *supra* note 36.
- ⁴⁴ Telephone interview of Neil Chantler, *supra* note 24.
- ⁴⁵ *Ibid*.
- ⁴⁶ *Ibid*.
- ⁴⁷ *Ibid*.
- ⁴⁸ Vancouver Sun, "Timeline of tragedy", *supra* note 36.
- ⁴⁹ *Ibid*.
- ⁵⁰ *Ibid*.
- ⁵¹ *Ibid*.
- ⁵² CBSA, "Regional Due Diligence Report", *supra* note 26 at 6.
- ⁵³ Telephone interview of Neil Chantler, *supra* note 24.
- ⁵⁴ *Ibid*.
- ⁵⁵ *Ibid*.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*; see also CBSA, “Regional Due Diligence Report”, *supra* note 26 at 16-17.

⁵⁹ CBSA, “Regional Due Diligence Report”, *supra* note 26 at 23.

⁶⁰ *Ibid.*

⁶¹ Telephone interview of Neil Chantler, *supra* note 24.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ CBSA, “Regional Due Diligence Report”, *supra* note 26 at 23.

⁶⁹ Telephone interview of Neil Chantler, *supra* note 24.

⁷⁰ CBSA, “Regional Due Diligence Report”, *supra* note 26 at 19.

⁷¹ Telephone interview of Neil Chantler, *supra* note 24.

⁷² CBSA, “Regional Due Diligence Report”, *supra* note 26 at 23.

⁷³ Telephone interview of Neil Chantler, *supra* note 24.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ British Columbia, Ministry of Justice, The Burnaby Coroners Court, *Verdict at Inquest into the death of VEGA JIMENEZ Lucia Dominga*, 7 October 2014 at 4.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ British Columbia Civil Liberties Association, “One year after Lucia Vega Jiménez’s death, rights organizations condemn federal failure to make CBSA accountable”, online: BCCLA <<https://bccla.org/news/2015/02/release-one-year-after-lucia-vega-jimenezs-death-rights-organizations-condemn-federal-failure-to-make-cbsa-accountable/>> [BCCLA, “One Year after Lucia Vega Jiménez’s death”].

⁸² Telephone interview of Neil Chantler, *supra* note 24.

⁸³ BCCLA, “One Year after Lucia Vega Jiménez’s death”, *supra* note 81.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Telephone interview of Neil Chantler, *supra* note 24.

⁸⁸ CBSA, *Number of Detentions 2013*, *supra* note 13.

⁸⁹ Immigration and Refugee Board of Canada, Immigration Division, “Detention Reviews Finalized by Member, 2013” (obtained through access to information request by MacDonald Scott, A-2013-02027/JSJ) [IRB, “Detention Reviews Finalized by Member”].

⁹⁰ Janet Cleveland & Cecile Rousseau, “Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada” (2013) 58:7 Can J Psych 409 [Cleveland et al, “Psychiatric Symptoms associated with brief detention”]

⁹¹ UNHCR & OHCHR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, 11-12 May 2011 at para 11 [UNHCR, *Global Roundtable on Alternatives to Detention*].

⁹² Email interview of Dr. Meb Rashid (3 March 2015) [Email interview of Dr. Meb Rashid].

⁹³ *Ibid.*

⁹⁴ Kelly Anderson et al. “Incidence of psychotic disorders among first-generation immigrants and refugees in Ontario” *CMAJ* 2015, early release, published at www.cmaj.ca on May 11, 2015, at 1.

⁹⁵ *Ibid* at 4.

⁹⁶ United Nations General Assembly, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, UNGA, 20th Sess, A/HRC/20/24 (2012) at para 48 [UNGA, *Report of the Special Rapporteur on the human rights of migrants*].

⁹⁷ *Ibid* at para 46.

⁹⁸ UNHCR, *Global Roundtable on Alternatives to Detention*, *supra* note 91 at para 10.

⁹⁹ UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 96 at para 48.

¹⁰⁰ UNHCR, *Global Roundtable on Alternatives to Detention*, *supra* note 91 at para 11.

¹⁰¹ UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 96 at para 43.

¹⁰² UNHCR, *Global Roundtable on Alternatives to Detention*, *supra* note 91 at para 11.

¹⁰³ Janet Cleveland, Cecil Rousseau & Rachel Kronick, “The harmful effects of detention and family separation on asylum seekers’ mental health in the context of Bill C-31: Brief submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the *Protecting Canada’s Immigration System Act*,” (2012) at 3 [Cleveland et al, “The harmful effects of detention: Bill C-31”].

¹⁰⁴ Cleveland et al, “Psychiatric Symptoms associated with brief detention”, *supra* note 90.

¹⁰⁵ To date, this is the largest study of immigration detainees in Canada, and the first to compare detainees to non-detainees with similar trauma experiences and homogenous migration status (asylum seekers who claim has not been adjudicated).

¹⁰⁶ Cleveland et al, “Psychiatric Symptoms associated with brief detention”, *supra* note 90, at 414.

¹⁰⁷ *Ibid* at 413.

¹⁰⁸ *Ibid* at 415.

¹⁰⁹ *Ibid.*

¹¹⁰ Cleveland et al, “The harmful effects of detention: Bill C-31”, *supra* note 103; citing K Robjant, I Robbins & V Senior, “Psychological distress amongst immigration detainees: a cross-sectional questionnaire study” (2009) 48:3 Br J Clinical Psychology at 275-286.

¹¹¹ *Ibid*; citing AS Keller, B Rosenfeld, C Trinh-Shervin, et al, "Mental health of detained asylum seekers" (2003) 362(9397) *Lancet* 1721-3.

¹¹² *Ibid*; citing Suicide prevention Australia, *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, August 2011, online: <http://www.aph.gov.au/Senate/committee/immigration_detention_ctte/immigration_detention/submissions.htm>; Department of Immigration and Citizenship Australia, *Immigration Detention Statistics Summary*, (Canberra, Australia: November 2011); and *Canada: Country report and charts. Graph 1, Suicide rates (per 100,000), by gender, Canada, 1950-2004*. Geneva: World Health Organization, online: <www.who.int/mental_health/media/cana.pdf>.

¹¹³ Derrick Silove, Patricia Austin & Zachary Steel, "No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia" (2007) 44:3 *Transcultural Psych* 433 at 366.

¹¹⁴ *Ibid* at 367.

¹¹⁵ *Ibid* at 373.

¹¹⁶ *Ibid* at 375.

¹¹⁷ Interview of Branka Agic, Manager, Health Equity, Centre for Addiction and Mental Health Toronto (24 February 2015) [Interview of Branka Agic].

¹¹⁸ Interview of Dr. Lisa Andermann, Psychiatrist at Mount Sinai Hospital (26 February 2015) [Interview of Dr. Lisa Andermann].

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

¹²² Wayne Jansson, "Wilkie and Barns turn up #refugees heat on Abbott with "comprehensive brief" to ICC. @Jansant reports"(2015), online: No Fibs <<http://nofibs.com.au/2015/02/12/wilkie-and-barns-turn-up-refugees-heat-on-abbott-with-comprehensive-brief-to-icc-jansant-reports/>>.

¹²³ *Ibid*.

¹²⁴ As discussed below, there are immense obstacles in arranging mental health assessments, and for this reason, new diagnoses are rarely discovered. Furthermore, some mental health issues (such as bipolar, schizophrenia, and psychosis) are more commonly recognized and treated than others (such as depression, PDST, and anxiety). As such, we were unable to rule out undiagnosed mental health issues among the detainees and former detainees that we interviewed.

¹²⁵ Canada Border Services Agency, "National directive on the transfer of medical information of immigration detainees" (undated) (obtained through access to information request by IHRP, A-2014-12933)[CBSA, "National directive on the transfer of medical information"]

¹²⁶ Interview of Dr. Lisa Andermann, *supra* note 118; Interview of Branka Agic, *supra* note 117.

