



OVERSIGHT AT THE BORDER

A Model for Independent Accountability
at the Canada Border Services Agency





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Oversight at the Border: A Model for Independent
Accountability at the Canada Border Services Agency

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EXECUTIVE SUMMARY

Every significant police agency in the country has some form of independent oversight or review body. This glaring gap in oversight must be urgently remedied.

CANADA BORDER SERVICES AGENCY (CBSA) officers have vast powers. As an agency responsible for enforcing Canada's customs and immigration laws, they have powers of arrest, detention, and search and seizure. At the borders, CBSA officers have an even wider range of powers than police. They can stop travellers for questioning, take breath and blood samples, and search, detain and arrest non-citizens without a warrant.

Yet despite these sweeping police powers, there is no independent civilian body to receive complaints, review CBSA's policies or officer conduct, or investigate allegations of misconduct. There is no independent investigation of potential criminal wrongdoing or negligence when someone is harmed or dies while in CBSA custody. There is no independent body with a mandate to look at the agency's policies and practices to ensure they respect the rights of the refugees, migrants, and Canadians officers interact with every day.

This is a highly unusual situation in Canada. Every significant police agency in the country has some form of independent oversight or review body, and in many cases, multiple such agencies. In light of a disturbing number of deaths of migrants in detention, deplorable conditions of prolonged confinement in immigration detention facilities, and numerous examples of egregious officer conduct, this glaring gap in oversight must be urgently remedied.

The BCCLA has a long history of advocating for effective civilian oversight and accountability for law enforcement. In this report, we propose a two-pronged approach to extending this kind of accountability to the CBSA. The BCCLA recommends two separate accountability mechanisms for the CBSA, one charged with providing real-time oversight of CBSA's policies and practices, and one charged

Despite sweeping police powers, there is no independent civilian body to receive complaints, review CBSA's policies or officer conduct, or investigate allegations of misconduct. This is a highly unusual situation in Canada.

with conducting investigations and resolving complaints. We make specific recommendations regarding the form these independent accountability mechanisms should take, and the components necessary to ensure effective, credible oversight and review of CBSA's activities.

We have been heartened to see over the past year that in light of sustained advocacy from a variety of organizations, independent oversight for CBSA seems to be on the horizon. We encourage decision-makers to consider the analysis and recommendations contained in this report when creating independent oversight for CBSA and debating the government's proposal.

While accountability for CBSA is much needed and long overdue, implementing CBSA oversight is no panacea. Oversight will not be sufficient to address longstanding problems in CBSA practice, in particular the long-standing practice of detaining immigrants—including children—indefinitely in correctional facilities, sometimes alongside maximum security federal inmates. The BCCLA will continue to work alongside other advocacy and human rights groups for changes to harmful CBSA practices, including prolonged immigration detention and detention of minors.

Independent oversight for CBSA seems to be on the horizon. We encourage decision-makers to consider the analysis and recommendations contained in this report when creating independent oversight for CBSA and debating the government's proposal.



INTRODUCTION

Vega Jiménez's death was preventable. A BC Coroner's Inquest determined that there were numerous mistakes on the part of CBSA and CBSA's contractors that, had they been avoided, might have made a difference.

IN THE EARLY MORNING of December 20, 2013, while in the custody and care of the CBSA, Lucía Vega Jiménez hanged herself in the Immigration Holding Centre several storeys below Vancouver International Airport. She was a 42-year-old woman who was in Canada without regular status, reportedly fleeing domestic violence in Mexico.¹ She had been stopped in a Vancouver transit station by transit police—partly on account of her Spanish accent, according to police officer testimony—and was turned over to the Canada Border Services Agency (CBSA). It was in CBSA's custody that she eventually died.²

Ms. Vega Jiménez's death was preventable. A BC Coroner's Inquest determined that there were numerous mistakes on the part of CBSA and CBSA's contractors (private security guards and a provincial correctional facility) that, had they been avoided, might have made a difference.³ Despite CBSA being aware that a nurse had determined that Ms. Vega Jiménez needed a mental health assessment—which CBSA admitted in its testimony at the Inquest—the assessment that was scheduled for her was cancelled and never rescheduled.⁴ The evidence at the Inquest suggested that this was due to poor communications, and also related to a drive on the part of CBSA officers to hasten her deportation.⁵

1 Verdict at the BC Coroner's Inquest into the death of Lucía Dominga Vega Jiménez, 7 October 2014, www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/inquest/2014/vega-jimenez-lucia-dominga-2013-0380-0004-verdict.pdf.

2 Josh Paterson, "Distressed, Afraid and Alone: Tragic story slowly unfolds at Lucía Vega Jiménez Inquest", 2 October 2014, bccla.org/2014/10/distressed-afraid-and-alone-tragic-story-slowly-unfolds-at-lucia-vega-jimenez-inquest/.

3 Verdict at the Coroner's Inquest, *supra* note 1.

4 *Ibid.*

5 *Ibid.*

Within 48 hours of being told, inaccurately, that she had no hope of applying to remain in Canada, Ms. Vega Jiménez hanged herself.

This drive to deport was also connected with the CBSA's failure to advise Ms. Vega Jiménez that she could still apply to stop her deportation if she might be subject to risk in her country of origin, even though the formal deadline had passed. CBSA was aware that she wanted to make such an application. However, internal emails in evidence at the Inquest showed that the CBSA officer on the file thought it was "unfortunate" that she wanted to make the application, and that Ms. Vega Jiménez was a "very frustrating Mexican removal!"⁶ Evidence at the Inquest also showed that Ms. Vega Jiménez was questioned without her lawyer, was asking for her lawyer, and was confused about her rights.⁷ Within 48 hours of being told, inaccurately, that she had no hope of applying to remain in Canada, Ms. Vega Jiménez hanged herself.⁸

While she was at the Immigration Holding Centre at the Vancouver airport, the evidence at the Inquest showed that the private security officers staffing the centre had failed to conduct their regular supervisory rounds of the facility, as required, and had falsified their reports.⁹ CBSA had failed to appropriately staff the facility with CBSA officers and, as was heard at the Inquest, failed to properly carry out its duty to ensure the proper management of the facility.¹⁰

CBSA did not disclose Ms. Vega Jiménez's death to the public, notifying only the RCMP and BC Coroner. Internal CBSA emails obtained through access to information requests show that CBSA management was deeply concerned about the story becoming public.¹¹ It decided not to notify the public, but prepared media lines in case the story got out. It considered not emailing a memo to CBSA staff with information about employee assistance counselling to CBSA members affected by the death, out of fear that the news might get out. Media reports suggested that Ms. Vega Jiménez's family had signed some kind of confidentiality agreement in relation to her death;

6 Paterson, *supra* note 2.

7 Verdict at the Coroner's Inquest, *supra* note 1.

8 *Ibid.*

9 Tara Carman, "Security guard falsified reports", *The Province* (2 October 2014), pressreader.com/canada/the-province/20141002/282544426534916.

10 Verdict at the Coroner's Inquest, *supra* note 1.

11 Tara Carman, "Lucia Vega Jimenez : Border services information censorship exposed", *Vancouver Sun* (4 December 2014), vancouversun.com/news/Lucia+Vega+Jimenez+Border+services+information+censorship+exposed/10437597/story.html.



