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

Submission to the UN Human Rights Committee to assist in its review of Canada

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I. Introduction

The International Human Rights Program (IHRP) at the University of Toronto Faculty of Law enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society.

The IHRP is pleased to submit this brief to the United Nations Human Rights Committee (the Committee) in advance of its consideration of Canada's sixth periodic report at the Committee's 114th session from 29 June - 24 July 2015.

This brief analyzes the treatment of immigration detainees in Canada, with a particular focus on non-citizens ("migrants")[1] with mental health issues. It is the result of an investigation conducted over ten months by the IHRP's award-winning legal clinic. 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), along with over 30 experts (including counsel,[2] correctional staff, doctors, immigration experts, civil society groups, mental health experts, and a retired Canada Border Services Agency manager). We also provided a draft of our recommendations to the federal and Ontario governments, but did not receive any response.

We respectfully submit that Canada's detention of migrants with mental health issues in maximum security jails violates the *International Covenant on Civil and Political Rights* (the Covenant) insofar as such detention is arbitrary (art 2); cruel, inhuman and degrading treatment (art 7); discrimination on the basis of disability (art 26); and violates the right of detainees to a challenge their detention before a court (arts 9).

We will be releasing a full report based on our findings entitled "*We Have No Rights": Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* in advance of World Refugee Day on June 20, 2015. The forthcoming report is co-authored by Hanna Gros and Paloma van Groll, and will include a foreword by the world's leading scholar on refugee rights, Professor James Hathaway. This brief was prepared by Logan St. John-Smith.

II. Executive Summary and Key Recommendations

Every year thousands of migrants are detained in Canada; in 2013, for example, over 7300 migrants were detained.[3] Nearly one third of all detention occurs in a facility intended for a criminal population (i.e. a provincial jail),[4] while the remaining occurs in three dedicated immigration holding centres (IHCs) in Toronto (195 beds), Montreal (150 beds), and Vancouver (24 beds).[5] Migrants detained in provincially-administered correctional facilities are not 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 60% of all detention occurs in the province of Ontario, with 53% of detention occurring in the Greater Toronto Area (GTA) alone.[6] A Canadian Red Cross Society report notes that Canada Border Services Agency (CBSA) held 2247 migrants in detention in Ontario provincial jails in 2012. [7] Unfortunately, more up-to-date statistics are not publicly available.

This brief focuses on Ontario as a case study to discuss broader issues with Canada's laws, policies, and practices, since the majority of immigration detainees are held in that province.[8] Wherever possible, we highlight experiences from other provinces since there is significant regional variation. For example, outside of Ontario, British Columbia, and Quebec, there are no dedicated IHCs, which means that all immigration detainees are held in provincial correctional 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 the central region (which includes Toronto).[9] Regional variation in immigration detention is symptomatic of the lack of clear laws and policies to guide immigration detention in Canada.

Our investigation found that migrants with mental health issues or diagnosed mental illnesses[10] are routinely detained despite their vulnerable status, while others develop mental health issues as a result of detention. 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.[11] Due to the overrepresentation of people with mental health issues in Canada's criminal justice system,[12] 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.

We found that 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. This is especially problematic since, in Ontario at least, there is no regular, independent monitoring of provincial jails that house immigration detainees.[13] 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), which is clearly struggling to keep up with increasing numbers of persons detained under the criminal justice system.

Unfortunately, while the laws and policies allude to the importance of exploring alternatives prior 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.

The immigration detainees we spoke to spent between two months and three years imprisoned in maximum-security provincial jails, and each had a diagnosed mental health issue(s) and/or expressed serious anxiety or suicidal ideation. Each of the immigration detainees we met with communicated incredible hopelessness: "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." This anguish is compounded for detainees with mental health issues, who feel further marginalized and discriminated against on account of their health needs. Without exception, detention in a provincial jail, even for a short period, exacerbated their mental health issues, or created new ones.

Anxiety over immigration status and the hardship of indefinite detention has a severe impact on the mental health of immigration detainees.[14] 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.[15] 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.

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 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.[16] 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 Canadian Government claims that detainees can better access health care services in jail, even though all our research indicates that mental health care in provincial jails is woefully inadequate and has been the subject of recent reports and human rights complaints.

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 long-term detention of Michael Mvogo who has been detained for eight years and remains detained today.[17] 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.

This practice is especially troubling in light of the Committee's recent decision which found that Canada's deportation of a mentally-ill person in need of special protection, on account of criminal offences recognized to be related to his mental illness, constituted a violation of article 7 of the Covenant.[18] If the Canadian government fully implements the Committee's views, many of the detainees we interviewed during our investigation would become effectively irremovable.

We respectfully submit that 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. We argue that this practice violates the *International Covenant on Civil and Political Rights*.

In particular, we are gravely concerned that the detention of migrants with mental health issues in provincial jails violates the right to be free from arbitrary detention (art 9). First, key aspects of the immigration detention regime are not sufficiently prescribed by law. No legislation, regulations or policies define where detainees shall 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. Similarly, neither the *Immigration and Refugee Protection Act* (IRPA) nor the *Immigration and Refugee Protection Regulations* (IRPR) contain explicit authority to transfer detainees from one type of facility to another, particularly on the basis of health status. Additionally, Canadian law is silent as to which legal authority has jurisdiction over immigration detainees held in non-CBSA run facilities – in particular, their conditions of confinement, health and safety.

Second, the decision to detain is not sufficiently individualized and fails to take into account vulnerabilities, such as existing mental health issues. 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.

Finally, for migrants whose detention is lengthy and/or indefinite, it is more likely that it is arbitrary. Canada has no maximum length of immigration detention or "presumptive period" prescribed in law. Moreover, the detention review process does not, in practice, prevent long-term and indefinite detention.

We also submit 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, fails to provide adequate health care to meet their needs, and raises the spectre of indefinite detention (arts 7, 10). Our research indicates that Canada routinely detains individuals with severe mental illnesses in provincial maximum-security jails. In many of these cases, Canada 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. Additionally, for detainees housed in provincial jails, access to health care remains inadequate. The uncertain, lengthy, and often-indefinite nature of immigration detention in Canada amounts to ill treatment, especially where detainees have or develop mental health issues.

We further submit that Canada's immigration detention regime discriminates against migrants with mental health issues on the basis of disability, both in terms of their liberty and security of person, and their access to adequate health care in detention (arts 2, 26). 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*. Once detained, having a mental health issue is often a significant barrier to release - either because a detainee cannot establish reliable access to medication or because they cannot secure a spot in a community treatment facility. This is particularly disturbing because detention in provincial jails has been shown to cause significant deterioration in mental health.

Finally, we submit that the legislative scheme for the review of detention violates the right to challenge detention before a court (art 9). Canada's detention review regime effectively creates a presumption against release, while judicial review of detention decisions is largely ineffectual. While Canada has a statutory detention review regime that, at least on its face, complies with international legal principles,

our research indicates that in practice the system is broken. In some cases, the end result is long-term detention that is, in effect, preventative and indefinite.

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 an IHC.
- 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.

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.
- 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.