¹²⁷ Interview of Michael L Perlin, Professor at New York Law School (5 February 2015).

¹²⁸ Canada Border Services Agency, "Annex A, Statement of Work, Contract between CBSA and TBP" (No. 47636-106168/001/TOR).

¹²⁹ Bondfield Construction, "Correctional Facilities: Central Ontario East Correctional Facility," online: <www.bondfield.com/portfolio/correctional-facilities/central-ontario-east-correctional-facility.php>.

¹³⁰ *Ibid*.

¹³¹ *Correctional and Conditional Release Act*, SC 1992 c 20, s 16(1)(b) [CCRA].

¹³² CBSA, *Number of Detentions 2013*, *supra* note 13.

¹³³ PSFC, *Overcrowding and Inmates*, *supra* note 7 at 28.

¹³⁴ None of the women we interviewed had children in Canada.

¹³⁵ Optimus|SBR, *Facility and Service Delivery Options*, *supra* note 8 at 17.

¹³⁶ *Ibid* at 18.

¹³⁷ Canada Border Services Agency, "Arrests and Detentions" (September 2014), online: <<http://www.cbsa-asfc.gc.ca/security-securite/arr-det-eng.html>>(accessed May 15, 2015) [CBSA, "Arrests and Detentions"].

¹³⁸ Ontario Ministry of Community Safety and Correctional Services, "Correctional Services: Adult Offenders," (22 November 2012), online: <http://www.mcscs.jus.gov.on.ca/english/corr_serv/adult_off/inmate_class/inmate_class.html> [MCSCS, "Correctional Services: Adult Offenders"].

¹³⁹ CRCS, *Annual Report 2012-2013* *supra* note 16.

¹⁴⁰ *Ibid* at 25.

¹⁴¹ Accused on pre-trial detention, or those sentenced for a summary conviction offence to a term of less than 2 years. CCRA, *supra* note 131 at s 16(1)(b).

¹⁴² Canada Border Services Agency, "Taking stock: Current process for assessing, identifying and determining course of action in regard to mental health issues of persons detained under the *Immigration and Refugee Protection Act*" (undated) (obtained through access to information request by IHRP, A-2014012993

¹⁴³ *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 54-61 [IRPA].

¹⁴⁴ *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 248(e) [IRPR].

¹⁴⁵ The immigration detention regime is outlined in Division 6 of IRPA and Part 14 of IRPR.

¹⁴⁶ IRPA, *supra* note 143, s 4(1); *Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the Act*, SI/2005-120, (2014) online: Justice Laws Website <<http://laws-lois.justice.gc.ca/eng/regulations/SI-2005-120/page-1.html>>.

¹⁴⁷ IRPA, *supra* note 143, s 4(2).

¹⁴⁸ *Ibid*; s 42.1 refers to exceptions and considerations to the application of inadmissibility decisions, as applied to and initiated by the Minister of Public Safety and Emergency Preparedness.

¹⁴⁹ *Ibid*, ss 6(1) and 6(2).

¹⁵⁰ Vic Toews, "Designation and Delegation by the Minister of Public Safety and Emergency Preparedness under the IRPA and IRPR", online: Canada Border Services Agency <<http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2011-03-eng.html#a7>> [Vic Toews, "Designation and Delegation by the Minister of Public Safety"].

¹⁵¹ *Canada Border Services Agency Act*, SC 2005, c 38 [CBSA Act].

¹⁵² *Ibid*, s 8(1).

¹⁵³ *Ibid*, s 5(1).

¹⁵⁴ CBSA, "Arrests and Detentions", *supra* note 137.

¹⁵⁵ Canada Border Services Agency, "CBSA Enforcement Manual" (2009) (obtained through access to information request by the IHRP, redacted, A-2013-16378).

¹⁵⁶ Canada Border Services Agency, “CBSA Enforcement Manual, Part 6 Searches and Enforcement Actions – Persons Chapter 2 Care and Control of Persons in Custody Policy and Procedures” (2009) (obtained through access to information request by the IHRP A-2013-16378: 00804-A0090539. PDF) at para 3.

¹⁵⁷ *Ibid* at para 84.

¹⁵⁸ Citizenship and Immigration Canada, “Operational bulletins and manuals,” online: <<http://www.cic.gc.ca/English/resources/manuals/index.asp>>.

¹⁵⁹ Citizenship and Immigration Canada, “ENF 20 Detention” (26 September 2007) [CIC, “ENF 20”].

¹⁶⁰ *Ibid*, s 1.

¹⁶¹ CBSA, “Arrests and Detentions”, *supra* note 137.

¹⁶² CIC, “ENF 20”, *supra* note 159, s 5.13.

¹⁶³ *IRPA*, *supra* note 143, ss 53-61.

¹⁶⁴ *Ibid*, s 55.

¹⁶⁵ **Summary of IRPA Considerations & Requirements for Detention**

Section	Legal Status	Reasonable grounds to believe is:					Arrest warrant required?	Detention within or upon entry into Canada?
		Flight Risk	Danger to public	Identity	Complete Exam	Inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality		
55(1)	Resident - or - Foreign National	X	X	-	-	-	Yes	Within Canada
55(2)	Foreign National - not - Protected Person -not- Permanent Resident	X	X	X	-	-	No	Within Canada
55(3)	Permanent Resident - or - Foreign National	-	-	-	X	X	No	Upon entry only
55(3.1)	Designated Foreign National	-	-	-	-	-	No	<i>Required</i> upon entry Within Canada

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- ¹⁶⁶ *IRPA*, *supra* note 143, ss 55(1), 55(2(a)).
- ¹⁶⁷ *Ibid*, s 55(3(a)).
- ¹⁶⁸ *IRPR*, *supra* note 144, s 245. The factors include:
- (a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;
 - (b) voluntary compliance with any previous departure order;
 - (c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;
 - (d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;
 - (e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;
 - (f) involvement with a people smuggling or trafficking in persons operations that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and
 - (g) the existence of strong ties to a community in Canada.
- ¹⁶⁹ *IRPA*, *supra* note 143, ss 55(1), 55(2(a)).
- ¹⁷⁰ *Ibid*, s 55(3)(b).
- ¹⁷¹ *IRPR*, *supra* note 144, s 246.
- ¹⁷² *Ibid*, ss 246(d(i)), 246(f(i)).
- ¹⁷³ *Ibid*, ss 246(d(ii)), 246(f(ii)).
- ¹⁷⁴ *Ibid*, ss 246(e(i)(ii)(iii)), 246(g(i)(ii)(iii)).
- ¹⁷⁵ *Ibid*, s 246(b).
- ¹⁷⁶ *Ibid*, s 246(c).
- ¹⁷⁷ *Ibid*, s 246(a).
- ¹⁷⁸ CIC, “ENF 20”, *supra* note 159, s. 5.6.
- ¹⁷⁹ *Ibid*.
- ¹⁸⁰ *Ibid*.
- ¹⁸¹ *IRPA*, *supra* note 143, s 55(2)(b).
- ¹⁸² *IRPR*, *supra* note 144, s 247(1).
- ¹⁸³ *IRPA*, *supra* note 143, s 55(3)(a).
- ¹⁸⁴ *Ibid*, s 55(3.1).
- ¹⁸⁵ Canada Border Services Agency, “From Recruit to Officer Trainee – Training and Development Programs,” online: <<http://www.cbsa-asfc.gc.ca/job-emploi/bsa-asf/training-formation-eng.html>> (accessed May 5 2015).
- ¹⁸⁶ *Ibid*.
- ¹⁸⁷ *IRPR*, *supra* note 144, s 248(e).
- ¹⁸⁸ CIC, “ENF 20”, *supra* note 159, s. 5.2.
- ¹⁸⁹ *IRPA*, *supra* note 143, s 57(1).
- ¹⁹⁰ CIC, “ENF 20”, *supra* note 159, s 10.
- ¹⁹¹ *IRPA*, *supra* note 143, s 56(1).
- ¹⁹² *Ibid*, s 56(1).
- ¹⁹³ *Ibid*, s 56.
- ¹⁹⁴ CIC, “ENF 20”, *supra* note 159, s 5.11.
- ¹⁹⁵ *Ibid*.
- ¹⁹⁶ *Ibid*.
- ¹⁹⁷ *Ibid*, s 5.12.
- ¹⁹⁸ *Ibid*, s 5.11.
- ¹⁹⁹ Patrick Cain, “Iranian refugee’s jail ordeal: 173 days and counting – with no end in sight,” Global News, Dec 2014, online: <<http://globalnews.ca/news/1732366/iranian-refugees-jail-ordeal-173-days-and-counting-with-no-end-in-sight/>>.
- ²⁰⁰ *Ibid*.
- ²⁰¹ *Ibid*.
- ²⁰² *Ibid*.
- ²⁰³ *Ibid*.
- ²⁰⁴ *Ibid*.
- ²⁰⁵ *Ibid*.
- ²⁰⁶ Interview of Masoud Hajivand (4 February 2015).
- ²⁰⁷ CBSA, “Arrests and Detentions”, *supra* note 137.
- ²⁰⁸ *Ibid*.
- ²⁰⁹ CIC, “ENF 20”, *supra* note 159, s 5.13.
- ²¹⁰ Canada, Canada Border Services Agency, *ARCHIVED* – “CBSA Detentions and Removals Programs – Evaluation Study”, (November 2010), online: CBSA <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html#ftn_ref_36> [CBSA, “Detentions and removals programs – evaluation study”].
- ²¹¹ *Ibid*.
- ²¹² *Ibid*.
- ²¹³ *IRPA*, *supra* note 143, s 54.
- ²¹⁴ *Ibid*, s 172; *Immigration Division Rules*, SOR/2002-229 [IDR].
- ²¹⁵ *IRPA*, *supra* note 143, s 159(1)(h); Immigration and Refugee Board of Canada “Chairperson Guideline 2: Detention” (14 October 2014), online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/index.aspx>> [IRB, “Chairperson Guideline 2”].
- ²¹⁶ Immigration and Refugee Board of Canada, “Acts, Rules and Regulations,” (18 March 2015), online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/ActRegLoi/Pages/index.aspx>>.