CBSA's only response to this allegation was to say that it did not ask her family to sign such an agreement, but it was silent as to whether they had signed any other agreement.¹² To this date, there has been no clearer answer. Only once a fellow detainee who knew of Ms. Vega Jiménez's death contacted a reporter did the news become public. Following that, the CBSA largely refused to answer any questions about Ms. Vega Jiménez's death or the circumstances surrounding it.¹³

Each of the issues raised by the tragedy of Lucía Vega Jiménez's death, and its aftermath, are issues that call out for independent oversight and review of CBSA's conduct, from her treatment at the provincial correctional centre, where it was reported that she was bullied and harassed by prisoners,¹⁴ to the failure to deal appropriately with an identified mental health risk, to the failure

Every major police force in Canada has some kind of independent oversight or review body that can receive complaints and conduct investigations. But as the Inquest into Ms. Vega Jiménez's death concluded, there is "no independent, realistic method for immigrants to bring forward concerns or complaints." This is unacceptable.

to properly manage, staff and supervise the Immigration Holding Centre, to the failure to disclose her death publicly afterwards. There have been 14 other deaths in CBSA custody since 2000, and there have been a great many other incidents and systemic issues of different types and severity that demonstrate the absolute necessity of an independent oversight and review mechanism for the CBSA.

The BC Civil Liberties Association is one of several organizations that have been calling for this much needed independent oversight and review of CBSA for many years.¹⁵ Every major police force in Canada has some kind of independent oversight or review body that can receive complaints and conduct investigations.

But as the Inquest into Ms. Vega Jiménez's death concluded, there is "no independent, realistic method for immigrants to bring forward concerns or complaints." This is unacceptable.

In 2016, two more deaths occurred in CBSA custody in the span of just one week. In the aftermath of the deaths and sustained advocacy from rights and refugee groups,¹⁶ Minister of Public Safety Ralph Goodale committed to creating an independent oversight body for the CBSA, as part of the government's reforms to the country's national security framework.¹⁷ "The government is examining how best to provide the Canada Border Services Agency with an appropriate review

12 Pete McMartin, "Lucia Vega Jimenez — death behind a veil of secrecy", *Vancouver Sun* (30 January 2014), vancouversun.com/news/Pete+McMartin+Lucia+Vega+Jimenez+death+behind+veil+secrecy/9451632/story.html.

13 *Ibid.*

14 Paterson, *supra* note 2.

15 "Release—One year after Lucía Vega Jiménez's death, rights organizations condemn federal failure to make CBSA accountable" (12 February 2015), bccla.org/news/2015/02/release-one-year-after-lucia-vega-jimenezs-death-rights-organizations-condemn-federal-failure-to-make-cbsa-accountable/.

16 Christina McAllister, "Independent oversight needed to monitor border agency, advocates say" *CBC News* (31 March 2016), cbc.ca/news/politics/cbsa-refugee-immigrant-detention-oversight-1.3515087.

17 Michelle Zilio, "Ottawa mulls greater scrutiny of border agency after detainee deaths" *The Globe and Mail* (15 March 2016), theglobeandmail.com/news/politics/liberals-mull-improved-scrutiny-of-border-agency-amid-criticism-over-deaths/article29252389/.

mechanism,” said Mr. Goodale’s press secretary at the time.¹⁸ The government has also hired a former public servant, Mel Cappe, to study options for independent oversight for CBSA and report back on how best to accomplish it.¹⁹ This is welcome news.

This report makes specific recommendations regarding the form an independent accountability mechanism for the CBSA should take, and the necessary components to make it an effective, credible body for oversight and review of CBSA’s activities. These recommendations are informed by a comprehensive review of previous calls for oversight and accountability for CBSA, including the Maher Arar Inquiry conducted by Justice Dennis O’Connor,²⁰ the work of the Senate Standing Committee on National Security and Defence²¹ and the House of Commons Standing Committee on Public Safety and National Security,²² as well as recent reports assessing accountability and oversight structures for police.²³ The report also considers practices in other Commonwealth countries.

In addition, in preparing this report the BCCLA conducted interviews with 12 lawyers, advocates and service providers working with refugees and other newcomers to Canada, who shared their experiences and the experiences of their clients in dealing with CBSA. Their stories about concerning interactions their clients have had with CBSA, as well as stories gleaned from media reports, court cases, and the work of other human rights organizations,²⁴ illustrate why independent oversight and accountability of CBSA is so badly needed. In light of the sensitivity of many of these stories, we have kept the names of both clients and most of the professionals we interviewed confidential.

While accountability for CBSA is much needed and long overdue, implementing CBSA oversight is no panacea. Oversight will not be sufficient to address longstanding problems in CBSA practice, in particular the long-standing practice of detaining immigrants—including children—indefinitely in correctional facilities, sometimes alongside maximum security federal

18 *Ibid.*

19 Jim Bronskill, “Independent monitoring in store for Canada Border Services Agency” *The Canadian Press* (18 May 2016), globalnews.ca/news/3460577/canada-border-services-agency-oversight/.

20 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP’s National Security Activities* (Ottawa: December 2006) [O’Connor Report].

21 Senate Standing Senate Committee on National Security and Defense, *Vigilance, Accountability and Security at Canada’s Borders* (June 2015), sencanada.ca/content/sen/Committee/412/secd/rep/rep16jun15a-e.pdf [Vigilance, Accountability and Security].

22 Report of the House of Commons Standing Committee on Public Safety and National Security, *Protecting Canadians and their Rights: A New Road Map for Canada’s National Security*, (House of Commons, Canada: May 2017), ourcommons.ca/Content/Committee/421/SECU/Reports/RP8874869/securp09/securp09-e.pdf [Road Map].

23 Hon. Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Appendix C, (Queens Printer for Ontario, March 2016), policeoversightreview.ca/ReportoftheIndependentPoliceOversightReview.pdf, and Civilian Review and Complaints Commission for the RCMP, *Report into Workplace Harassment in the RCMP*, (16 May 2017), crcc-ccetp.gc.ca/en/report-workplace-harassment-rcmp.

24 See e.g., the work of the University of Toronto International Human Rights Program on immigration detention, including *Invisible Citizens: Canadian Children in Immigration Detention* (2017), ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf and “We have no rights”: *Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada* (2015), ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf.



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inmates. The government has recently completed public consultations on a new “National Immigration Detention Framework”,²⁵ and we look forward to further details about the government’s plans for immigration detention reform.

In this report, the BCCLA recommends two separate accountability mechanisms for the CBSA, one charged with providing real-time oversight of CBSA’s policies and practices, and one charged with conducting investigations and resolving complaints. The report proceeds in three parts: in Part 1, we describe the CBSA and its powers, including the existing and inadequate procedures that exist for complaints, and make the case for independent oversight. In Part 2, we overview the numerous recommendations for CBSA oversight made by inquiries, Parliamentary committees, and proposed legislation. In Part 3, we set out our recommendations for both an independent, civilian-led oversight commission and a civilian review and complaints body, describing in detail both the broad principles and specific requirements to ensure these bodies can provide credible, independent oversight and accountability for CBSA and its work.

25 CBSA, *CBSA's New National Immigration Detention Framework: A Summary of the Framework and Stakeholder Roundtable Discussions (August—December 2016)*, (January 2017), cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/menu-eng.html.

THE CASE FOR OVERSIGHT

MANDATE AND POWERS

The Canada Border Services Agency (CBSA) was created in 2003 by an order-in-council amalgamating Canada Customs (from the now-defunct Canada Customs and Revenue Agency) with border and enforcement personnel from the Department of Citizenship and Immigration Canada (CIC) and the Canadian Food Inspection Agency (CFIA). CBSA is responsible to the Minister of Public Safety. Its mandate is set out in its enabling statute, the *Canada Border Services Agency Act*,²⁶ to manage the movement of goods and people across Canadian borders. This mandate includes both facilitation and enforcement activities.

The CBSA administers more than 90 acts, regulations and international agreements. It has a staff of approximately 13,000 employees, including over 7,200 uniformed officers who staff 117 land-border crossings, 13 international airports, and over 1,000 other points across Canada, as well as at 39 international locations.²⁷

Under the *Immigration and Refugee Protection Act* (IRPA),²⁸ CBSA and Immigration, Refugees and Citizenship Canada (IRCC) are jointly responsible for administering Canada's immigration and refugee program. IRCC develops Canada's admissibility policies, which set the conditions for entering and remaining in Canada, while CBSA's Immigration Enforcement Program enforces compliance with IRPA.