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.
- Those with serious mental health issues are routinely 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.
- There is no effective independent monitoring of the conditions of confinement for detainees held in provincial jails.

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.

Key Recommendations:

In the context of its upcoming review, the IHRP urges the Committee to recommend that Canada:

1. Create an independent body or ombudsperson responsible for overseeing and investigating the CBSA, and to whom immigration detainees can hold the government accountable.

2. Amend existing laws, regulations, and policies to create a rebuttable presumption in favour of release after 90 days of detention.

3. Reinstate the Interim Federal Health Program to ensure that migrants are able to access essential health care services, including mental health care and medication, in the community.

4. Sign and ratify the Optional Protocol to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment*, which would allow for international inspection of all sites of immigration detention.

(A full set of recommendations to the Canadian government is contained as Appendix 1 to this submission.)

III. Depression and deterioration: the impact of detention on mental health

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.[19] 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."[20]

It is not surprising then that mental health experts worldwide have documented the exceedingly harmful effects of immigration detention. It has been noted extensively that "detention systematically deteriorates the physical and mental condition of nearly everyone who experiences it."[21] In 2012, François Crépeau, the UN Special Rapporteur on the human rights of migrants, reported that "immigration detention has widespread and seriously damaging effects on the mental (and sometimes physical) health of detainees."[22]

Detention causes psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional, and psychological consequences.[23] 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."[24] 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.[25]

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.[26] A 2011 UN High Commissioner for Refugees (UNHCR) 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."[27]

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."[28]

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.[29] 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.[30]

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."[31] 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).[32]

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, uncertainty as to length of detention, loneliness, fear of being sent back home, boredom, and the sense that detention is unfair.[33] Detainees also describe "feelings of shock and humiliation when handcuffed, and most felt that they were unjustly treated like criminals."[34]

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).

IV. The lived experience of immigration detainees

Over the course of our investigation 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.[35]

A. Voices from the Inside

This section provides a high-level summary of how immigration detention is experienced by those who are detained. Our forthcoming report, *We Have No Rights,* profiles each individual detainee's story in more detail.

The immigration detainees 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 count down 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. 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).[36] 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.[37] 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."[38] At all facilities, detainees we spoke with 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 sent to 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 only 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.

Indeed, one former detainee 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 (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 long-term 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.[39]

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 Immigration Division Members agree to consider release for detainees with mental health issues, they generally insist on an 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 ID Members, Minister's counsel or correctional staff, to be disrespectful. One detainee reported that ID Members and Minister's 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 in Lindsay, Ontario; Central North Correctional Centre in Penetanguishene, Ontario; and Vanier Centre for Women in Milton, Ontario). We also visited the Toronto IHC, but investigation of the conditions there was outside the scope of our investigation.

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.

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.[40] Furthermore, all doors, windows, locks and perimeter walls are built to maximum-security standards, and feature "the most advanced security technology."[41] 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.[42]

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.[43]

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.

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.

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." 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.

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 reason communicated to detainees.

Alarmingly, 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.

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. 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. 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."

b. Vanier Centre for Women

At Vanier Centre for Women (Vanier), immigration detainees are also held in the maximum-security wing, which is where we conducted our interviews. 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 unit, where both of the immigration detainees we met were being held. We also 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. In the IMAT unit, each prisoner has her own cell, whereas in general population prisoners are double-bunked.

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.

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.

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.[44] 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."[45]

c. Access to Healthcare in provincial jails

A central theme of our interviews with counsel was 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"[46] and that "for those inmates with mental health and addictions problems the environment is almost guaranteed to further exacerbate these problems."[47]

In 2013, Ontario settled a complaint file 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.[48] As part of the settlement, the Ontario government 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."[49] 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 if not equipped to effective 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.[50]

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."[51] 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.

V. 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 the Ontario Ministry of Community Safety and Correctional Services (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.[52] 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."[53]

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)[54] and the *Immigration and Refugee Protection Regulations* (IRPR)[55] govern immigration detention in Canada.[56] While the Minister of Citizenship and Immigration is responsible for much of the administration of IRPA,[57] the Minister of Public Safety and Emergency Preparedness ("Minister of Public Safety") is responsible for arrest, detention and removal pursuant to the IRPA,[58] and establishment of policies respecting inadmissibility on grounds of security, organized crime, or violation of human or international rights.[59]

The Minister of Public Safety has delegated and designated the authority conferred by ss. 55-59 of the IRPA to CBSA,[60] such that CBSA is responsible for the administration and enforcement of the vast majority of arrest and detention powers contained in the Act.[61] The *Canada Border Services Agency Act*[62] (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.[63]

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…."[64] CBSA is guided by several policy instruments. A 'snapshot' of CBSA's policy on immigration detention is available online,[65] and an internal Enforcement Manual contains more detail.[66]

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."[67]

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."[68]

Citizenship and Immigration Canada (CIC) has issued a publicly-accessible operational manual related to enforcement,[69] chapter 20 of which is entitled "immigration detention" ("ENF 20").[70] ENF 20 offers "guidance to officers in exercising their powers of detention under IRPA."[71]

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.[72] 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.[73]

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.[74]

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 admissibility or removal from Canada,[75] or where, upon entry into Canada, the officer considers detention necessary in order for the examination to be completed.[76] The IRPR specify various factors to be considered in determining whether an individual is a flight risk.[77]

An individual may also be detained if found to be "inadmissible and a danger to the public"[78] or "inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality."[79] The IRPR specify the factors that inform the decision to detain an individual who is found to be a danger to the public.[80] These include criminal convictions (within or outside Canada) for sexual assault,[81] offences involving violence or weapons,[82] or drug-related offences.[83] Furthermore, association with a criminal organization,[84] or engagement in human smuggling or trafficking,[85] 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,[86] 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."[87]

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 threating behaviour, violent or threatening behaviour at the time of examination or, *mentally unstable behavior at the time of examination* [emphasis added].[88] The ENF 20 indicates that where mental instability is involved, officers are to "secure the help of the necessary professional resources."[89]

However, there are no CBSA policy manuals that contemplate any mental health assessment of a potential detainee at the decision to detain stage.

Foreign nationals may be arrested and detained without a warrant where their identities are unclear "in the course of any procedure under this Act."[90] 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.[91]

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.[92]

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.[93] (However, detailed analysis of the DFN regime is outside the scope of this brief.)

i. Alternatives to detention

CBSA officers have wide discretion when it comes to detention of migrants. However, pursuant to the IRPR, before exercising discretionary authority to detain individuals, decision-makers must consider all reasonable alternatives to detention.[94] This requirement is echoed in the ENF 20.[95]

However, CBSA officers may only allow for release up until the first detention review, which takes place 48 hours after the decision to detain[96] (after which point it is up to an ID Member to make decisions regarding release or continued detention).[97]

CBSA officers may release an individual from detention if they are of the opinion that the reasons for the detention no longer exist.[98] 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.[99] The ENF 20 also lists numerous examples of conditions that may be imposed upon release at the discretion of the officer,[100] 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.[101]

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."[102] 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.[103] CBSA may also release individuals to third party risk management programs, such as the TBP.[104]

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.[105]

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.