²¹⁷ Immigration and Refugee Board of Canada, “Chairperson’s Guidelines” (14 October 2014), online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/index.aspx>>.

²¹⁸ *Ibid.*

²¹⁹ *IRPA*, *supra* note 143, Division 7: Right of Appeal; *IRPA*, *supra* note, 143 s 72; Immigration and Refugee Board of Canada “Detention Review Process,” (18 March, 2015), online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessRevMot.aspx>> [IRB, “Detention Review Process”].

²²⁰ *IRPA*, *supra* note 143, s 57(1), 57(2).

²²¹ *Ibid.*, s 57(2).

²²² *IDR*, *supra* note 214, s 9(1) and (2).

²²³ *IRPA*, *supra* note 143, s 167(1).

²²⁴ IRB, “Detention Review Process”, *supra* note 219.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *IRPA*, *supra* note 143, s 173(c) and (d)

²²⁸ *Cardoza Quinteros v Canada (Public Safety and Emergency Preparedness)*, 2008 CanLII 77997 (CA IRB) at para 12; *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, 3 FCR 572 [Thanabalasingham].

²²⁹ *IRPA*, *supra* note 143, s 58 (1)(a)-(e).

²³⁰ *IRPR*, *supra* note 144, s. 244. For ‘flight risk’ assessments, see *IRPR*, s 245; For ‘danger to the public’ assessments, see *IRPR*, s 246; For ‘identity not established’ assessments, see *IRPR*, s 247.

²³¹ *IRPA*, *supra* note 143, s 61(b).

²³² *IRPR*, *supra* note 144, s 248 (a)-(e).

²³³ IRB, “Chairperson Guideline 2”, *supra* note 215, s 3.1.3; *Sahin v Canada (Minister of Citizenship and Immigration)*, 1995 1 FC 214, 85 FTR 99 [Sahin].

²³⁴ *Thanabalasingham*, *supra* note 228 at paras 6-8.

²³⁵ The question of whether or not there is a clear and compelling reason to depart from a prior decision is one of mixed law and fact; therefore, an ID Member’s decision to depart is reviewable by higher courts on standard of reasonableness. See: *Canada (Minister of Citizenship and Immigration) v Lai*, 2007 FC 1252, [2007] FCJ No 1603 at para 17 [Lai].

²³⁶ *Thanabalasingham*, *supra* note 228 at para 10.

²³⁷ *Ibid* at para 10-11. Note that, ID Members are not required to demonstrate “clear and compelling” reasons to depart from a past decision where the issue is a matter of law: see *Lai*, *supra* note 235 at para 12.

²³⁸ *Ibid* at para 24.

²³⁹ *Ibid* at para 11.

²⁴⁰ *Odosashvili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 308, [2014] FCJ No 317 at para 22.

²⁴¹ *Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230, [2014] FCJ No 261 at para 80-81 [Bruzzese].

²⁴² *Canada (Minister of Citizenship and Immigration) v B072*, 2012 FC 563, 2012 FCJ No 584 at para 28.

²⁴³ See, for example, *Bruzzese*, *supra* note 241 at para 79-81.

²⁴⁴ *Ibid* at para 78.

²⁴⁵ IRB, “Detention Reviews Finalized by Member”, *supra* note 89.

²⁴⁶ *Ibid.*

²⁴⁷ End Immigration Detention Network, *Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada* (June 2014), at 3 [EIDN, *Indefinite, Arbitrary and Unfair*].

²⁴⁸ *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 118, [2002] SCR 3.

²⁴⁹ *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 25 [Charkaoui].

²⁵⁰ *Dehghani v Canada (Minister of Employment & Immigration)*, [1993] 1 SCR 1053, [1993] SCJ No 38 (SCC) at para 49.

²⁵¹ *S(P) v Ontario*, 2014 ONCA 900, 123 OR (3d) 651.

²⁵² *Ibid* at para 112.

²⁵³ *Ibid* at para 1.

²⁵⁴ *Ibid* at para 115.

²⁵⁵ Immigration and Refugee Board of Canada, “Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB” online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/guidir/Pages/GuideDir08.aspx>>, s 1.1 [IRB, “Chairperson Guideline 8”].

²⁵⁶ *Ibid.*, s 1.3.

²⁵⁷ *Ibid.*, s 2.1.

²⁵⁸ *Ibid.*, s 1.5.

²⁵⁹ *Ibid.*, s 7.1.

²⁶⁰ *Ibid.*, s 2.4.

²⁶¹ Details of the content of the report are in IRB, “Chairperson Guideline 8”, *supra* note 255, s 8.3 (a)-(g).

²⁶² *Ibid.*, s 8.1.

²⁶³ *Ibid.*, s 7.4.

²⁶⁴ *Ibid.*, s 8.2.

²⁶⁵ *Ibid.*, s 8.6.

²⁶⁶ *Ibid.*, s 7.3. Others who are knowledgeable are expected to do the same.

²⁶⁷ *Ibid.*, s 7.5.

²⁶⁸ *Ibid.*, s 4.2.

²⁶⁹ *Ibid.*, s 7.6.

²⁷⁰ *Ibid.*, s 9.1.

²⁷¹ *Ibid.*, s 11.1.

²⁷² *Ibid.*, s 10.1.

²⁷³ *Ibid*, s 12.1.

²⁷⁴ *IDR*, *supra* note 214, s 8(1)(m).