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²⁶ SC 2005, c 38.

²⁷ Canada Border Services Agency, About the CBSA, cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html.

²⁸ SC 2001, c 27.



CBSA has vast powers to collect intelligence and detect, arrest, detain and remove people from Canada. At the borders, CBSA has even greater enforcement powers than the police. CBSA's powers include:

- preventing entry by people not legally allowed into Canada (inadmissible persons);
- conducting interviews with refugee claimants in which they have their first opportunity to explain why they wish to claim asylum;
- referring foreign nationals and permanent residents who are believed to have contravened the IRPA to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board (IRB);
- detaining refugee claimants and others on a range of grounds;
- engaging in proceedings for cessation of a person's refugee status if conditions in the country of origin change, and vacation of refugee status if the refugee claimant is alleged to have made a misrepresentation;
- conducting inland enforcement, which includes carrying out arrests, detention and removal of individuals it believes are not permitted in Canada; and
- in some cases, issuing removal orders directly and sending the person out of Canada without an admissibility hearing.

The CBSA also enforces Canadian customs laws, which regulate the goods and currency that may enter Canada. This responsibility includes reporting certain cross-border financial transactions to the Financial Transactions and Reports Analysis Centre (FINTRAC) and/or the RCMP. In enforcing customs laws and other laws related to the border, CBSA officers have the power to search individuals and baggage and seize certain goods, including currency.

CBSA and the RCMP share complementary and integrated roles and responsibilities. CBSA officers staff all points of entry into Canada, at which they screen people and goods and conduct interviews and secondary examinations. Along the rest of the border, between official points of entry, the RCMP is responsible for enforcing Canadian laws with respect to the flow of goods and people across Canada's borders. The role of the two agencies is thus highly complementary. Similarly, CBSA's activities with respect to immigration issues that intersect with national security issues are also integrated with the activities of Canada's spy agency, the Canadian Security Intelligence Service (CSIS).

The CBSA is highly integrated into Canada's national security landscape. It works closely with IRCC, RCMP, CSIS and other Canadian and international agencies in its screening functions at points of entry. The RCMP and the CBSA share responsibility for gathering criminal intelligence to assist investigations relating to cross-border national security issues.

The CBSA also plays a significant role in the security certificate process, a controversial regime under which non-citizens may be designated as threats to public and national security and arrested and detained without a warrant. If a Federal Court judge finds the certificate to be

“reasonable” after a highly secretive trial, the person may be deported from Canada without ever being charged, let alone convicted, of any criminal offence.²⁹ The CBSA evaluates classified national security information, which may not be available to the person who is the subject of the certificate or to that person’s counsel, and makes recommendations to the IRCC Minister regarding the individual’s participation in activities that would result in inadmissibility on grounds of national security or other grounds set out in IRPA. The Minister considers these recommendations before signing the security certificate.

THE CASE FOR OVERSIGHT

“There is a significant potential for the CBSA’s activities to affect individual rights, dignity and well-being.” —Justice Dennis O’Connor, Commissioner of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar

The absence of any kind of independent oversight and accountability for CBSA is unique among Canadian law enforcement agencies. We point to four primary reasons that this omission must be addressed: 1) CBSA’s extraordinary law enforcement powers; 2) the exceptionally vulnerable population with whom CBSA officers often interact; 3) CBSA’s role in detaining migrants and refugee claimants, including children and people dealing with significant mental health challenges; and 4) the impact of the lack of accountability on public trust in the agency’s work. Each of these points is explained in further detail below.

CBSA’s extraordinary powers

CBSA officers are given extraordinary powers. When performing their duties under customs and immigration legislation, CBSA officers generally have the same powers as police officers, including powers of arrest, detention, and search and seizure, and they are empowered to initiate deportation proceedings against people deemed inadmissible to Canada. At the border, CBSA officers have an even wider range of powers than police: they can stop travellers for questioning, take breath and blood samples, and search, detain and arrest non-citizens without a warrant. They may carry firearms, batons and pepper spray, and are authorized to use reasonable force when necessary to carry out their duties. The CBSA also has legal responsibility for immigration detention facilities, including the conditions of detention therein, though correctional services staff the facilities.

As Justice O’Connor concluded during the Maher Arar Inquiry, “[t]here is a significant potential for the CBSA’s activities to affect individual rights, dignity and well-being.”³⁰

29 See Audrey Macklin, “The Canadian Security Certificate Regime” (March 2009) Centre for European Policy Studies Special Report.

30 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP’s National Security Activities* (Ottawa: December 2006) at 564 [Arar Inquiry Report].



“UNWELCOMING, INTIMIDATING AND NASTY”

In 2013, an Ottawa reporter published the results of an access to information request regarding complaints about treatment by border officials made by passengers travelling through the Ottawa International Airport.³¹ The reporter obtained copies of 45 complaints made between 2010 and 2013, heavily redacted to remove names, dates and other information that could identify the travellers.

Many of the complaints shared a consistent theme: rude, harassing and aggressive treatment on the part of border officials. “I have travelled the world and I have never had a more unwelcoming, intimidating and nasty experience,” wrote one. “We were shocked and appalled at the rude and eventually hostile reception from Canada Border Service agents,” wrote another.

Complainants reported feeling “intimidated and harassed,” “demeaned,” and being treated in a “highly rude and disrespectful manner.” Two parents complained that their daughter was searched and questioned in a “rough and ill-humoured manner” by an officer who, upon noticing a tampon in her bag, asked her if she was “having her menstruation,” according to the complaint. “We find this Customs agent’s behaviour towards our daughter to be demeaning, unnecessary, hostile and, most unacceptable

Two parents complained that their daughter was searched and questioned in a “rough and ill-humoured manner” by an officer who, upon noticing a tampon in her bag, asked her if she was “having her menstruation.”

of all, an intrusion into her privacy,” the complainants wrote. “She left the Ottawa Airport with the feeling of having been humiliated as she re-entered her country.”

Another complainant, who had immigrated to Canada and had recently become a citizen, alleged that the CBSA ransacked his belongings, tore apart his private letters and took his picture and fingerprints, all while other officers looked on and laughed. Another, returning from a holiday, complained that he had been handcuffed after an agent found two souvenir carved wooden pipes in his bags. When he asked to call a lawyer, he claims he was told the process could take hours. Instead, he consented to a strip search. The officers found nothing, and he was left feeling “totally humiliated and degraded.”

There was no indication in the documents as to how any of the complaints were resolved or whether any disciplinary action was taken against the officers.

31 Glen McGregor, “‘Are you having your menstruation?’ and other bizarre questions asked by airport border guards”, *Ottawa Citizen* (8 July 2013), o.canada.com/news/cbsa-airport-agents-harassment-humiliation.

CBSA deals with exceptionally vulnerable individuals

In interviews with advocates who serve refugees and other newcomers to Canada, we heard a range of anecdotal evidence suggesting that many individuals have experienced bullying, discrimination, harassment and threats at the hands of CBSA officers.