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 with behavioural or mental health issues."[106] 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."[107] The ENF 20 adds that, in such cases, "alternatives to detention should always be considered."[108]

A 2010 CBSA Evaluation Study on its Detention and Removal Program found several issues with the detention of immigration detainees with mental health issues.[109] 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."[110] 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.[111]

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.

c. <u>The Decision to continue detention (detention review hearings)</u>

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 research indicates that some migrants are detained for years.

The ID is an independent and quasi-judicial tribunal responsible for conducting statutorily-mandated detention reviews.[112] The ID is guided by legislation, as well as two main policy instruments: the Immigration Division Rules[113] and the Guidelines.[114] 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).[115]

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, [116] and then a review must occur every 30 days for as long as the individual is detained. [117] The detainee may ask for an early detention review at any time, but must present new facts to justify the request.[118] Immigration detainees have the right to be represented by counsel at detention review hearings.[119]

ID Members conduct detention reviews according to the IRB tribunal process.[120] 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).[121] Upon hearing submissions from both parties, the ID Member may order continued detention or release.[122]

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."[123]

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.[124] It is worth noting that, despite the fact that Members are 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.[125]

IRPA requires Members to consider specific factors (enumerated in detail in the IRPR)[126] for each of these grounds.[127]

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 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.[128]

These factors are not exhaustive, and the weight given to them will depend on the circumstances of each case.[129]

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.[130] 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"[131] for doing so.[132] 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.[133]

While deference to the trier of fact makes imminent 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.[134] 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.[135] 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,[136] there are reasons to suspect the Minister is responsible for an unjustified delay resulting in longer detention or acted in bad faith,[137] or the presence of new family in Canada that would mitigate against flight risk.[138] In practice, length of detention on its own is not a sufficiently "clear and compelling reason" to depart from previous decisions.[139] 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.[140]

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 the Central region, for example, one ID Member's rate of release was 5%, whereas another Member's release rate was nearly one in four.[141] 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).[142]

In *Suresh v Canada (Minister of Citizenship and Immigration)*, 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*]."[143] In *Charkaoui* v *Canada (Citizenship and Immigration)*,[144] the Supreme Court reiterated its statement in *Dehghani* v *Canada (Minister of Employment & Immigration)*, that "factual situations which are closer to analogous to criminal proceedings will merit greater vigilance by the courts."[145]

Similarly, in 2014, in *S (P)* v *Ontario*,[146] 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 *Canadian Charter of Rights and Freedoms'* 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."[147]

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. 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 Canada cases that fulsomely consider a detainee's mental health issues in the context of a detention review hearing.

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 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."

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. Most ID Members do not view deterioration in mental health as a sufficient change in circumstances to justify release.

ii. 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.[148] 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".[149] Members must also consider the "availability, effectiveness and appropriateness of alternatives to detention".[150] 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.[151] As mentioned above, the ENF 20 lists a variety of conditions available for Members to impose upon release.[152]

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.

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.'"

Dr. Meb Rashid, co-founder of the Canadian group 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 Program] 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."[153]

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 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.[154] 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.

iii. 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.[155]

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, which is now enshrined in s. 248 of the IRPR.[156] The considerations relevant to a specific case, and the weight to be placed on each factor, will depend on the circumstances of the case.[157]

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.[158] 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.[159]

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.[160] 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*.[161] 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.[162] Ultimately, the Court held that the decision to release Panahi-Dargahloo was reasonable, and dismissed the Minister's application for judicial review.[163] Despite the precedent in *Panahi-Dargahloo*, counsel advise that ID Members continue to refer to *Kamail* in deciding that refusal to sign the statutory declaration constitutes causing delay, and justifies continued detention.

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.[164] 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."[165]

The notion that the immigration 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.[166] As discussed, decision-makers must give "clear and compelling reasons" for departing from previous decisions.[167] 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*).[168] As noted above, 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."

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.[169] 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.[170] Immigration detainees may only seek judicial review of a decision to detain at the Federal Court of Canada.[171] In order to do so, detainees must request and obtain leave from the Federal Court.[172] Although the Federal Court is to "dispose of the [leave] application without delay and in a summary way,"[173] 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,[174] which must be held between 30-90 days after leave is granted, unless the parties agree to an earlier day.[175]

ID Members who make immigration detention decisions are considered to have considerable specialized expertise,[176] 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).[177] This means that

deference is owed to ID Members' findings of fact and assessment of the evidence.[178] The role of the Federal Court is not to substitute its opinion for that of the ID Member.[179]

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.[180] The effect of this judgment was that the matter was "remitted to the Board for consideration by a differently constituted panel."[181] The Federal Court lacks jurisdiction to issue a writ of *habeas corpus* ancillary to judicial review,[182] which effectively means the Court cannot order release but only redetermination by the ID.

ii. Habeas corpus

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*,[183] 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."[184] This finding was reiterated by the Supreme Court in the 2014 decision in *Mission Institution* v *Khela*.[185]

The Ontario Superior Court and various appellate courts have followed *May* v *Ferndale*,[186] 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."[187] Accordingly, the court declined to exercise its *habeas corpus* jurisdiction to review the lawfulness of the detention.[188] *Chaudhary* is currently on appeal to the Court of Appeal for Ontario.[189]

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*,[190] 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.[191]

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.[192]

In carrying out its mandate to administer immigration detention, CBSA forms agreements with provinces to house some immigration detainees in provincial jails.[193] CBSA pays the provinces an agreed-upon per diem rate to imprison immigration detainees. [194] The amount paid by CBSA to each province, more than $26 million in total in 2013, reflects the extent to which CBSA relies on provinces to administer detention across Canada.[195] Over the span of nine fiscal years, the annual cost associated with the administration of detention have risen by over $20 million, with nearly 30,000 more detention days per year. [196]

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.

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.[197] Approximately 30% of all detention occurred in a facility intended for a criminal population, while the remaining occurred in dedicated IHCs.[198] A Red Cross Society report notes that, "CBSA held 2247 persons in immigration detention in Ontario provincial correctional facilities" in 2012.[199]

a. 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."

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 area[200] (as the Vancouver IHC, located in the basement of the airport, is designed for short stays only).[201]

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."[202] Another document listed transfer to a jail as an appropriate disciplinary measure if a staff member witnesses "unacceptable behaviour."[203] None of these factors are set out in the IRPA or IRPR.

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."[204] 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."[205]

A 2011 study completed for the 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.[206] However, detainees with such symptoms are usually transferred to a provincial jail, "especially if the detainee is agitated or aggressive".[207] 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.[208]

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. 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 to 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. [209]

b. Jurisdictional overlap or black hole

Immigration detainees held in provincial jails are under both provincial and federal jurisdiction.[210] This leads to myriad issues in terms of who is ultimately accountable for the conditions of confinement, including access to mental health care.

Whereas CBSA is clearly authorized by the *CBSA Act* to enter into agreements with the provinces[211], 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."[212] 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.[213]

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.)[214] Neither Ontario's *Ministry of Correctional Service Act*[215] nor the corresponding regulations[216] 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."[217] The website also notes that immigration status is a factor that is considered when determining prisoner security classification.[218]

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."[219]

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.[220] In addition, CBSA is rarely notified about segregation,[221] punishment, or transfer of immigration detainees to other facilities.[222]

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 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.