²⁷⁵ IRB, “Chairperson Guideline 8”, *supra* note 255, s 12.1. Counsel we interviewed noted that there is no regulated procedure for appointing DRs for immigration-related applications or processes other than detention reviews, such as for unsuccessful refugee claimants completing Humanitarian and Compassionate applications, PRRAs, or judicial review. According to one counsel, this “causes access to justice issues because a detainee may have a strong application but may not have the capacity to retain and instruct counsel. It also causes ethical issues for lawyers because you may be forced to play, at least for a time, a dual role as counsel and DR in the interest of your client.” However, this gap can have even more immediate effects where detainees are asked by CBSA to sign travel applications (or related documents, such as declarations that they wish to return to Somalia) without the presence of a DR.

²⁷⁶ Immigration and Refugee Board of Canada, “Commentaries to the Rules, Rule 19 Designated Representatives,” online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/ActRegLoi/Pages/CommentIdSi.aspx>> [IRB, “Commentaries to the Rules – Rule 19”].

²⁷⁷ Immigration and Refugee Board of Canada, “Guide to Proceedings Before the Immigration Division – Chapter 7: Designated Representative,” online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/GuideldSi07.aspx>>, art 7.5 [IRB, “Guide to Proceedings Chapter 7”].

²⁷⁸ *Ibid*, art 7.5.1. The factors include:

- Admissions by the person who is the subject of the proceedings concerning his or her inability to understand what is going on;
- the testimony or report of an expert on the mental health or cognitive abilities of the person who is the subject of the proceedings;
- the behaviour observed at the hearing (namely, the responses of the person who is the subject of the proceedings to the questions that are put to him or her); and
- the observations of the parties

²⁷⁹ *Ibid*, art 7.5.1.

²⁸⁰ *Ibid*, art 7.3.1; *IDR*, *supra* note 214 s 3(o), 8(1)(m).

²⁸¹ *Ibid*, art 7.3.1.

²⁸² *Ibid*, art 7.3.2.

²⁸³ *Ibid*, art 7.3.2.

²⁸⁴ *Ibid*, art 7.3.1; *IDR*, *supra* note 214, Rule 18.

²⁸⁵ *Ibid*, art 7.3.1; *IDR*, *supra* note 214, Rule 18.

²⁸⁶ *Ibid*, art 7.3.1.

²⁸⁷ *Ibid*, art 7.3.1.

²⁸⁸ Immigration and Refugee Board of Canada, “Designated Representative’s Guide,” Prepared by the Policy and Procedures Directorate, Operations Branch (January 2012) (obtained through access to information request by the Refugee Law Office of Ontario) at 7-18 [IRB, “Designated Representative’s Guide”].

²⁸⁹ *Ibid* at 145-146. For certain organizations, MOUs have been drafted (e.g. for Matthew House, ARCH, and the Schizophrenic Society of Ontario), see at 125 onwards.

²⁹⁰ IRB, “Guide to Proceedings Chapter 7”, *supra* note 277, article 7.2.1.

²⁹¹ IRB, “Designated Representative’s Guide”, *supra* note 288 at 2.

²⁹² IRB, “Guide to Proceedings Chapter 7”, *supra* note 277, article 7.2.1.

²⁹³ *Ibid*, article 7.2.2.

²⁹⁴ *Ibid*, article 7.2.2.

²⁹⁵ IRB, “Commentaries to the Rules – Rule 19”, *supra* note 276.

²⁹⁶ IRB, “Guide to Proceedings Chapter 7”, *supra* note 277, article 7.2.3.

²⁹⁷ *Ibid*, article 7.2.3.

²⁹⁸ *IDR*, *supra* note 214, Rule 19.

²⁹⁹ *Ibid*, article 7.3.5.

³⁰⁰ *Ibid*, article 7.3.5.

³⁰¹ *Ibid*, article 7.3.4.

³⁰² IRB, “Designated Representative’s Guide”, *supra* note 288 at 5.

³⁰³ The Canadian government drastically reduced the scope of health funding for refugees, asylum-seekers, failed refugee claimants, and other classes of migrants in 2012, by significantly changing the Interim Federal Health Program, which previously covered medical services and medications comparable to coverage available to Canadians on social assistance. The Federal Court struck down the cuts in 2014, but the government is currently pursuing an appeal at the Federal Court of Appeal. See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, at paras 57-87; Ruby Dhand & Robert Diab, “Canada’s Refugee Health Law and Policy from a Comparative, Constitutional, and Human Rights Perspective” (2015) CJCCL 351 at 351.

³⁰⁴ *Canada (Citizenship and Immigration) v Chi*, 2001 CanLII 26665 (CA IRB).

³⁰⁵ *IRPA*, *supra* note 143, s 58(1).

³⁰⁶ IRB, “Chairperson Guideline 2”, *supra* note 215, s 3.6.1.

³⁰⁷ *Ibid*, s 3.6.3.

³⁰⁸ *IRPA*, *supra* note 143, s 58(3).

³⁰⁹ CIC, “ENF 20”, *supra* note 159, s 5.11.

³¹⁰ CBSA, “Detentions and removals programs – evaluation study”, *supra* note 210.

³¹¹ Canadian Council for Refugees, “Alternatives to detention: CCR comments regarding the Toronto Bail Program.” (Jan 2015), online: CCR <<http://ccrweb.ca/en/alternatives-detention-comments-toronto-bail-program>>.

³¹² *Ibid*.

³¹³ *Ibid*.

³¹⁴ CBSA, *Unit cost by facility type*, *supra* note 20.

³¹⁵ Email interview of Dr. Meb Rashid, *supra* note 92.

³¹⁶ CBSA, “Detentions and removals programs – evaluation study”, *supra* note 210.

³¹⁷ *Sahin*, *supra* note 233 at para 25.

³¹⁸ *IRPR*, *supra* note 144, s.248.

³¹⁹ *Sahin*, *supra* note 233 at para 30.

³²⁰ *Ibid* at para 30.

³²¹ *Canada (Minister of Citizenship and Immigration) v Kamil*, 2002 FCT 381, [2002] FCJ No 490, at para 33.

³²² *Canada (Minister of Citizenship and Immigration) v Panahi-Dargahloo*, 2010 FC 647, 2010 CF 647, at para 58.

³²³ *Ibid* at para 58.

³²⁴ *Ibid* at para 10.

³²⁵ *Ibid* at para 62-66.

³²⁶ EIDN, *Indefinite, Arbitrary and Unfair*, *supra* note 247 at 2.

³²⁷ *Ibid*.

³²⁸ End Immigration Detention Network, "Immigration detainees boycott ends after momentous month of action" (July 21, 2014) online: EIDN <<http://endimmigrationdetention.com/2014/07/21/immigration-detainees-boycott-end-after-momentous-month-of-action/>>(accessed May 5 2015)

³²⁹ *Ibid*.

³³⁰ *Charkaoui*, *supra* note 249.

³³¹ *Ibid* at para 107.

³³² *Ibid* at paras 110-123.

³³³ *Ibid* at para 123.

³³⁴ IRB, "Chairperson Guideline 2", *supra* note 215, s 1.1.7.

³³⁵ *Thanabalasingham*, *supra* note 228 at para 24; *Canada (Minister of Citizenship and Immigration) v Li*, 2008 FC 949, [2008] FCJ No 1992 [*Li*].

³³⁶ While there is no prescribed maximum length of detention in the *IRPA*, caselaw attempts to limit indefinite detention. The four-part test to determine whether indefinite detention violates the Charter includes a consideration of the length of time in detention. See *Sahin*, *supra* note 233 at para 30.

³³⁷ As noted above, the Canadian government drastically reduced the scope of health funding for refugees, asylum-seekers, failed refugee claimants, and other classes of migrants in 2012, by significantly changing the Interim Federal Health Program, which previously covered medical services and medications comparable to coverage available to Canadians on social assistance. The Federal Court struck down the cuts in 2014, but the government is currently pursuing an appeal at the Federal Court of Appeal. See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, at paras 57-87; Ruby Dhand & Robert Diab, "Canada's Refugee Health Law and Policy from a Comparative, Constitutional, and Human Rights Perspective" (2015) CJCL 351 at 351.