“At a recent interview with one of my clients, the CBSA officer just kept repeating: “You’ve been here [in Canada] way too long, I’m going to do everything I can to get you out of here”. My client felt totally disrespected—he couldn’t believe this kind of bullying could happen here.”—Refugee advocate

“They can be just so disrespectful! I’m working with one family that has to travel a fairly long way to get to the nearest CBSA office, where they have to go to check in on a regular basis. They spend hours and hundreds of dollars getting back and forth, and often the check-in lasts only 5 minutes. When I’ve asked CBSA about local alternatives, I’m rebuffed. Once, they showed up for a scheduled appointment only to be told that their officer was on vacation! When they asked to see another officer so they wouldn’t have to come back again so soon, their request was refused. When they asked for an explanation, an officer told them ‘We don’t have to tell you anything.’ They were near tears with the stress and expense of going all that way for nothing. It seemed like the officer knew that no one would complain or be able to hold anyone accountable for this, and just didn’t care about the impact on my clients.”—Refugee advocate

Every year, CBSA officers have many thousands of interactions with Canadians, visitors and migrants, including refugee claimants. CBSA officers routinely interact with extremely vulnerable individuals, including refugee claimants fleeing abusive regimes, some of whom have experienced torture and other forms of state-sponsored violence. A lack of sensitivity to the realities of post-traumatic stress, depression, and fear of armed state officials as a result of experiences in their home country was a common theme of complaints from advocates we spoke to for this project.

“They were near tears with the stress and expense of going all that way for nothing. It seemed like the officer knew that no one would complain or be able to hold anyone accountable for this, and just didn’t care about the impact on my clients.”—Refugee advocate

Several advocates reported that their clients were berated and treated harshly when they became emotional at the prospect of deportation to a country they had fled. One advocate reported that CBSA officers in flak jackets came to the hospital psychiatric ward where a distressed and suicidal woman had been committed and proceeded to remove her. She was handcuffed, detained, and quickly deported. Advocates emphasized that officers need a great deal more training on the mental health challenges individuals might be dealing with, including post-traumatic stress disorder, and need a better understanding of how to respond to individuals in distress in a more helpful and understanding manner.



“These are very common problems, but CBSA officers demonstrated no sympathy. They seem to have no understanding of traumatized people’s behaviour. It’s not histrionics; they’re terrified. Officers need more training on the fact that clients have stories they don’t understand, and have mental health issues that need to be respected.” — Community lawyer

“The officers go to people’s homes dressed like police, they’re angry and intimidating...people are terrified.” — Community lawyer

CBSA detains thousands of individuals without genuine oversight

CBSA is also responsible for the health and safety of the thousands of detainees—including children—being held in jails and other detention facilities across the country. In 2016-17, CBSA detained 6,251 people, including 162 minors.³² On any given day as many as 450-500 people are in immigration detention across Canada.³³ Many of these detainees are dealing with significant mental health issues, which can be exacerbated by their incarceration.³⁴ While the number of detainees has declined each year, from over 9,000 in 2011-12 to 6,251 in 2016-17, the average length of detention has increased from 19 to 23.1 days (with a peak of 24.5 days in 2014-2015).³⁵ In 2016-17, 439 detainees spent over 90 days in detention (down from a high of 706 long-term detainees in 2013-14).³⁶ In 2013-2014, nearly one-fifth of the 10,088 individuals detained were refugee claimants.³⁷ Approximately one third of immigration detainees are held in criminal detention centres.³⁸

The BCCLA and other civil society groups take the position that CBSA detains individuals far too frequently, often absent any genuine necessity to do so, and in numerous cases detains individuals for far too long. The BCCLA takes the position that the use of immigration detention must be heavily curtailed, used only when it is truly the last resort, and subject to strict time limits. The BCCLA has joined many other civil society groups in adopting the position 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,

32 CBSA, Arrests, detentions and removals statistics, cbsa-asfc.gc.ca/security-securite/detent-stat-eng.html.

33 CBSA, *CBSA’s New National Immigration Detention Framework - A Summary Report of the Framework and Stakeholder Roundtable Discussions*, *supra* note 25.

34 Hanna Gros and Paloma van Groll, *‘We have no rights’: Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* (University of Toronto International Human Rights Law Program, 2015), ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf.

35 CBSA, *CBSA’s New National Immigration Detention Framework - A Summary Report of the Framework and Stakeholder Roundtable Discussions*, *supra* note 25.

36 CBSA, Arrests, detentions and removals statistics, *supra* note 32.

37 Jim Bronskill, “Senators grill border agency officials about deaths in custody”, *CTV News* (21 March 2016), ctvnews.ca/politics/senators-grill-border-agency-officials-about-deaths-in-custody-1.2826677.

38 CBSA, Arrests, detentions and removals statistics, *supra* note 32.

staff members, and other detainees,” and that detention must last no longer than 90 days absent exceptional circumstances.³⁹

The United Nations Human Rights Committee, in its periodic review of Canada in 2015, similarly recommended that Canada should refrain from indefinitely detaining migrants, and should ensure detention is used as a last resort once non-custodial options have been exhausted.⁴⁰

There have been very serious allegations of rights violations against detainees. In Lindsay, Ontario, nearly 200 immigration detainees have gone on repeated hunger strikes to protest the conditions and length of their detention.⁴¹ In 2014, a report from the International Committee of the Red Cross—which is authorized to monitor CBSA detention facilities and raise concerns with the detaining authorities⁴²—found that immigration detainees in provincial correctional facilities suffered from overcrowding including triple-bunking, extreme stress due to their incarceration, inadequate access to support including legal assistance, and poor environmental conditions.⁴³ Detainees in these conditions have no opportunity to complain to an independent body about these conditions or their treatment at the hands of agents and contractors of the CBSA.

Since 2000, at least 15 detainees have died while in the custody of the CBSA under a range of deeply concerning circumstances.⁴⁴

The BCCLA and other civil society groups take the position that CBSA detains individuals far too often, often absent any genuine necessity to do so, and in numerous cases detains individuals for far too long.

39 Gros and Paloma, *supra* note 34 at 8. See list of endorsing organizations, ihrp.law.utoronto.ca/We_Have_No_Rights.

40 United Nations Human Rights Committee, *Concluding observations on the sixth periodic review of Canada* CCPR/C/CAN/CO/6 (13 August 2015) at para 12.

41 “End Immigration Detention Network Responds to Death in Custody” (12 June 2015), endimmigrationdetention.com/2015/06/12/end-immigration-detention-network-responds-to-death-in-immigration-custody/.

42 Canadian Red Cross, “A visit to a detention centre”, redcross.ca/how-we-help/migrant-and-refugee-services/promoting-the-rights-of-immigration-detainees/a-visit-to-a-detention-centre.

43 Jim Bronskill, “Red Cross probe finds cramped conditions for immigration detainees”, *The Globe and Mail* (25 September 2015), theglobeandmail.com/news/national/red-cross-probe-finds-cramped-conditions-for-immigration-detainees/article20783417/.

44 End Immigration Detention Network, “Media Release: Federal Court questions border enforcement on constitutionality of indefinite detention”, (15 May 2017), endimmigrationdetention.com/. See also Debra Black, “Second immigration detainee dies in prison in less than a week”, *Toronto Star* (14 March 2015), thestar.com/news/immigration/2016/03/14/second-immigration-detainee-dies-in-prison-in-less-than-a-week.html.



Lack of independent oversight undermines public trust

CBSA employs many officers who do their best to serve the public interest and work hard to execute their function in a professional way. But as with any law enforcement agency employing thousands of people, inevitably there will be mistakes, as well as officers who abuse their power.

As set out in the previous sections, despite their sweeping powers and the scale of CBSA's law enforcement work, there is no independent oversight of the activities of CBSA officers. There is no formal and independent complaints process where individuals can register their concerns. There is no procedure by which a person aggrieved as a result of a CBSA officer's conduct can seek an independent review of that conduct. There is no independent civilian investigation of potential criminal wrongdoing or negligence when someone is harmed or dies while in CBSA custody. There is no independent body with a mandate to look at the agency's policies and practices to ensure they respect the rights of the refugees, migrants, and Canadians officers interact with every day.

Those who exercise such exceptional powers ought to be held to the highest degree of accountability. In a society bound by the rule of law, it is deeply disturbing that officials with such wide-ranging powers are not subject to any kind of independent oversight.