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.[223] 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 December 26, 2012.[224] 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.[225] Clearly, CBSA does not keep close tabs on immigration detainees held in provincial jails.

c. <u>Challenging detention in provincial jail</u>

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.[226] 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.[227]

C. 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.

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.[228] In 2006, the Red Cross entered into an MOU with CBSA, which mandates that it monitor the conditions of persons detained under the IRPA.[229] 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."[230]

From 2011-2013, the Red Cross did not visit any correctional facility in Ontario,[231] because it had not been granted access to do so.[232] 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."[233]

VI. 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."[234] 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."[235]

Nevertheless, we respectfully submit that Canada's treatment of immigration detainees with mental health issues violates several articles of the ICCPR; we submit that it constitutes:

- arbitrary detention (art 9);
- cruel, inhuman and degrading treatment (arts 7, 10);
- discrimination on the basis of disability (arts 2, 9, 26); and
- a violation of the right to challenge detention before a court (art 9).

A. Arbitrary detention (art 9)

Article 9(1) protects liberty and security of the person and protects against arbitrary detention.[236] The right to liberty and security of the person is enshrined in other international[237] treaties to which Canada is a party, and is the first substantive right protected in the *Universal Declaration of Human Rights*.[238] 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.[239]

Article 9 applies equally to citizens and non-citizens detained by a state party.[240] The Committee established more than three decades ago that the right to liberty and security of person is applicable to all deprivations of liberty, including immigration control.[241] This continues to be supported in the Committee's recent views.[242] 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.[243]

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.[244] Detention may be arbitrary if it is lacks reasonableness, necessity, or proportionality.[245] Arrest or detention that lacks a legal basis is also arbitrary.[246] Accordingly, any deprivation of liberty must be in accordance with grounds and procedures that are established by law.[247]

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.[248] Therefore, detention may by authorized by law and nonetheless be arbitrary.[249] Legislation that allows wide executive discretion in authorizing or reviewing detention may be an insufficiently precise basis for deprivation of liberty.[250]

Precise laws imposing deprivation of liberty must also be accessible, and foreseeable in their application, in order to avoid all risk of arbitrariness.[251] 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.[252]

Three key aspects of Canada's immigration detention regime are not adequately prescribed by law, and are therefore arbitrary and may 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,[253] and CBSA has legal authority to form contracts with governmental branches (including the provinces) in order to "carry out its programs,"[254] 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. 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, [255] 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,[256] and highlighted the need for Memorandums of Understanding (MOUs).[257] 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."[258]

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.[259] 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,[260] or risk of interference with collecting evidence.[261] The reasons for detention must also be necessary, reasonable, and proportional to the legitimate purpose for which it is being used.[262] This is echoed in UNHCR Detention Guideline 4.2.[263] Detention without this appropriate justification is arbitrary.[264]

To establish necessity and proportionality of detention, the government must show that less intrusive measures were considered and were found to be insufficient.[265] Less invasive means of achieving the same ends may include reporting obligations, sureties, or other conditions to prevent absconding.[266] Consideration of alternatives to detention is part of an overall assessment of the necessity, reasonableness, and proportionality of detention.[267] Appropriate screening and assessment methods can aid decision makers in determining whether detention is appropriate in a particular circumstance.[268]

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.[269] Victims of trauma or torture, and asylum seekers with disabilities are especially vulnerable.[270] The UNHCR Guidelines provide that "as a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments should not be detained.[271]

There is a legislative requirement to consider alternatives to detention in s. 248(e) of the *IRPR*,[272] 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.[273] 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.[274]

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.

We submit that the 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.

c. Lengthy and indefinite detention is arbitrary

Prolonged detention is more likely to be considered arbitrary.[275] The Committee and regional courts maintain that, in order to avoid arbitrariness, the law must provide for time limits that apply to detention,[276] and clear procedures for imposing, reviewing and extending detention. [277]

The WGAD affirms that when a person is detained due to his or her irregular immigration status, "a maximum period should be set by law and the custody may in no case be unlimited or of excessive length."[278] A time limit on immigration detention is called a "presumptive period" and varies between 90 and 180 days in the United States[279] and across Europe.[280]

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."[281]

Canada has no maximum length of immigration detention or "presumptive period" prescribed in law. Moreover, the detention review process does not, in practice, prevent long-term and indefinite detention. We are gravely concerned that this results in arbitrary detention.

The WGAD recently 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 years[282] Michael was detained based by CBSA's inability to confirm his identity, and the lack of cooperation by Cameroon's consulate.[283] The WGAD noted 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."[284] 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.[285]

B. Cruel, inhuman and degrading treatment (arts 7, 10)

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.[286] The aim of this provision is to "protect both the dignity and the physical and mental integrity of the individual."[287] The prohibition in Article 7 is "complemented"[288] by the positive obligations in Article 10.

Article 10 is a more specific application of the general right to freedom from torture or other cruel, inhuman or degrading treatment or punishment.[289] 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.[290]

The Committee 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.[291]

The Special Rapporteur on the human rights of migrants 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.[292] 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.[293]

According to the Committee, "any necessary detention [of migrants] should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons."[294] To protect against ill treatment, as well as arbitrary detention, detainees should be held only in facilities "officially acknowledged as places of detention."[295]

We submit that Canada routinely detains individuals with severe mental illnesses – including individuals diagnosed with schizophrenia, bipolar disorder, severe depression, and suicidal ideation – in provincial maximum security 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.

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.[296] 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.[297]

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.[298] This is particularly important in light of the clear evidence that detention leads to significantly deteriorated physical and mental health.[299]

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.[300] While in detention, detained asylum seekers should be provided medical treatment where needed, including psychological counseling where it is appropriate.[301] 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."[302]

We submit 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.[303] 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.[304] According to the UN Committee Against Torture, providing for a maximum length of detention in law is an important safeguard against indefinite detention.[305] The longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment.[306] In particular, States must take the mental health of immigration detainees into account in the context of prolonged or indefinite detention.[307] In two cases[308] concerning asylum seekers who arrived by boat to Australia, the 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."[309]

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, some had been in detention for over a year. The uncertain, 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 (arts 2, 9, 26)

We submit 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 Committee has indicated in several Concluding Observations that disability is a ground of discrimination that falls under "other status" under articles 2 and 26 and that may attract the protection of the Convention.[310]

According to the Committee, Article 9 of the ICCPR prohibits the justification of a deprivation of liberty on the basis of disability.[311] Moreover, Article 14 of the *Convention on the Rights of Persons with Disabilities* (CRPD),[312] to which Canada is a party, protects liberty and security of the person, and affirms that there can be no deprivation of liberty due to disability. [313] Individuals with mental health issues are explicitly included in the scope of the term "disability" in CRPD Article 1.[314]

Even when measures are only partly justified by the person's disability, they are discriminatory and violate Article 14 of the CRPD:[315] 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."[316] 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."[317]

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."[318] "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.[319] 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.