³³⁸ The *IRPA* and *IRPR* do not provide complaint mechanisms for immigration detainees. Although the ENF 20 provides that one of CBSA's guiding principles is that, "feedback is welcomed ... and all detainees have access to a feedback process," there was no indication from counsel that there is a meaningful complaint mechanism. In fact, one counsel noted that the extent of her capacity to bring complaints was to "write a stern letter."

³³⁹ *IRPA*, *supra* note 143, s 62; *IRPA*, *supra* note 143, Division 7: Right of Appeal.

³⁴⁰ *Ibid*, Division 7: Right of Appeal; *ibid*, s 72; IRB, "Detention Review Process", *supra* note 219.

³⁴¹ *Ibid*, s 72; IRB, "Detention Review Process", *supra* note 219.

³⁴² *IRPA*, *supra* note 143, s 72(2)(d).

³⁴³ *Ibid*, s 74(a).

³⁴⁴ *Ibid*, 74(b).

³⁴⁵ *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 58 [*Khosa*].

³⁴⁶ *Li*, *supra* note 335 at paras 10-16.

³⁴⁷ *Khosa*, *supra* note 345 at para 59.

³⁴⁸ *Ibid* at para 59.

³⁴⁹ *Walker v Canada (Minister of Citizenship and Immigration)*, 2010 FC 392, [2010] FCJ No 474.

³⁵⁰ *Ibid* at "Judgment."

³⁵¹ *Poirier v Federal Training Centre* (1988), 26 FTR 215 (Fed TD) at para 11.

³⁵² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 10.

³⁵³ *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809, at para 74 [*May*].

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid* at para 40.

³⁵⁶ *Khela v Mission Institution*, 2014 SCC 24, [2014] 1 SCR 502 at para 55 [*Khela*].

³⁵⁷ *Apaolaza-Sancho v Director of Établissement de détention de Rivière-des-Prairies*, 2008 QCCA 1542, 80 WCB (2d) 367; *Fairfield v Canada (Minister of Immigration Board)* 2009 BCCA 391, [2009] BCWL 7778; *Khela*, *supra* note 356 at para 55; *Kippax, Alan and Attorney General of Canada*, 2014 ONSC 3685, [2013] OJ No 6324.

³⁵⁸ *Chaudhary v Canada (Minister of Public Safety & Emergency Preparedness)*, 2014 ONSC 1503, 251 ACWS (3d) 121, at para 6.

³⁵⁹ *Ibid* at para 6.

³⁶⁰ Interview of Barbara Jackman (17 March 2015) [Interview of Barbara Jackman].

³⁶¹ *Singh v Canada (Minister of Employment & Immigration)* [1985] 1 S.C.R. 177 at para 35.

³⁶² Interview of Barbara Jackman, *supra* note 360.

³⁶³ In *Miller*, the Supreme Court broadened habeas corpus to include deprivations of "residual liberty," recognizing that there could be a "prison within a prison." (*R v Miller*, [1985] 2 SCR 613, [1985] SCJ No 79, at para 32. Accordingly, the Supreme Court in *May v Ferndale* affirmed that, "a transfer from a minimum to maximum security institution involves a significant deprivation of liberty for inmates" (*May*, *supra* note 353 at paras 5, 76). In *Khela v Mission Institution*, 2014 SCC 24, [2014] 1 SCR 502, the Supreme Court found that, on application for *habeas corpus*, the superior court is able to rule on the reasonableness of the administrative decision to transfer an inmate to a higher security institution.

³⁶⁴ *Almrei v Canada (Attorney General)*, [2003] OJ No 5198, 115 CRR (2d) 20 (Ont Sup Ct), at para 29.

³⁶⁵ *Ibid* at para 39.

³⁶⁶ Vic Toews, "Designation and Delegation by the Minister of Public Safety", *supra* note 150.

³⁶⁷ IRB, "Detention Reviews Finalized by Member", *supra* note 89.

³⁶⁸ CBSA, "Detentions and removals programs – evaluation study", *supra* note 210. These agreements are consistent with s.5(1)(c) of the *CBSA Act* which authorizes the agency to implement "agreements between the Government of Canada or the Agency [i.e., CBSA] and the government of a province or other public body performing a function of the Government in Canada to ... administer a ... program."

³⁶⁹ Delphine Nakache, "The Human and Financial Cost of Detention of Asylum-Seekers in Canada" (2011) (United Nations High Commissioner for Refugees), at 87 [Nakache, "The Human and Financial Cost of Detention"].

³⁷⁰ CBSA, *Unit cost by facility type*, *supra* note 20.

³⁷¹ CBSA, *2013 Detention cost by province*, *supra* note 19.

³⁷² CBSA, “Detentions and removals programs – evaluation study”, *supra* note 210.

³⁷³ CRCS, *Annual Report 2012-2013* *supra* note 16 at 17.

³⁷⁴ CBSA, *Unit cost by facility type*, *supra* note 20.

³⁷⁵ CBSA, “Arrests and Detentions”, *supra* note 137.

³⁷⁶ Canada Border Services Agency, “After Incident Report: Incident at the B.C. Immigration Holding Centre” (undated) (obtain through access to information request by IHRP, A-2014-11555) at 2 [CBSA, “After Incident Report”].

³⁷⁷ *Ibid* at 3.

³⁷⁸ Canada Border Services Agency, “National Standards & Monitoring Plan for the Regulation and Operation of CBSA Detention Centres” (September 2014) (obtained through access to information request by IHRP, A-2014-12933) [CBSA, “National Standards & Monitoring Plan”].

³⁷⁹ Canada Border Services Agency, “Information for People Detained under the *IRPA*,” (20 March 2015), online: <<http://www.cbsa-asfc.gc.ca/publications/pub/bsf5012-eng.html>> [CBSA, “Information for People Detained under the *IRPA*”].

³⁸⁰ CBSA, “Arrests and Detentions”, *supra* note 137.

³⁸¹ Nakache, “The Human and Financial Cost of Detention”, *supra* note 369 at 81.

³⁸² *Ibid*.

³⁸³ *Ibid*.

³⁸⁴ CBSA, “National Standards & Monitoring Plan”, *supra* note 378.

³⁸⁵ CBSA, “After Incident Report”, *supra* note 376 at 2.

³⁸⁶ CBSA, *Detainees Disaggregated*, *supra* note 12.

³⁸⁷ CBSA, *Detention at a Glance*, *supra* note 13.

³⁸⁸ CRCS, *Annual Report 2012-2013* *supra* note 16 at 16.

³⁸⁹ CBSA, *Number of Detentions 2013*, *supra* note 13.

³⁹⁰ Canada’s *Constitution Act*, 1867 vests the federal government with exclusive jurisdiction to regulate the entry and stay of foreigners under s. 91(25) (Naturalization and Aliens), while the provinces retain sole jurisdiction over provincial prisons under s.92(6) (Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province).

³⁹¹ CBSA Act, *supra* note 151, s 5(1)(c).

³⁹² CBSA, “National directive on the transfer of medical information”, *supra* note 125.

³⁹³ CRCS, *Annual Report 2012-2013* *supra* note 16 at 4. Although this report was confidential, it was leaked to the public. Indeed, in a MOU between CBSA and another detaining authority, Correctional Service of Canada (albeit a federal one), regarding the Kingston Immigration Holding Centre (closed in 2012), CBSA was listed as the lawful detaining authority, and the Correctional Service Canada operated the centre as a service provider under CBSA’s delegated authority. See CBSA, “Closing the Kingston Immigration Holding Centre and Terminating the Memorandum of Understanding –CSC Dormant MOU,” (18 Nov 2011) (obtained under through access to information request by IHRP, A-2012-01303 QC EWA: A201201303_2014-11-24_05-27-51.PDF).

³⁹⁴ “Inmate” is defined in section 1 of the *Ministry of Correctional Services Act Regulation 778*, O Reg 37/13, as a person confined in a correctional institution or otherwise detained in lawful custody under a court order (but does not include a young person).