This is a highly unusual situation in Canada. Every major police force, from the national to the provincial to the municipal level, has some kind of independent oversight or review body, and in some cases, multiple such agencies. While none are perfect, their existence is essential to the public interest.

Without effective, independent oversight of law enforcement, public trust in police forces, officers, and the services they provide is critically undermined.⁴⁵ As the US Department of Justice Civil Rights Division stated in its investigation of the Baltimore Police Department, "BPD's persistent failure to hold officers accountable for misconduct contributes to an erosion of the community trust that is central to effective law enforcement."⁴⁶ Similarly, the United Nations *Handbook on Police Accountability, Oversight and Integrity* states:

Enhancing police accountability and integrity is primarily meant to establish, restore or enhance public trust and (re-)build the legitimacy that is a prerequisite for effective policing.

This may be achieved through establishing a system of civilian oversight. Accepting external civilian scrutiny is a hallmark of a democratic police force, that is, one that is responsive and accountable to the needs of the public. [emphasis added]⁴⁷

Continued on page 24

45 Ontario Human Rights Commission, Submission to the Independent Review of Police Oversight Bodies (15 November 2016), ohrc.on.ca/en/ohrc-submission-independent-review-police-oversight-bodies#_ednref4.

46 United States Department of Justice Investigation into the Baltimore Police Department (10 August 2016) at 139.

47 United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (New York: United Nations, 2011) at 8.

CBSA ACCOUNTABILITY IN THE COURTS?

Occasionally, examples of rights violations committed by CBSA officers come to light during criminal proceedings and result in forceful admonitions from the Court.

In one 2009 case, for example, an Ontario court found that a CBSA officer had obtained statements from an accused individual in violation of his right to counsel and contrary to the principle against self-incrimination, protected by section 7 of the *Charter*.⁴⁸

In another case, the Court found that CBSA abused its authority by demanding that a refugee claimant who had arrived in Canada aboard the *MV Sun Sea* attend an interview with a CSIS agent, something it did not have the authority to do.⁴⁹

And in *R. v. Clarke*,⁵⁰ a CBSA official made headlines⁵¹ for his actions during a drug bust at Pearson International Airport. A judge called the officer's conduct "egregious" and found that his testimony on the stand was "replete with errors, evasions and excuses."⁵² His answers "literally changed from one minute to another on important issues," nearly always in his in own favour.⁵³ Moreover, the judge found that the officer's decision to arrest the accused happened only after he had asked to speak to lawyer, "as punishment for [the accused] exercising his *Charter* rights."⁵⁴

The courts have a limited ability to hold CBSA officers accountable even for conduct they find "egregious." They can exclude improperly obtained evidence and issue rulings that will—one hopes—influence officer conduct in the future, but they cannot impose penalties or order restitution for victims of rights violations when the violations come to light in the context of these kinds of cases.

48 *R v Ellis*, 2009 ONCJ 319.

49 *GJ v Minister of Public Safety and Emergency Preparedness*, 2012 FC 1489.

50 2016 ONSC 1510 [*Clarke*].

51 Jacques Gallant, "Border officer blows coke bust" (10 March 2016) *Toronto Star*, thestar.com/news/crime/2016/03/10/pearson-airport-border-officer-blows-coke-bust.html.

52 *Clarke* at paras 5-6.

53 *Ibid* at para 10.

54 *Ibid* at para 7.



TAKING THE CBSA TO COURT

While it may be possible to seek redress in the courts or human rights tribunals for certain types of wrongs allegedly committed by CBSA officers, these processes can be slow, expensive, exceedingly complex, and ultimately inaccessible for those who have suffered harm.

In one example, a Toronto man sued CBSA after being detained in an immigration holding centre for over a month, despite being a Canadian citizen.⁵⁵ In September of 2015, a BC businessman wanted by Chinese authorities for fraud sued the CBSA and Canada's Attorney General for allegedly withholding information he says could have helped his refugee claim, as well as proof that evidence against him was obtained by torture.⁵⁶ The Federal Court granted him a new refugee hearing on the basis of the withheld disclosure.⁵⁷ His civil suit is ongoing and no decision has yet been rendered. In April 2017, an Ontario court ordered the release of an immigration detainee who could not be deported and who had been held in a maximum security prison for seven years instead.⁵⁸ The decision found that the indefinite detention was "unacceptable" and violated his *Charter* rights.⁵⁹

Bringing a civil claim against the government is exceedingly difficult, expensive and time-consuming. It is not a realistic option for many newcomers to Canada, who may not speak English or French and may be unfamiliar with the Canadian legal system and their rights under Canadian law. It is an especially difficult option for individuals who may already have been removed from Canada. There is no legal aid for these types of cases, and the cost of a lawyer is out of reach for most people, even those with middle to upper-middle incomes.⁶⁰

In some cases, people may also be able to make a claim against CBSA to the Canadian Human Rights Commission alleging discriminatory treatment. For example, in 2006, a member of the Akwesasne community near the Cornwall border crossing, which sits on Mohawk land, filed a complaint with the Commission alleging discrimination on the basis of race after she was detained at the border. Her complaint was upheld in part, with the Tribunal member finding that comments made to her by the CBSA officer were "unjustified,

55 Nicholas Keung, "Toronto man sues Canada Border Services over alleged wrongful detention", *Toronto Star* (27 March 2016), thestar.com/news/immigration/2016/03/27/toronto-man-sues-canada-border-services-over-alleged-wrongful-detention.html.

56 Jason Proctor, "Chinese fraud suspect Shiyuan Shen sues Canada Border Services Agency", *Toronto Star* (22 September 2015), cbc.ca/news/canada/british-columbia/chinese-fraud-suspect-shiyuan-shen-sues-canada-border-services-agency-1.3229069.

57 *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70.

58 *Ali v Canada*, 2017 ONSC 2660.

59 Brendan Kennedy, "Jailed seven years by Canada, Kashif Ali now walks free", *Toronto Star* (28 April 2017), thestar.com/news/canada/2017/04/28/jailed-seven-years-by-canada-kashif-ali-now-walks-free.html.

60 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (October 2013).

even aggressive, and defiant” and that his behaviour was “marked by racist stereotyping” towards her as an Indigenous woman.⁶¹ The Tribunal awarded her \$5,000 in compensation, and directed CBSA to develop and implement a policy specifically prohibiting racial discrimination and profiling.

Human rights complaints have the advantage of being less expensive and less procedurally complex than court cases, with more relaxed rules of evidence and less formal procedures. However, they suffer from two key disadvantages. First, the claimant must prove that the alleged mistreatment was *discriminatory*. This means they must show 1) that they have a characteristic protected from discrimination by the *Canadian Human Rights Act* (CHRA), such as race or disability; 2) they experienced an adverse impact; and 3) the protected characteristic was a factor in the adverse impact.⁶² While this process will be relevant for some complainants, many complaints against the CBSA will not involve allegations of discrimination, making this avenue for pursuing accountability unavailable to people who have experienced ill-treatment.

A second disadvantage of the Canadian human rights system is that human rights protection under the CHRA is unavailable to people who are not “lawfully present in Canada”.⁶³ Where there is a question about a detainee’s lawful presence, which there often is in cases involving migrant detainees, the CHRC must refer the matter to the Minister of Immigration, Refugees and Citizenship, and cannot proceed with the complaint unless the question of immigration status is resolved by the Minister in the individual’s favour.⁶⁴ The CHRC has declined to deal with complaints as a result of these sections of the CHRA in at least 30 cases since 1986, including two in 2015, and has—so far unsuccessfully—called for the sections’ repeal.⁶⁵ Therefore, at least some individuals with uncertain, precarious or no immigration status—individuals with a strong likelihood of interacting with CBSA officers—may find themselves therefore unable to use the Canadian human rights process to hold CBSA officers accountable for alleged discriminatory treatment.⁶⁶

61 *Davis v Canada Border Services Agency*, 2014 CHRT 34 at paras 246 and 250. The finding of discrimination was upheld on judicial review: *Canada (Attorney General) v Davis*, 2017 FC 159.