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

D. Violation of the right to challenge detention before a court (art 9)

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.[320] The object of the right is release from ongoing unlawful detention, either unconditional or conditional.[321] Therefore, the reviewing court must have the power to order release from the unlawful detention.[322]

The "court" should ordinarily be a court within the judiciary.[323] 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.[324] The review must have a "judicial character and provide guarantees appropriate to the type of deprivation of liberty in question."[325] Therefore, it is not always necessary that the review meet the same standard as is required for criminal or civil litigation.[326] 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."[327]

The European[328] 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.[329] Legal assistance must be provided to the extent necessary for an effective application for release.[330]

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.[331] Furthermore, the more the consequences of a proceeding resemble criminal sanction, the stronger the protections must be.[332] 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).[333] In concluding, the Court held that there was a resulting violation of the right to take proceedings before a court.[334]

Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.[335] However, where an individual becomes mentally ill during his detention, this is "a sufficient ground for a prompt and substantive review of his detention."[336]

To facilitate effective review, detainees should be afforded prompt and regular access to counsel.[337] However, access to legal counsel that is inconvenienced by the fact that the place of detention is in a remote location does not violate Article 9.[338] Detainees should be informed (in a language they understand) of their right to initiate proceedings for a decision on the lawfulness of their detention.[339]

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.[340] 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.[341] 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 ability to pursue judicial review of detention decisions, the remedy is ineffectual. Firstly, application for judicial review requires leave,[342] which results in delay of between three months to a year,[343] 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.

Appendix: Recommendations to Canadian Authorities

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.

To the Canadian government and lawmakers:

1. Create an independent body or 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, regulations and policies 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 vulnerable migrants, including 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 and treatment 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 of 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 those with mental health issues and victims of torture and, and to accurately assess the risk posed by an individual detainee.

7. Provide training to CBSA officers on mental health, 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, 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:

    a. 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; and

    b. 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.

11. 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.

12. 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:

13. Ensure that Immigration Division Members receive adequate training on mental health, human rights, diversity, and viable alternatives to detention.

14. Reinstate the Interim Federal Health Program to ensure that migrants are able to access essential health care services, including mental health care and medication, in the community.

To provincial governments:

15. 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 detainee; and

    b. CBSA staff is regularly present at all provincial facilities that house immigration detainees.

16. 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.

17. Ensure consistent and meaningful access to adequate in-person, health care (including mental health care), legal counsel, community supports, and spiritual and family supports.

18. Allow for regular, independent monitoring by the Canadian Red Cross Society of provincial jails that house immigration detainees, and commit to implementation of any recommendation received.

19. Provide training to correctional staff on immigration detention, mental health, human rights, and diversity.

20. 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.

21. 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:

22. 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.

23. In relation to detention review hearings:

    a. interpret the “clear and compelling” test narrowly to allow for meaningful *de novo* review of the decision to continue detention.

    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:

24. Conduct in-person visits with clients whenever possible and at least once at the outset of the retainer.

25. Communicate with clients more effectively about the detention process (e.g. why legal counsel cannot attend every detention review) and what they are doing behind the scenes to end detention.

26. 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:

27. 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.

28. 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.

29. 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.

[1] For the purposes of this submission, 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.
[2] We anonymized quotes from counsel after many expressed fear that speaking out against CBSA would negatively impact their current and future clients.
[3] Canada Border Services Agency, "Detainees Disaggregated by Age, Gender and Calendar Year" (obtained through access to information request by MacDonald Scott) [CBSA, *Detainees Disaggregated]*.
[4] 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*].
[5] CBSA, *Detentions at a Glance, supra* note 4.
[6] CBSA, *Number of Detentions 2013, supra* note 4.
[7] Canadian Red Cross Society, *Annual Report on Detention Monitoring Activities in Canada, Confidential* (2012-2013), at 16 [CRCS, *Annual Report 2012-2013*].
[8] CBSA, *Number of Detentions 2013, supra* note 4.
[9] 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"].
[10] For the purposes of this submission, 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/>.)
[11] Canada Border Services Agency, "Detainee – Legislative Grounds" (2004-2013) (obtained through access to information request by MacDonald Scott, A-2014-04644/STH)
[12] *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.
[13] CRCS, *Annual Report 2012-2013 supra* note 7 at 8.
[14] 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"]
[15] 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*].
[16] 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"].
[17] Complaint/Petition on behalf of Michael Mvogo to the Working Group on Arbitrary Detention, UNHCR (2013).
[18] *A.H.G. v Canada,* UNHRC Communication No. 2091/2011, UN Doc CCPR/C/113/D/2091/2011 (2015) at para 10.4.
[19] 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.
[20] *Ibid* at 4.
[21] 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]*.
[22] *Ibid.* at para 46.
[23] UNHCR, *Global Roundtable on Alternatives to Detention, supra* note 15 at para 10.
[24] UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 21 at para 48.
[25] UNHCR, *Global Roundtable on Alternatives to Detention, supra* note 15 at para 11.
[26] UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 21 at para 43.
[27] UNHCR, *Global Roundtable on Alternatives to Detention, supra* note 15at para 11.

[28] 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"].
[29] Cleveland et al, "Psychiatric Symptoms associated with brief detention", *supra* note 14.
[30] 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).
[31] Cleveland et al, "Psychiatric Symptoms associated with brief detention", *supra* note 14, at 414.
[32] *Ibid* at 413.
[33] *Ibid* at 415.
[34] *Ibid.*
[35] 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.
[36] 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"]
[37] Interview of Dr. Lisa Andermann, Psychiatrist at Mount Sinai Hospital (26 February 2015); Interview of Branka Agic, Manager, Health Equity, Centre for Addiction and Mental Health Toronto (24 February 2015).
[38] Interview of Michael L Perlin, Professor at New York Law School (5 February 2015).
[39] Canada Border Services Agency, "Annex A, Statement of Work, Contract between CBSA and TBP" (No. 47636-106168/001/TOR).
[40] Bondfield Construction, "Correctional Facilities: Central Ontario East Correctional Facility," online: <www.bondfield.com/portfolio/correctional-facilities/central-ontario-east-correctional-facility.php>.
[41] *Ibid.*
[42] *Correctional and Conditional Release Act*, SC 1992 c 20, s 16(1)(b) [*CCRA*].
[43] CBSA, *Number of Detentions 2013, supra* note 4.
[44] Optimus|SBR, *Facility and Service Delivery Options, Analysis and Recommendations Report: Prepared for the Ministry of Community Safety and Correctional Services* (2015) at 17 [Optimus|SBR, *Facility and Service Delivery Options*].
[45] *Ibid* at 18.
[46] 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>.
[47] *Ibid* at 15.
[48] Optimus|SBR, *Facility and Service Delivery Options, supra* note 44 at 11.
[49] *Ibid* at 4.
[50] *Ibid* at 20.
[51] *Ibid* at 20.
[52] Accused on pre-trial detention, or those sentenced for a summary conviction offence to a term of less than 2 years. *Correctional and Conditional Release Act*, SC 1992 c 20, s 16(1)(b) [*CCRA*].
[53] 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
[54] *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 54-61 [*IRPA*].
[55] *Immigration and Refugee Protection Regulations,* SOR/2002-227, s 248(e) [*IRPR*].
[56] The immigration detention regime is outlined in Division 6 of *IRPA* and Part 14 of *IRPR*.
[57] *IRPA*, *supra* note 54, 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>.
[58] *IRPA*, *supra* note 54, s 4(2).
[59] *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.
[60] *Ibid*, ss 6(1) and 6(2).
[61] 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"].