³⁹⁵ *Ministry of Correctional Services Act*, RSO 1990, C 33 [MCSA].

³⁹⁶ *Ministry of Correctional Services Act Regulation 778*, O Reg 37/13 [MCSAR].

³⁹⁷ This is stated on the MCSCS website, but is not grounded in any publicly available legislative, regulatory, or policy document, see, “Correctional Services: Jurisdiction” *Ontario Ministry of Community Safety & Correctional Services* (13 January 2011), online: <[http://www.mcscs.jus.gov.on.ca/english/corr_serv/jurisdiction/jurisdiction.html?_utm=1.1791181603.1411964335.1411964335.1412056998.2&_utmb=1.4.10.1412056998&_utmc=1&_utmx=-&_utmz=1.1412056998.2.2._utmcsr=mcscs.jus.gov.on.ca%7Cutmccn=\(referral\)%7Cutmcmd=referral%7Cutmctt=/english/default.html&_utmv=1.%7C1=tag_visitor_type=external=1&_utmik=80804631](http://www.mcscs.jus.gov.on.ca/english/corr_serv/jurisdiction/jurisdiction.html?_utm=1.1791181603.1411964335.1411964335.1412056998.2&_utmb=1.4.10.1412056998&_utmc=1&_utmx=-&_utmz=1.1412056998.2.2._utmcsr=mcscs.jus.gov.on.ca%7Cutmccn=(referral)%7Cutmcmd=referral%7Cutmctt=/english/default.html&_utmv=1.%7C1=tag_visitor_type=external=1&_utmik=80804631)>.

³⁹⁸ MCSCS, “Correctional Services: Adult Offenders”, *supra* note 138.

³⁹⁹ CRCS, *Annual Report 2012-2013* *supra* note 16 at 4.

⁴⁰⁰ Nakache, “The Human and Financial Cost of Detention”, *supra* note 369 at 88.

⁴⁰¹ In fact according to one counsel, “jails don’t have a mandate where they have to tell CBSA that they have put someone in the ‘hole’” (a commonly-used term to describe punitive segregation in correctional facilities).

⁴⁰² Nakache, “The Human and Financial Cost of Detention”, *supra* note 369 at 88.

⁴⁰³ Canada Border Services Agency, “Email correspondence between Christa-Leanne Green and Carmen Alexander-Nash et al.” dated January 15, 2013 (obtained through access to information request by IHRP, A-2014-13639) [CBSA, “Email correspondence”]; see also: Patrick Cain, “CBSA learned of its own detainee’s death by accident – three weeks later,” *Global News*, online: <<http://globalnews.ca/news/1802770/cbsa-learned-of-its-own-detainees-death-by-accident-three-weeks-later/>> [Cain, “CBSA learned of its own detainee’s death by accident”].

⁴⁰⁴ Cain, “CBSA learned of its own detainee’s death by accident”, *supra* note 403.

⁴⁰⁵ CBSA, “Email correspondence”, *supra* note 403; Cain, “CBSA learned of its own detainee’s death by accident”, *supra* note 403.

⁴⁰⁶ *Canada (Citizenship and Immigration) v Jama*, [2007] IDD No 6, 2007 CanLII 12831 (CA IRB).

⁴⁰⁷ *Ibid*.

⁴⁰⁸ *X (Re)*, 2008 CanLII 75933 (CA IRB).

⁴⁰⁹ MCSA, *supra* note 395, s 1.

⁴¹⁰ MCSAR, *supra* note 396 s 4(1).

⁴¹¹ *Ibid*, s 4(2).

⁴¹² *Ibid*, s 4(3).

⁴¹³ MCSA, *supra* note 395, s 24(1).

⁴¹⁴ *Ibid*, s 24(2).

⁴¹⁵ *Ibid*, s 24(3).

⁴¹⁶ PSFC, *Overcrowding and Inmates*, *supra* note 7.

⁴¹⁷ *Ibid* at 15.

⁴¹⁸ Optimus|SBR, *Facility and Service Delivery Options*, *supra* note 8 at 11.

⁴¹⁹ *Ibid* at 4.

⁴²⁰ *Ibid* at 20.

⁴²¹ *Ibid* at 20.

⁴²² MCSAR, *supra* note 396, s. 34.

⁴²³ *Ibid*, s 34(1).

⁴²⁴ *Ibid*, s 34(2).

⁴²⁵ *Ibid*, s 34(3).

⁴²⁶ *Ibid*, s 34(5).

⁴²⁷ *Ibid*, s 34(4).

⁴²⁸ Amnesty International, Dokters van de Wereld, ‘If Someone Is Suffering, Does He Have To Be Kept In An Isolation Cell?’ Isolation in Detention Summary (March 2015) at 2.

⁴²⁹ CRCS, *Annual Report 2012-2013 supra* note 16 at 8.

⁴³⁰ *Ibid*.

⁴³¹ *Ibid*.

⁴³² *Ibid* at 33-4.

⁴³³ *Ibid* at 34.

⁴³⁴ *Ibid*.

⁴³⁵ *Ibid* at 14.

⁴³⁶ *Ibid* at 16.

⁴³⁷ *Ibid* at 15.

⁴³⁸ *Ibid*.

⁴³⁹ Canadian Red Cross Society, Annual Report on Detention Monitoring Activities in Canada (2011) (obtained through access to information request by IHRP, A-2014-09720) at 5.

⁴⁴⁰ *Ibid* at 6.

⁴⁴¹ IRPA, *supra* note 143, s 3(2)(b).

⁴⁴² *Ibid*, s 3(3)(f); See Appendix B for a list of all international treaties which govern immigration detention and Canada’s relationship to the treaty.

⁴⁴³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976) [ICCPR].

⁴⁴⁴ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNRTS 3 (entered into force 3 May 2008), art 14 [CRPD]; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3, art 16(1),(4) (entered into force 1 July 2003) [ICRMW].

⁴⁴⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc 1/810 (1948), 71, arts 3,9 [UDHR].

⁴⁴⁶ UNHRC, *Report of the Working Group on Arbitrary Detention*, 22nd Sess (2012), UN Doc A/HRC/22/44 at paras 42-43, 51, 75, 79 [UNHRC, WGAD Report 2012].

⁴⁴⁷ *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, at para 39.

⁴⁴⁸ ICCPR, *supra* note 443 art 2.

⁴⁴⁹ UNHRC, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 16th Sess (1982), at para 1 [UNHRC, *General Comment No 8*].

⁴⁵⁰ *Shafiq v Australia*, UNHRC Communication No 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (2006) at para 7.2 [Shafiq].

⁴⁵¹ UNHRC, *General Comment No 35: Article 9 (Right to Liberty and Security of Persons)*, 112th Sess (2014), UN Doc CCPR/C/GC/35, at para 5 [UNHRC, *General Comment No 35*].

⁴⁵² *A v Australia*, UNHRC Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997) at para 9.2 [A v Australia]; *Gorji-Dinka v Cameroon*, UNHRC Communication No 1134/2002, UN Doc CCPR/C/83/D/1134/2002 (2005) at para 5.1.

⁴⁵³ UNHRC, *General Comment No 35, supra* note 451 at para 12; *A v Australia, supra* note 452 at para 9.2; *FKAG et al v Australia*, UNHRC Communication No 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013) at para 9.3 [FKAG]; *Shafiq, supra* note 450 at para 7.2.

⁴⁵⁴ *Mika Miha v Equatorial Guinea*, UNHRC Communication No 414/1990, UN Doc CCPR/C/51/D/414/1990 (1994) at para 6.5 [Mika Miha].

⁴⁵⁵ ICCPR, *supra* note 443, art 9(1); CRPD, *supra* note 444, art 14; ICRMW, *supra* note 444, art 16; *American Convention on Human Rights, “Pact of San José, Costa Rica,”* 22 November 1969, 1144 UNTS 123, art 7; *Mika Miha, supra* note 454 at para 6.5; UNHRC, *WGAD Report 2012, supra* note 446 at para 38.