62 *Moore v British Columbia (Ministry of Education)*, [2012] 3 SCR 360.

63 CHRA s 40(5)(a).

64 CHRA s 40(6).

65 Canadian Human Rights Commission, *Submission to the Committee on the Elimination of Discrimination against Women in advance of its consideration of Canada’s 8th and 9th Periodic Reports* (September 2016) at 20.

66 The Canadian Human Rights Commission has argued that the CHRA should apply to people in immigration detention on the basis that when someone is prevented from leaving Canada, they can no longer be considered “not lawfully present,” and should therefore be able to access Canada’s human rights protections. The BCCLA also takes the position that individuals making a refugee claim are, while their claim is being processed, lawfully present in Canada, but it is not clear whether the Commission supports this interpretation.

PROJECT GUARDIAN: ILLUSTRATING THE NEED FOR OVERSIGHT

In 2014, CBSA launched “Project Guardian”, an initiative to crack down on cases of live-in caregivers working without the proper work permits. Live-in caregivers are some of the most vulnerable workers in Canada and can face isolation, ill-treatment and abuse at the hands of employers with whom, until recently, they were required to live. But rather than protecting caregivers’ rights to safe and decent conditions of work, Project Guardian seems to exist to guard families from the possibility that the caregiver they hired could leave to take a job with another family.⁶⁷

Under Project Guardian, CBSA raids on caregivers’ workplaces have become widespread in BC and the Yukon (the only parts of the country where the program is currently active), and a number of caregivers have been detained and deported.⁶⁸ According to advocates for live-in caregivers, CBSA engages in these raids and apprehensions without any screening for issues of trafficking, exploitation or abuse.

While the stated goal of the project is to enforce rules requiring live-in caregivers to work for only one employer, Natalie Drolet, a lawyer and Executive Director of the West Coast Domestic Workers Association, says that a common reason caregivers leave their employer is because they are being subject to abusive conditions including long hours of work without pay, verbal or physical abuse, privacy violations in the home, and other violations of their employment rights.⁶⁹ In the cases her organization has worked on, many of the caregivers suspected that it was their former employer who had contacted CBSA in order to punish them for leaving the abusive workplace conditions.

Caregivers are legally entitled to leave their employers and may apply to change employers while in Canada. However, the process is lengthy and uncertain. It takes 6-10 months to obtain the necessary work permit that would allow the caregiver to work for another family. In the meantime, the caregiver is in an incredibly precarious situation: unemployed, unable to access social assistance and other services, even potentially homeless.⁷⁰

67 Peter Mazereeuw, “CBSA looking into abuse by live-in caregivers”, *Embassy* (16 April 2014).

68 Ethel Tungohan, “‘Project Guardian’ raids on live-in caregivers leads to calls for immigration reform”, *Rabble* (29 March 2016), rabble.ca/news/2016/03/project-guardian-raids-on-caregivers-leads-to-calls-immigration-reform.

69 *Ibid.*

70 “Temporary Foreign Worker Program: A submission by the West Coast Domestic Workers’ Association to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities”, (31 May 2016) migrantrights.ca/wp-content/uploads/2016/06/WCDWA-Brief-to-HUMA-Committee-for-TFWP-Review.pdf.

Project Guardian is just the type of CBSA program an oversight body should have the authority to respond to, investigate, and potentially order cancelled given the harms resulting from the current approach.

It is deeply concerning that CBSA officers are adding to caregivers' vulnerability by showing up on their doorsteps and interrogating them in order to uncover evidence that they've committed an offence, such as beginning to work before their new work permit has been issued. Most caregivers do not know their legal rights; they don't know they're entitled to consult with a lawyer before speaking to CBSA and to defer the interview to a later date.

In one particularly egregious case described by Ms. Drolet,⁷¹ a CBSA officer arrived at the home of a live-in caregiver—the very home she was supposed to be working at according to her work permit—questioned her, took her into custody and placed her in immigration detention. The caregiver had been employed to care for an elderly woman. In the caregiver's absence, the woman was left without care and suffered a fall. She died ten days later. It is unclear whether the woman's death was directly related to the fall. The caregiver was later deported.

Caregivers and their advocates have made a number of recommendations to the federal government to address caregivers' vulnerability under the "one worker-one employer" rule, reforms which are beyond the scope of this report. But Project Guardian is just the type of CBSA program an oversight body should have the authority to respond to, investigate, and potentially order cancelled given the harms resulting from the current approach.

⁷¹ Personal communication with author.



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Building and maintaining community trust is the cornerstone of successful law enforcement. Independent oversight builds public confidence in law enforcement by assuring the public that officers are being held to the highest standards of professionalism and accountability. The absence of an independent review body for the CBSA does the CBSA—and the public—a great disservice.

THE EXISTING COMPLAINT MECHANISM

Independent oversight builds public confidence in law enforcement by assuring the public that officers are being held to the highest standards of professionalism and accountability. The absence of an independent review body for the CBSA does the CBSA—and the public—a great disservice.

Currently, someone with a complaint against the CBSA can file a complaint by writing to the CBSA's Recourse Directorate⁷² or completing the CBSA's online "Feedback Form" for "compliments", "comments" or "complaints".⁷³ The form limits complainants to 1,000 words to describe the incident leading to their complaint.

The Recourse Directorate is an entirely complaints-based mechanism, and cannot initiate its own reviews of CBSA policies or practices. It is internal to the agency, and reports to the president of CBSA.

The CBSA describes the system as creating "a single point of contact for Recourse that will improve accessibility for stakeholders, streamline internal processes and support the independence and neutrality of redress functions."⁷⁴ The Recourse Directorate does not itself deal with complaints about alleged improper conduct by CBSA officers or excessive use of force. The CBSA's website states that: "Once a complaint is submitted, it will be shared with the appropriate manager or supervisor who will discuss it with the employee(s) concerned and a review will ensue."⁷⁵ The Recourse Directorate itself handles complaints and requests for review of enforcement action or decisions taken by CBSA such as

72 Two other existing mechanisms are the International Committee of the Red Cross and the UN High Commissioner for Refugees, which both have access to CBSA detention facilities. While important, these measures are inadequate because neither body is allowed to report on their findings to the public. Even if they could report to the public, the CBSA has no statutory accountability to these agencies. They are not and cannot serve as a substitute for a Canadian-based independent complaint and review mechanism, housed within the structure of the Canadian government.

73 Online: www.cbsa-asfc.gc.ca/contact/feedback-retroaction-eng.html. Complaints can also be sent by mail.

74 CBSA slideshow presentation, *CBSA's New Organizational Structure*, February 2010, slideshare.net/guestb47574/cbsas-new-organizational-structure.

75 Compliments, Comments and Complaints, Frequently Asked Questions, cbsa-asfc.gc.ca/contact/faq-eng.html.

import duty decisions, seizures, penalties related to agricultural imports, and decisions related to trusted traveller (e.g.: NEXUS) status.⁷⁶

While it is not clear from information that CBSA makes available to the public for the purpose of describing its services and operations, a 2015 Audit of Professional Standards at the CBSA sheds light on how complaints are handled internally, once complaints about officer conduct are received by CBSA.⁷⁷ The Audit describes a variety of internal units that deal with different aspects of professional standards within CBSA's Human Resources Branch and its Comptrollership Branch.