[62] *Canada Border Services Agency Act,* SC 2005, c 38 [*CBSA Act*].
[63] *Ibid,* s 8(1).
[64] *Ibid,* s 5(1).
[65] 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"].
[66] Canada Border Services Agency, "CBSA Enforcement Manual" (2009) (obtained through access to information request by the IHRP, redacted, A-2013-16378).
[67] 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.
[68] *Ibid* at para 84.
[69] Citizenship and Immigration Canada, "Operational bulletins and manuals," online: <http://www.cic.gc.ca/English/resources/manuals/index.asp>.
[70] Citizenship and Immigration Canada, "ENF 20 Detention" (26 September 2007) [CIC, "ENF 20"].
[71] *Ibid,* s 1.
[72] *IRPA*, *supra* note 54, ss 53-61.
[73] *Ibid*, s 55.
[74] **Summary of *IRPA* Considerations & Requirements for Detention**

Section	Legal status	Reasonable grounds to believe is: **Flight Risk**	**Danger to public**	**Identity**	**Complete Exam**	**Inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality**	Arrest warrant required?	Detention within or upon entry to Canada?
55(1)	Permanent 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	*Required* upon entry Within Canada

[75] *IRPA*, *supra* note 54, ss 55(1), 55(2(a)).

[76] *Ibid,* s 55(3(a)).
[77] *IRPR, supra* note 55, 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.
[78] *IRPA*, *supra* note 54, ss 55(1), 55(2)(a).
[79] *Ibid,* s 55(3)(b).
[80] *IRPR, supra* note 55, s 246.
[81] *Ibid,* ss 246(d(i)), 246(f(i)).
[82] *Ibid*, ss 246(d(ii)), 246(f(ii)).
[83] *Ibid*, ss 246(e(i)(ii)(iii)), 246(g(i)(ii)(iii)).
[84] *Ibid,* s 246(b).
[85] *Ibid*, s 246(c).
[86] *Ibid*, s 246(a).
[87] CIC, "ENF 20", *supra* note 70, s. 5.6.
[88] *Ibid.*
[89] *Ibid.*
[90] *IRPA*, *supra* note 54, s 55(2)(b).
[91] *IRPR, supra* note 55, s 247(1).
[92] *IRPA*, *supra* note 54, s 55(3)(a).
[93] *Ibid,* s 55(3.1).
[94] *IRPR, supra* note 55, s 248(e).
[95] CIC, "ENF 20", *supra* note 70, s. 5.2.
[96] *IRPA*, *supra* note 54, s 57(1).
[97] CIC, "ENF 20", *supra* note 70, s 10.
[98] *IRPA*, *supra* note 54, s 56(1).
[99] *Ibid,* s 56(1).
[100] *Ibid,* s 56.
[101] CIC, "ENF 20", *supra* note 70, s 5.11.
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid,* s 5.12.
[105] *Ibid,* s 5.11.
[106] CBSA, "Arrests and Detentions", *supra* note 65.
[107] *Ibid.*
[108] CIC, "ENF 20", *supra* note 70, s 5.13.
[109] 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"].
[110] *Ibid.*
[111] *Ibid.*
[112] *IRPA*, *supra* note 54, s 54.
[113] *Ibid,* s 172; *Immigration Division Rules,* SOR/2002-229 [*IDR*].
[114] *IRPA*, *supra* note 54, 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"].
[115] *IRPA*, *supra* note 54, Division 7: Right of Appeal; *IRPA*, *supra* note, 54 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"].
[116] *IRPA*, *supra* note 54, s 57(1), 57(2).
[117] *Ibid,* s 57(2).

[118] *IDR, supra* note 113, s 9(1) and (2).
[119] *IRPA*, *supra* note 54, s 167(1).
[120] IRB, "Detention Review Process", *supra* note 115.
[121] *Ibid.*
[122] *Ibid.*
[123] *IRPA*, *supra* note 54, s 173(c) and (d)
[124] *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*].
[125] *IRPA*, *supra* note 54, s 58 (1)(a)-(e).
[126] *IRPR, supra* note 55, 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.
[127] *IRPA*, *supra* note 54, s 61(b).
[128] *IRPR, supra* note 55, s 248 (a)-(e).
[129] IRB, "Chairperson Guideline 2", *supra* note 114, s 3.1.3; *Sahin* v *Canada (Minister of Citizenship and Immigration)*, 1995 1 FC 214, 85 FTR 99 [*Sahin*].
[130] *Thanabalasingham*, *supra* note 124 at paras 6-8.
[131] 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*].
[132] *Thanabalasingham*, *supra* note 124 at para 10.
[133] *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 131 at para 12.
[134] *Ibid* at para 24.
[135] *Ibid* at para 11.
[136] *Odosashvili* v *Canada (Minister of Citizenship and Immigration),* 2014 FC 308, [2014] FCJ No 317 at para 22.
[137] *Bruzzese* v *Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230, [2014] FCJ No 261 at para 80-81 [*Bruzzese*].
[138] *Canada (Minister of Citizenship and Immigration) v B072*, 2012 FC 563, 2012 FCJ No 584 at para 28.
[139] See, for example, *Bruzzese, supra* note 137 at para 79-81.
[140] *Ibid* at para 78.
[141] IRB, "Detention Reviews Finalized by Member", *supra* note 9.
[142] *Ibid.*
[143] *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 118, [2002] SCR 3.
[144] *Charkaoui* v *Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 25 [*Charkaoui*].
[145] *Dehghani* v *Canada (Minister of Employment & Immigration)*, [1993] 1 SCR 1053, [1993] SCJ No 38 (SCC) at para 49.
[146] *S(P)* v *Ontario*, 2014 ONCA 900, 123 OR (3d) 651.
[147] *Ibid* at para 112.
[148] *IRPA*, *supra* note 54, s 58(1).
[149] IRB, "Chairperson Guideline 2", *supra* note 114, s 3.6.1.
[150] *Ibid*, s 3.6.3.
[151] *IRPA*, *supra* note 54, s 58(3).
[152] CIC, "ENF 20", *supra* note 70, s 5.11.
[153] Email interview of Dr. Meb Rashid (3 March 2015).
[154] CBSA, "Detentions and removals programs – evaluation study"*, supra* note 109.
[155] *Sahin, supra* note 129 at para 25.
[156] *IRPR, supra* note 55, s 248. S 248 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

[157] *Sahin, supra* note 129 at para 30.
[158] *Ibid*.
[159] *Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381, [2002] FCJ No 490, at para 33.
[160] *Canada (Minister of Citizenship and Immigration) v Panahi-Dargahloo*, 2010 FC 647, 2010 CF 647, at para 58.
[161] *Ibid* at para 58.