⁴⁵⁶ UNHRC, *General Comment No 35, supra* note 451 at para 22; regionally, this principle is also found in *Amuur v France* (1996), No 19776/92, [1996], III ECHR 1996 25, 22 EHRR 533 at para 50 [Amuur]; *Servellón-García et al v Honduras* (2006), Inter-AM Ct HR (Ser C) No 152 at para 89.

⁴⁵⁷ *Ibid.* at para 12.

⁴⁵⁸ *Rafael Ferrer-Mazorra et al v USA* (2001), Inter-Am Comm HR, N 51/01 at paras 222 and 226.

⁴⁵⁹ *Amuur, supra* note 456 at para 50; *Soldatenko v Ukraine*, No 2440/07, [2008], II ECHR 302 at para 111.

⁴⁶⁰ *Abdolkhani and Karimnia v Turkey*, No 30471/08, [2009] IHRL 3633 at paras 131-136 [Abdolkhani]; *Amuur, supra* note 456 at para 53; *Vélez Loor v Panama* (2010), Inter-Am Ct HR (ser C) No 218, at para 120 [Vélez Loor].

⁴⁶¹ CBSA Act, *supra* note 151, s 12(1).

⁴⁶² *Ibid*, s 5(1)(c).

⁴⁶³ CBSA, “Arrests and Detentions”, *supra* note 137.

⁴⁶⁴ UN Commission on Human Rights, *Addendum to the Report of the Working Group on Arbitrary Detention: Visit to Canada (1-15 June 2005)*, 62nd Sess, UN Doc E/CN/4/2006/7/Add.2 (2005) at para 81.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ CRCS, *Annual Report 2012-2013 supra* note 16 at 16.

⁴⁶⁷ *Bakhtiyari v Australia*, UNHRC Communication No 1069/2002, Un Doc CCPR/C/79/1069/2002 (2003) at paras 9.2-9.3 [Bakhtiyari]; UNHRC, *General Comment No 35, supra* note 451 at para 18.

⁴⁶⁸ UNHRC, *General Comment No 35, supra* note 451 at para 18; see also *Ahani v Canada*, UNHRC Communication No1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004) at para 10.2.

⁴⁶⁹ *Shafiq, supra* note 450 at para 7.2; *A v Australia, supra* note 452 at para 9.2.

⁴⁷⁰ UNHRC, *General Comment No 35, supra* note 451 at para 12; *A v Australia, supra* note 452 at para 9.2; *FKAG, supra* note 453 at para 9.3; *Shafiq, supra* note 450 at para 7.2.

⁴⁷¹ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 at para 34 [UNHRC, *Detention Guidelines*].

⁴⁷² *A v Australia*, supra note 452 at para 9.2; *Kwok v Australia*, Communication No 1442/2005, UN Doc CCPR/C/97/D/1442/2005 (2010) at para 9.3 [Kwok].

⁴⁷³ *C v Australia*, UNHRC Communication No 900/1999, UN Doc A/58/40 (2002) at para 8.2 [C v Australia]; *Al-Gertani v Bosnia and Herzegovina*, UNHRC Communication No 1955/2010, UN Doc CCPR/C/109/D/1955/2010 (2013) at para 10.4; *Shams and ors v Australia*, UNHRC Communication No 1255/2004, Communication No 1256/2004, Communication No 1259/2004, Communication No 1260/2004, Communication No 1266/2004, Communication No 1268/2004, Communication No 1270/2004, Communication No 1288/2004, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (2008) at para 7.2 [Shams and ors]; *Kwok*, supra note 472 at para 9.3.

⁴⁷⁴ *Baban and Baban v Australia*, UNHRC Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) at para 7.2; *Bakhtiyari v Australia*, supra note 467 at para 9.3.

⁴⁷⁵ UNHCR, *Detention Guidelines*, supra note 471, guideline 4.3 at para 35.

⁴⁷⁶ *Ibid* at para 19.

⁴⁷⁷ *Ibid* at para 39.

⁴⁷⁸ *Ibid* at para 49-50.

⁴⁷⁹ *Ibid* at para 63.

⁴⁸⁰ *IRPR*, supra note 144, s 248(e).

⁴⁸¹ CIC, “ENF 20”, supra note 159, s 5.13.

⁴⁸² *Ibid*, s 5.11.

⁴⁸³ International Commission of Jurists, *Migration and International Human Rights Law – A Practitioners’ Guide, Updated Edition*, 2014, Chapter 4: “Migrants in detention: (Geneva: ICJ, 2014) at 183 [ICJ, *Practitioners Guide*].

⁴⁸⁴ *Vélez Loo*, supra note 460 at para 117.

⁴⁸⁵ *Abdolkhani*, supra note 460 at para 133, 135; *Shafiq*, supra note 450 at para 7.2.

⁴⁸⁶ UNHRC, *Report of the Working Group on Arbitrary Detention: Deliberation No 5: Situation regarding immigrants and asylum-seekers*, 56th Sess, Annex II, UN Doc E/CN.4/2000/4 (1999), Principle 7 [UNHRC, *WGAD Deliberation No 5*].

⁴⁸⁷ *Zadydas v Davis* [2001] 531 99-7791 (Supreme Court of the United States), at 699-701; *Demore v Kim* [2002] 01-1491 (Supreme Court of the United States) at 18-20, *Clark v Martinez* [2004] 543 03-878 (Supreme Court of the United States) at 15.

⁴⁸⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art 15(5).

⁴⁸⁹ UNHRC, *Report of the Working Group on Arbitrary Detention: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right to Development*, 10th Sess (2009), UN Doc A/HRC/10/21, at para 67.

⁴⁹⁰ Mr. Mvogo has been in detention since September 20th, 2006. UNHRC, Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session (22 April-1 May 2014)*, No 15/2014 (Canada), A/HRC/WGAD/2014/15, 13 February 2014, at para 6.

⁴⁹¹ *Ibid* at para 24.

⁴⁹² *Ibid*.

⁴⁹³ *Ibid*.

⁴⁹⁴ The prohibition against torture or cruel, inhuman or degrading treatment is elaborated further in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1994, 85 UNTS 1465 (entered into force 26 June 1987); It is also enshrined in Article 15 of the CRPD, and protected regionally, e.g. Article 5 of the *American Convention on Human Rights*, “*Pact of San José, Costa Rica*,” 22 November 1969, 1144 UNTS 123, and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, art 5 (entered into force 3 September 1953).

⁴⁹⁵ UNHRC, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th Sess (1992) UN Doc HRI/GEN/1/Rev.6, at para 2.

⁴⁹⁶ *Ibid* at para 2.

⁴⁹⁷ ICJ, *Practitioners Guide*, supra note 483 at 196.

⁴⁹⁸ UNHRC, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th Sess, (1992) at para 2.

⁴⁹⁹ *C v Australia*, supra note 473 para 8.4 [C. v Australia].

⁵⁰⁰ UNGA, *Report of the Special Rapporteur on the human rights of migrants*, supra note 96 at recommendation (j).

⁵⁰¹ *Ibid* at para 46.

⁵⁰² UNHRC, *General Comment No 35*, supra note 451 at para 18; UNHRC, *WGAD Deliberation No 5*, supra note 486, principle 9; UNGA, *Report of the Special Rapporteur on the human rights of migrants*, supra note 96 at para 33.

⁵⁰³ UNHRC, *General Comment No 35*, supra note 451 at para 58.

⁵⁰⁴ *ICCPR*, supra note 443, art 10; ICJ, *Practitioners Guide*, supra note 483 at 200.

⁵⁰⁵ *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663 C (XXIV), UNESCO, 1957 and 1977 at para 82(2) (SMRTP).