Within the Human Resources Branch, the Office of Values and Ethics "supports and promotes an ethical culture and working environment at the CBSA" and includes the Senior Officer for Internal Disclosure (SOID), who is "responsible for receiving disclosures of possible wrongdoing at the CBSA and determining if an investigation into the alleged wrongdoing is warranted."⁷⁸ On matters involving disclosures of wrongdoing,⁷⁹ SOID reports directly to the CBSA President. Also within the Human Resources Branch, the Labour Relations and Compensation Directorate is responsible for maintaining CBSA discipline policy and monitoring its application across the agency.⁸⁰

Within the Comptrollership Branch, the Security and Professional Standards Directorate (SPSD) deals with professional standards issues through two divisions. The Security and Professional Integrity Programs division includes the Professional Integrity Program, aimed at preventing occurrences of misconduct⁸¹ and raising awareness of professional integrity and standards of professional conduct throughout CBSA. The Personnel Security and Professional Standards

76 The Recourse Directorate website states: "If you are considering requesting a Ministerial or President's Review (undertaken by delegated CBSA officials), you first need to determine if the Agency actually took a formal action or made a decision in relation to you or your goods. [...] If you were provided with a form or letter, then the CBSA did make a decision and take action relating to the entry of your goods into Canada — and you can request a review." The website provides examples of actions taken by CBSA that can be the subject of a complaint: "Your goods were seized; You paid duties and taxes; You paid a monetary penalty; Your currency or monetary instruments were seized; Your Trusted Traveller membership was rejected, cancelled or suspended; Your goods were prohibited from entering Canada." cbsa-asfc.gc.ca/recourse-recours/firststeps-premieresetapes-eng.html.

77 Canada, *Audit of Professional Standards, CBSA*, May 2015, cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2015/ps-np-eng.html.

78 *Ibid.*

79 "Wrongdoing" is defined under the *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 8 as: (a) the contravention of an Act of Parliament or of the legislature of a province, or of any regulations made under any such Act; (b) the misuse of public funds or assets; (c) gross mismanagement in the federal public sector; (d) an act or omission that creates a substantial and specific danger to the life, health and safety of Canadians or the environment; (d) a serious breach of a Code of Conduct; and, (e) knowingly directing or counselling a person to commit a wrongdoing.

80 *Audit of Professional Standards*, *supra* note 77.

81 The Audit of Professional Standards, Annex D sets out two different definitions of misconduct used within CBSA: "Security and Professional Standards Directorate defined misconduct as any action or inaction by an employee that is contrary to established policy, standards, procedures or practices of the CBSA; violations of legislation for which criminal sanctions are applicable; or violations of other laws, rules and regulations administered by the CBSA or any other act which would bring the CBSA into disrepute or effect the Agency's working relationship with other law enforcement partners. Labour Relations and Compensation Directorate defined it as a wilful action or inaction on the part of an employee that includes a breach of the Criminal Code, the CBSA Code of Conduct and/or the Values and Ethics Code for the Public Service. It could also be related to attendance and inappropriate personal behaviour at work or away from work."

Division is responsible for “preliminary analysis of potential misconduct, supporting regional management by providing evidence or strategic advice, performing administrative investigations into allegations of employee misconduct and recording of the information into a centralized database.”⁸²

Once a complaint is submitted, or an incident reported, a manager or supervisor discusses it with the employee(s) concerned and begins a review.⁸³ An allegation can come from the public, management, employees, or other law enforcement agencies.⁸⁴ The Audit of Professional Standards outlines that when an incident or allegation is brought to management’s attention, it must be investigated by SPSD, or by local management after discussion with SPSD. There are three types of investigations:

1. Preliminary investigation, to determine whether there is sufficient evidence to support the allegations made and to make a determination of the scope of the alleged misconduct. This is conducted by the Security and Professional Standards Analysis section of SPSD. If an investigation is considered warranted, SPSD decides whether it will be conducted by the Professional Standards Investigation Unit or the Personnel Security Unit, both within SPSD; by SOID; or by regional management. In general, the SPSD takes responsibility for investigating more serious allegations of misconduct and security incidents, while regional management is assigned “informal” investigations into less serious allegations of misconduct;
2. Administrative investigation: this is the misconduct investigation that is conducted if it has been determined that an investigation is warranted. It is conducted by whichever unit is directed to do so by SPSD. If the misconduct allegation is substantiated, discipline may follow;
3. Criminal investigations, referred to police.⁸⁵

It should be noted that the 2015 Audit of Professional Standards found that not all investigations proceeded according to the policies set out by CBSA. At least at the time of the audit, regional management was found to have conducted its own investigations without notifying SPSD at CBSA headquarters, contrary to CBSA policy: “We noted that regions were not reporting all alleged misconduct to SPSD. All 11 regional investigations included in our sample were not communicated to SPSD.”⁸⁶ While the BCCLA argues that CBSA’s stated aim of having non-operational branches of CBSA conduct complaint investigations does not result in genuinely independent investigations, the practice of dealing with complaints at the managerial level within the operations branch of CBSA fails to meet even this low standard and the failure to communicate the existence of these investigations to headquarters is highly troubling.

⁸² *Ibid.*

⁸³ CBSA Compliments, Comments and Complaints, Frequently Asked Questions, cbsa-asfc.gc.ca/contact/faq-eng.html.

⁸⁴ *Audit of Professional Standards*, *supra* note 77.

⁸⁵ *Ibid.* These bullets are paraphrased from the wording used in the audit, with some additional explanation.

⁸⁶ *Ibid.*

CBSA's 2016-2017 Service Standards report states that the CBSA will strive to contact the client within 14 days after a written complaint is received to discuss the complaint, gain additional information and possibly seek a resolution.⁸⁷ CBSA states that the initial contact is made by phone in response to a complaint, and "[t]he main purpose is to resolve the complaint at this stage."⁸⁸ If the complaint is not resolved after this initial contact, the service standards report states that the CBSA will strive to give a "final response" to the client within 40 days after receiving the complaint.⁸⁹ CBSA claims to have responded to over 2,300 complaints in 2016-17, and to have met its target for initial contact 87% of the time, and for a final response 97% of the time.⁹⁰ However, numerous individuals and advocates reported to us that they had never even received an acknowledgement of their complaint, much less a satisfactory final response.⁹¹

The reports of unsatisfactorily slow responses are supported by the 2015 Audit of Professional Standards. The audit found that the SPSPD has established performance service standards that are completely different from those claimed in the CBSA's Service Standards report, and that CBSA failed to meet those standards in a majority of cases reviewed in the audit.⁹² For preliminary investigations, the stated performance service standard is 30 days, and the audit found that in 15 of the 20 investigations studied, the investigation had exceeded 30 days.⁹³ At the administrative investigation stage, the SPSPD uses a 60 day performance standard for "high profile" investigations, and 120 days for those that are not considered "high profile". The audit concluded:

While the BCCLA argues that CBSA's stated aim of having non-operational branches of CBSA conduct complaint investigations does not result in genuinely independent investigations, the practice of dealing with complaints at the managerial level within the operations branch of CBSA fails to meet even this low standard and the failure to communicate the existence of these investigations to headquarters is highly troubling.

In the 23 PSI [Professional Standards] investigations reviewed, there was no documentation that identified which profile the investigation was or what service standard would be applied. Five investigations were completed in less than 60 days, but since they were not identified as 'high-profile', we included them in our observations against the 120-day service standard. Of the 23 PSI investigations, 11 were completed within 120 calendar days. The remaining 12 investigations took between 139 and 501 days. Delays in completing the investigation can be attributed to a number of reasons that are outside of the investigator's control, including complexity of the case, involvement by other law-enforcement agencies and availability of respondent, complainant

87 CBSA Service Standard 2016-2017, cbsa-asfc.gc.ca/services/serving-servir/standards-normes-2016-2017-eng.html.

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 Personal communications with the authors.

92 *Audit of Professional Standards*, *supra* note 77.