[162] *Ibid* at para 10.
[163] *Ibid* at para 62-66.
[164] *Charkaoui, supra* note 144.
[165] *Ibid* at para 107.
[166] IRB, "Chairperson Guideline 2", *supra* note 114, s 1.1.7.
[167] *Thanabalasingham*, *supra* note 124 at para 24; *Canada (Minister of Citizenship and Immigration) v Li,* 2008 FC 949, [2008] FCJ No 1992 [*Li*].
[168] 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 129 at para 30.
[169] 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."
[170] *IRPA*, *supra* note 54, s 62; *IRPA*, *supra* note 54, Division 7: Right of Appeal.
[171] *Ibid,* Division 7: Right of Appeal; *Ibid*, s 72; IRB, "Detention Review Process", *supra* note 115.
[172] *Ibid*, s 72; IRB, "Detention Review Process", *supra* note 115.
[173] *IRPA*, *supra* note 54, s 72(2)(d).
[174] *Ibid*, s 74(a).
[175] *Ibid*, 74(b).
[176] *Canada (Minister of Citizenship and Immigration)* v *Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 58 [*Khosa*].
[177] *Li, supra* note 167 at paras 10-16.
[178] *Khosa*, *supra* note 176 at para 59.
[179] *Ibid*.
[180] *Walker* v *Canada (Minister of Citizenship and Immigration*, 2010 FC 392, [2010] FCJ No 474.
[181] *Ibid* at "Judgment."
[182] *Poirier* v *Federal Training Centre* (1988), 26 FTR 215 (Fed TD) at para 11.
[183] *Ibid*.
[184] *Ibid* at para 40.
[185] *Khela* v *Mission Institution*, 2014 SCC 24, [2014] 1 SCR 502 at para 55 [*Khela*].
[186] *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] BCWLD 7778; *Khela, supra* note 185 at para 55; *Kippax, Alan and Attorney General of Canada*, 2014 ONSC 3685, [2013] OJ No 6324.
[187] *Chaudhary* v *Canada (Minister of Public Safety & Emergency Preparedness)*, 2014 ONSC 1503, 251 ACWS (3d) 121, at para 6.
[188] *Ibid* at para 6.
[189] Interview of Barbara Jackman (17 March 2015) [Interview of Barbara Jackman].
[190] *Singh* v *Canada (Minister of Employment & Immigration)* [1985] 1 S.C.R. 177 at para 35.
[191] Interview of Barbara Jackman, *supra* note 189.
[192] Vic Toews, "Designation and Delegation by the Minister of Public Safety", *supra* note 61.
[193] CBSA, "Detentions and removals programs – evaluation study"*, supra* note 109. 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."
[194] 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"].
[195] Canada Border Services Agency, "2013 CBSA detention costs by province" (obtained through access to information request by MacDonald Scott, A-2014-00077/STH). 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":

Province	**2013 CBSA detention costs**	**Proportion of Total**
Ontario	$20,628,772.71	77.9%
Atlantic	$67,671.75	0.3%
British Colombia	$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%**

[196] 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). Immigration detention is very expensive. A request for files pursuant to access to information demonstrates rising costs likely correlated to increasing "detention days":

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

[197] CBSA, *Detainees Disaggregated, supra* note 3.
[198] CBSA, *Detention at a Glance, supra* note 4.
[199] CRCS, *Annual Report 2012-2013 supra* note 7 at 16.
[200] CBSA, "Arrests and Detentions", *supra* note 65.
[201] 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"].
[202] *Ibid* at 3.
[203] 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"].
[204] 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*"].
[205] CBSA, "Arrests and Detentions", *supra* note 65.
[206] Nakache, "The Human and Financial Cost of Detention", *supra* note 194 at 81.
[207] *Ibid*.
[208] *Ibid*.
[209] CBSA, "National Standards & Monitoring Plan"*, supra* note 203; CBSA, "After Incident Report", *supra* note 201 at 2. At CBSA facilities (i.e. IHCs) 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. 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."
[210] 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).
[211] *CBSA Act, supra* note 62, s 5(1)(c).
[212] CBSA, "National directive on the transfer of medical information"*, supra* note 36.
[213] CRCS, *Annual Report 2012-2013 supra* note 7 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).

[214] "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).
[215] *Ministry of Correctional Services Act,* RSO 1990, C 33 [*MCSA*].
[216] *Ministry of Correctional Services Act Regulation 778*, O Reg 37/13 [*MCSAR*].
[217] 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?__utma=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%7Cutmcct=/english/default.html&__utmv=1.%7C1=tag_visitor_type=external=1&__utmk=80804631>.
[218] 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>.
[219] CRCS, *Annual Report 2012-2013 supra* note 7 at 4.
[220] Nakache, "The Human and Financial Cost of Detention", *supra* note 194 at 88.
[221] 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).
[222] Nakache, "The Human and Financial Cost of Detention", *supra* note 194 at 88.
[223] 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"].
[224] Cain, "CBSA learned of its own detainee's death by accident", *supra* note 223.
[225] CBSA, "Email correspondence", *supra* note 223: Cain, "CBSA learned of its own detainee's death by accident", *supra* note 223.
[226] *Canada (Citizenship and Immigration) v Jama*, [2007] IDD No 6, 2007 CanLII 12831 (CA IRB).
[227] *Ibid*.
[228] CRCS, *Annual Report 2012-2013 supra* note 7 at 8.
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid* at 14.
[232] *Ibid* at 16. 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.
[233] *Ibid* at 6.
[234] *IRPA*, *supra* note 54, s 3(2)(b).
[235] *Ibid*, s 3(3)(f).
[236] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976) [*ICCPR*].
[237] *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*].
[238] *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*].
[239] 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*].
[240] *ICCPR*, *supra* note 236 art 2.
[241] 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*].
[242] *Shafiq v Australia*, UNHRC Communication No 1324/2004, UN Doc CCPR/C88/D/1324/2004 (2006) at para 7.2 [*Shafiq*].
[243] 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*].
[244] *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.
[245] UNHRC, *General Comment No 35, supra* note 243 at para 12; *A v Australia, supra* note 244 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 242 at para 7.2.