⁵⁰⁶ *Hurtado v Switzerland*, ECtHR, Application No 17549/90, 28 January 1994; *Mouisel v France*, ECtHR, Application No 67263/01, 14 November 2002, para 40, *Keenan v United Kingdom*, ECtHR, Application No 27229/95, 3 April 2001, para 111; *Aleksanyan v Russia*, ECtHR, Application No 46468/06, 22 December 2008, para 137-138; *Algür v Turkey*, ECtHR, Application No 32574/96, 22 October 2002, para 44 [Algür]; *Vélez Loo*, supra note 460 at paras 220, 225, 227; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UNGAOR, 1998, Un Doc A/RES/32/173, Principle 24 [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment].

⁵⁰⁷ UNGA, *Report of the Special Rapporteur on the human rights of migrants*, supra note 96 at para 48.

⁵⁰⁸ *Algür*, supra note 506 at para 44; *Vélez Loo*, supra note 460 at paras 220, 225, 227; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, supra note 506, principle 24; *SMRTP*, supra note 505 at para 22(1).

⁵⁰⁹ ICJ, *Practitioners Guide*, supra note 483 at 204.

⁵¹⁰ UNHCR, *Detention Guidelines*, supra note 471 at para 48(vi).

⁵¹¹ CBSA, “National directive on the transfer of medical information”, supra note 125.

⁵¹² ICJ, *Practitioners Guide*, supra note 483 at 182. See also: *Concluding Observations on Sweden*, CAT, UN Doc CAT/C/SWE/CO/5, 4 June 2008 at para 12; *Concluding Observations on Costa Rica*, CAT, UN Doc CAT/C/CRI/CO/2, 7 July 2008 at para 10 [Concluding Observations on Costa Rica].

⁵¹³ *Concluding Observations on Costa Rica*, supra note 512 at para 10.

⁵¹⁴ ICJ, *Practitioners Guide*, supra note 483 at 201.

⁵¹⁵ *Shafiq*, *supra* note 450.

⁵¹⁶ *FKAG*, *supra* note 453; *MMM et al v Australia*, UNHRC Communication No. 2136/2012, UN Doc CCPR/C/108/D2136/2012 (2013) [*MMM et al*].

⁵¹⁷ *Ibid* at para 9.8; *MMM et al*, *supra* note 516 at para 10.7.

⁵¹⁸ UNHRC, *General Comment No 35*, *supra* note 451 at para 19.

⁵¹⁹ *CRPD*, *supra* note 444.

⁵²⁰ *Ibid*, art 14.

⁵²¹ *Ibid*, art 1.

⁵²² UNHRC, *Thematic Study on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, the Office of the High Commissioner for Human Rights (OHCHR), 10th Sess, UN Doc A/HRC/10/48 (2009), at para 48 [UNHRC, *Thematic Study on Enhancing Awareness*].

⁵²³ *Ibid*.

⁵²⁴ *Ibid* at para 49.

⁵²⁵ CBSA, “Arrests and Detentions”, *supra* note 137.

⁵²⁶ CBSA, “Information for People Detained under the IRPA”, *supra* note 379.

⁵²⁷ UNHRC, *Thematic Study on Enhancing Awareness*, *supra* note 522 at para 39.

⁵²⁸ *Mr. X v Argentina*, CRPD Communication No. 8/2012, 11th Sess, UN Doc CPRD/C/11/D/8/2012 (2014) at para 8.7.

⁵²⁹ *Constitution to the World Health Organization*, 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948, acceptance by Canada 29 Aug 1946).

⁵³⁰ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 12: (1) “State Parties ... recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” (2) “The steps to be taken by the State Parties ... to achieve the full realization of this right shall include those necessary for: ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

⁵³¹ *CRPD*, *supra* note 444, art 25.

⁵³² *UDHR*, *supra* note 445, Art 25: “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”; *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969), Article 5(e)(iv); *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), Article 11.1(f) and 12; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 24.

⁵³³ UNESCO, *General Comment No 14: The right to the highest attainable standard of health (article 12 of the ICESCR)*, 22nd Sess (2000), at para 7 [UNESCO, *General Comment No 14*].

⁵³⁴ *Ibid* at para 12, 18.

⁵³⁵ *Ibid* at para 34.

⁵³⁶ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non-Citizens*, 64th Sess, UN Doc CERD/C/64/Misc.11/rev/3 (2004), at para 36.

⁵³⁷ UNESCO, *General Comment No 14*, *supra* note 533 at para 34.

⁵³⁸ *Ibid* at para 12(c).

⁵³⁹ UNGA, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, 23rd Sess, UN Doc A/HRC/23/41 (2013), at para 36.

⁵⁴⁰ UNHRC, *General Comment No 8*, *supra* note 449 at para 1.

⁵⁴¹ UNHRC, *General Comment No 35*, *supra* note 451 at para 41.

⁵⁴² *A v Australia*, *supra* note 452 at para 9.5; *Shafiq*, *supra* note 450 at para 7.4; *Shams and ors*, *supra* note 473 at para 7.3.

⁵⁴³ UNHRC, *General Comment No 35*, *supra* note 451 at para 45.

⁵⁴⁴ UNHRC, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 90th Sess (2007), UN Doc CCPR/C/GC/32 at paras 18-22.

⁵⁴⁵ *A and Others v United Kingdom*, ECtHR, Application No 3455/05, 19 February 2009, at para 203 [*A and Others*]; *Bouamar v Belgium*, ECtHR, Application No 9106/80, 29 February 1988, at para 57 [*Bouamar*]; *Vélez Loor*, *supra* note 460 at para 107-109.

⁵⁴⁶ *A and Others*, *supra* note 545 at para 203.

⁵⁴⁷ *Bouamar*, *supra* note 545 at para 57.

⁵⁴⁸ Article 9(4) of the ICCPR and Article 5(4) of the *ECHR* both enshrine a right to take proceedings before a court for anyone who is deprived of liberty. The wording of the two provisions is substantially similar.

⁵⁴⁹ *A and Others*, *supra* note 545 at para 204; *Garcia Alva v Germany*, ECtHR, Application No 23541/94, 13 February 2001, at para 39; *Reinprecht v Austria*, ECtHR, Application No 67175/01, 15 November 2005, at para 34.

⁵⁵⁰ *Winterwerp v Netherlands*, ECtHR, Application No 6301/73, 24 October 1979, at para 60; *Lebedev v Russia*, ECtHR, Application No 4493/04, 25 October 2007, at paras 84-89; *Suso Musa v Malta*, ECtHR, Application No 42337/12, 23 July 2013, at para 61.

⁵⁵¹ *De Wilde, Ooms and Versyp v Belgium*, ECtHR, Application No 2832/66; 2385/66; 2899/66, 18 June 1971, at para 79; *A and Others*, *supra* note 545 at para 217; *Chahal v The United Kingdom*, ECtHR, Application No 22414/93, 15 November 1996, at para 132.

⁵⁵² *Ibid* at para 79.

⁵⁵³ *Ibid*.

⁵⁵⁴ *Ibid* at para 80.

⁵⁵⁵ UNHRC, *General Comment No 35*, *supra* note 451 at para 39.

⁵⁵⁶ *Shafiq*, *supra* note 450 at para 7.3.

⁵⁵⁷ UNHRC, *General Comment No 35*, *supra* note 451 at para 46.

⁵⁵⁸ *A v Australia*, *supra* note 452 at para 9.6.

⁵⁵⁹ UNHRC, *General Comment No 35*, *supra* note 451 at para 46; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 506, principles 13-14.

⁵⁶⁰ *IRPA*, *supra* note 143, ss 56- 62, 72.

⁵⁶¹ IRB, “Chairperson Guideline 2”, *supra* note 215, s 1.1.7; *Thanabalasingham*, *supra* note 228 at para 24; *Li*, *supra* note 335.

⁵⁶² *IRPA*, *supra* note 143, s 72(1).

⁵⁶³ Interview of Barbara Jackman, *supra* note 360.



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