[246] *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*].
[247] *ICCPR*, *supra* note 236, art 9(1); *CRPD, supra* note 237, art 14; *ICRMW*, *supra* note 237, 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 246 at para 6.5; UNHRC, *WGAD Report 2012, supra* note 239 at para 38.
[248] UNHRC, *General Comment No 35, supra* note 243 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.
[249] *Ibid.* at para 12.
[250] *Rafael Ferrer-Mazorra et al v USA* (2001), Inter-Am Comm HR, N 51/01 at paras 222 and 226.
[251] *Amuur*, *supra* note 248 at para 50; *Soldatenko v Ukraine*, No 2440/07, [2008], II ECHR 302 at para 111.
[252] *Abdolkhani and Karimnia v Turkey*, No 30471/08, [2009] IHRL 3633 at paras 131-136 [*Abdolkhani*]; *Amuur*, *supra* note 248 at para 53; *Vélez Loor v Panama* (2010), Inter-Am Ct HR (ser C) No 218, at para 120 [*Vélez Loor*].
[253] *CBSA Act, supra* note 62, s 12(1).
[254] *Ibid*, s 5(1)(c).
[255] CBSA, "Arrests and Detentions", *supra* note 65.
[256] 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.
[257] *Ibid.*
[258] CRCS, *Annual Report 2012-2013 supra* note 7 at 16.
[259] *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 243 at para 18.
[260] UNHRC, *General Comment No 35, supra* note 243 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.
[261] *Shafiq, supra* note 242 at para 7.2; *A v Australia, supra* note 244 at para 9.2.
[262] UNHRC, *General Comment No 35, supra* note 243 at para 12; *A v Australia, supra* note 244 at para 9.2; *FKAG, supra* note 245 at para 9.3; *Shafiq, supra* note 242 at para 7.2.
[263] 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*].
[264] *A v Australia, supra* note 244 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*].
[265] *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 Hezegovina*, 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 CCRP/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (2008) at para 7.2 [*Shams and ors*]; *Kwok, supra* note 264 at para 9.3.
[266] *Baban and Baban v Australia,* UNHRC Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) at para 7.2; *Bakhtiyari*, *supra* note 259 at para 9.3.
[267] UNHCR, *Detention Guidelines, supra* note 263, guideline 4.3 at para 35.
[268] *Ibid* at para 19.
[269] *Ibid* at para 39.
[270] *Ibid* at para 49-50.
[271] *Ibid* at para 63.
[272] *IRPR, supra* note 55, s 248(e).
[273] CIC, "ENF 20", *supra* note 70, s 5.13.
[274] *Ibid*, s 5.11.
[275] 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*].
[276] *Vélez Loor, supra* note 252 at para 117.
[277] *Abdolkhani,* supra note 252 at para 133, 135; *Shafiq, supra* note 242 at para 7.2.
[278] 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*].
[279] *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.
[280] 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).

[281] 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.
[282] 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.
[283] *Ibid* at para 24.
[284] *Ibid*.
[285] *Ibid*.
[286] 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).
[287] 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.
[288] *Ibid*.
[289] ICJ, *Practitioners Guide, supra* note 275 at 196.
[290] UNHRC*, General Comment No 21*: *Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th Sess, (1992) at para 2.
[291] *C v Australia*, *supra* note 265 para 8.4 [*C. v Australia*].
[292] UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 21 at recommendation (j).
[293] *Ibid* at para 46.
[294] UNHRC, *General Comment No 35, supra* note 243 at para 18; UNHRC, *WGAD Deliberation No 5*, *supra* note 278, principle 9; UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 21 at para 33.
[295] UNHRC, *General Comment No 35, supra* note 243 at para 58.
[296] *ICCPR*, *supra* note 236, art 10; ICJ, *Practitioners Guide, supra* note 275 at 200.
[297] *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663 C (XXIV), UNESCOR, 1957 and 1977 at para 82(2) (*SMRTP*).
[298] *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 Loor, supra* note 252 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*].
[299] UNGA, *Report of the Special Rapporteur on the human rights of migrants*, *supra* note 21 at para 48.
[300] *Algür*, *supra* note 298 at para 44; *Vélez Loor, supra* note 252 at paras 220, 225, 227; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 298, principle 24; *SMRTP, supra* note 297 at para 22(1).
[301] ICJ, *Practitioners Guide, supra* note 275 at 204.
[302] UNHCR, *Detention Guidelines, supra* note 263 at para 48(vi).
[303] CBSA, "National directive on the transfer of medical information"*, supra* note 36.
[304] ICJ, *Practitioners Guide, supra* note 275 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*].
[305] *Concluding Observations on Costa Rica*, *supra* note 304 at para 10.
[306] ICJ, *Practitioners Guide, supra* note 275 at 201.
[307] *Shafiq, supra* note 242.
[308] *FKAG, supra* note 245; *MMM et al v Australia*, UNHRC Communication No. 2136/2012*,* UN Doc CCPR/C/108/D2136/2012 (2013) [*MMM et al*].
[309] *Ibid* at para 9.8; *MMM et al*, *supra* note 308 at para 10.7.
[310] *Concluding Observations on Panama* (2008), CCPR, UN doc CCPR/C/P AN/CO/3, at para 8; *Concluding Observations on Sweden* (2009), CCPR, UN doc CCPR/C/SWE/CO/6, at para 10; *Concluding Observations on Poland* (2010), CCPR, UN doc CCPR/C/POL/CO/6, at para 5; *Concluding Observations on Belgium* (2010), CCPR, UN doc CCPR/C/BEL/CO/5, at para 11; *Concluding Observations on Mongolia* (2011), CCPR, UN doc CCPR/C/MNG/CO/5, at para 10; *Concluding Observations on Dominican Republic* (2012), CCPR, UN doc CCPR/C/DOM/CO/5 at para 9,

[311] UNHRC, *General Comment No 35, supra* note 243 at para 19.
[312] *CRPD, supra* note 237.
[313] *Ibid*, art 14.
[314] *Ibid*, art 1.
[315] 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*]
[316] *Ibid*.
[317] *Ibid* at para 49.
[318] CBSA, "Arrests and Detentions", *supra* note 65.
[319] CBSA, "Information for People Detained under the *IRPA*", *supra* note 204.
[320] UNHRC, *General Comment No 8, supra* note 241 at para 1.
[321] UNHRC, *General Comment No 35, supra* note 243 at para 41.
[322] *A v Australia, supra* note 244 at para 9.5; *Shafiq, supra* note 242 at para 7.4; *Shams and ors, supra* note 265 at para 7.3.
[323] UNHRC, *General Comment No 35, supra* note 243 at para 45.
[324] UNHRC, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 90th Ses (2007), UN Doc CCPR/C/GC/32 at paras 18-22.
[325] *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 252 at para 107-109.
[326] *A and Others, supra* note 325 at para 203.
[327] *Bouamar*, *supra* note 325 at para 57.
[328] 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.
[329] *A and Others, supra* note 325 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.
[330] *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.
[331] *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 325 at para 217; *Chahal v The United Kingdom*, ECtHR, Application No 22414/93, 15 November 1996, at para 132.
[332] *Ibid* at para 79.
[333] *Ibid*.
[334] *Ibid* at para 80.
[335] UNHRC, *General Comment No 35, supra* note 243 at para 39.
[336] *Shafiq, supra* note 242 at para 7.3.
[337] UNHRC, *General Comment No 35, supra* note 243 at para 46.
[338] *A v Australia, supra* note 244 at para 9.6.
[339] UNHRC, *General Comment No 35, supra* note 243 at para 46; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, *supra* note 298, principles 13-14.
[340] *IRPA*, *supra* note 54, ss 56- 62, 72.
[341] IRB, "Chairperson Guideline 2", *supra* note 114, s 1.1.7; *Thanabalasingham*, *supra* note 124 at para 24; *Li, supra* note 167.
[342] *IRPA*, *supra* note 54, s 72(1).
[343] Interview of Barbara Jackman, *supra* note 189.