93 *Ibid.*



or witnesses. As of April 2014 this service standard was changed to 100 calendar days. The investigation is calculated beginning on the date that a PSI investigator receives the file from SPSA.⁹⁴

At least at the time of the audit, it was clear that the CBSA generally fails to meet its service standard for timeliness, acknowledging that the fault for those delays does not lie with the CBSA in every case.

As noted above, the experience of advocates is that sometimes, no response is received at all. One example, shared with us by the Canadian Council for Refugees, was particularly troubling:

Mr. Sathi Aseervatham was a Tamil migrant from Sri Lanka and a passenger on the Sun Sea, a ship that arrived in British Columbia in 2010 carrying hundreds of Tamil refugee claimants. Mr. Aseervatham alleged in a confidential affidavit⁹⁵ that he had been tortured in Sri Lanka and was therefore seeking refugee status in Canada. His claim for refugee status was denied, and he was deported to Sri Lanka. Back in Colombo, he was questioned about the affidavit he had given in Canada by Sri Lanka's Terrorist Investigations Division, in the presence of CBSA officers. He was then tortured. He later died in a car accident—a death that we understand was never investigated by Sri Lankan authorities.

An obvious inference that may be drawn from the sworn allegation that CBSA officers were present at his questioning in Colombo, and that Sri Lankan authorities interrogated him about his allegations of torture in Sri Lanka contained in the affidavit he provided in Canada, is that CBSA shared this information with Sri Lankan authorities. The Canadian Council for Refugees filed a complaint with CBSA in October 2013, asking for an investigation of this incident. Three and a half years later, the CCR has not even received an acknowledgment that the complaint was received.

Immigration lawyers and migrant advocates we interviewed in preparing this report were highly critical of the CBSA's internal complaints mechanism. One long-time advocate described it as "useless";⁹⁶ an immigration law professor and Dean of the UBC law school has called it "toothless" and "an almost completely unsatisfactory process."⁹⁷ Most advocates reported that they had never used it; some were not even aware it existed. One advocate was aware of an individual who had tried to make a complaint on his own, but he was deported before the complaint was addressed. Making a complaint does not affect the removal process.

"I don't make complaints to the Recourse Directorate because it's completely useless. The only thing that really works is to convince a manager to make a change your client needs. A meaningful complaints process is so needed, one that is independent, transparent, and accessible to anyone, including people without status in Canada." –Refugee advocate

94 *Ibid.*

95 Refugee proceedings are confidential given the nature of the information disclosed and the potential it could endanger the claimant and/or the claimant's family.

96 Interview with the author, April 2015.

97 Andrea Woo, "Civil Liberties Association renews calls for Border Services oversight", *The Globe and Mail* (5 March 2014), theglobeandmail.com/news/british-columbia/call-for-oversight-of-border-police-ignored-bc-group-says/article17321112/.

For the most part, advocates told us that when they raise with their clients the possibility of making a complaint, few want to pursue it, despite sometimes having experienced egregious treatment by CBSA officials. In addition to a fear of retaliation, many of these individuals are hopeful that the Canadian government will make a favourable decision in their case and more often than not, they do not want to rock the boat and put their ability to remain in Canada at risk.

The combination of the Recourse Directorate and CBSA's various professional standards units simply do not satisfy the standard of what people in Canada expect when it comes to accountability of law enforcement. They are internal mechanisms. They are limited in their scope, they are not independent, and their decisions are neither timely nor transparent. While they are not embedded in the Operations Branch of the CBSA, they nevertheless report internally either directly to the President of CBSA or to their respective branches, and their findings and responses are subject to the ultimate authority of CBSA. They cannot launch reviews on their own initiative in the absence of a complaint or an allegation reported to management. Their decisions are not made public. While the audit reported that in the investigations sampled, CBSA followed through on discipline in almost all cases in which it was recommended, the audit did not evaluate whether the discipline given was appropriate in the circumstances or whether discipline was consistent across the CBSA. In addition, the frequent instances in the audit of investigations conducted by regional managers in the operations branch, without even notifying the centralized professional standards directorate, represent a significant failure in accountability.

"I don't make complaints to the Recourse Directorate because it's completely useless. The only thing that really works is to convince a manager to make a change your client needs. A meaningful complaints process is so needed, one that is independent, transparent, and accessible to anyone, including people without status in Canada." –Refugee advocate

The CBSA has disclosed statistics for discipline resulting from professional standards investigations on its website, but for the year 2014 alone.⁹⁸ In that year, of 28 professional standards investigations, 21 were determined to be founded, and there were 201 instances of discipline across the CBSA.⁹⁹ However, there is no transparency as to what kinds of misconduct or wrongdoing the discipline relates to (even in the aggregate, without disclosing individualized information), and therefore it is impossible for an outside observer to ascertain whether appropriate discipline is being meted out in these cases.

Across Canada and the western world, internal complaints mechanisms have been found to lack the independence and credibility required to foster public confidence.¹⁰⁰ That is why in Canada

98 Professional Standards Investigations and Disciplinary Measures Statistics, cbsa-asfc.gc.ca/agency-agence/reports-rapports/acc-resp/codeconduct-normeethique-eng.html. Oddly, the chart on the page says that the statistics are for 2014, but the introduction to the chart says that the statistics are for 2013, so the actual year covered by the statistics is unclear.

99 *Ibid.*

100 See, for example, David McAllister, *Police-Involved Deaths — The Failure of Self-Investigation* (BC Civil Liberties Association, 2010), bccla.org/wp-content/uploads/2012/05/20101123-McAllister-Report-Police-Involved-Deaths-The-Failure-of-Self-Investigation.pdf.



and elsewhere, governments have created various independent accountability mechanisms, like complaints commissions, independent investigations units, and ombuds offices, to provide independent review and oversight.¹⁰¹

The CBSA's Recourse Directorate may be sufficient as a review mechanism for customs-related decisions by CBSA officers, but it offers little in the way of recourse to individuals who have been mistreated by CBSA officers. There must be an agency that is able to provide robust and meaningful oversight and accountability.

OVERSIGHT AND ACCOUNTABILITY OF BORDER AGENCIES IN OTHER COUNTRIES

United Kingdom

The United Kingdom has two independent agencies providing accountability for its border services, providing both oversight and accountability in cases of complaints.

On the oversight side, the Independent Chief Inspector of Borders and Immigration (ICIBI) provides independent scrutiny of the UK's borders and immigration functions.¹⁰² The office's mandate is to assess the efficiency and effectiveness of the performance of functions relating to immigration, asylum, nationality and customs by the Home Secretary and by any person exercising such functions on her behalf. The Chief Inspector is appointed by and reports directly to the Home Secretary, and his reports are placed before Parliament. The Inspector investigates and makes recommendations on the treatment of claimants and applicants; enforcement powers, including powers of arrest, entry, search and seizure; discrimination in the exercise of functions; and the appropriate exercise of customs functions and powers. It benefits from significant liberty as to the areas it can investigate and can do so on its own initiative.

The ICIBI has the power to conduct systemic oversight and review, which can then be used to underline systemic issues and provide for guidance to improve respect for human rights in customs practices. The reports submitted by the agency are available to the public on the website, which increases the transparency of the mechanism and provides the public with information that allows it to hold the agencies accountable. The remit of the Chief Inspector does not permit him to consider individual cases. However, he may take note of the key issues of an individual case and use these to inform his wider inspection programme.¹⁰³

101 For a summary of the existing police accountability agencies in Canada, see Hon. Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Appendix C, (Queens Printer for Ontario, March 2016), policeoversightreview.ca/ReportoftheIndependentPoliceOversightReview.pdf.

102 See online: icinspector.independent.gov.uk/.

103 Online: icinspector.independent.gov.uk/about/.

As of 2008, the Independent Police Complaints Commission (IPCC) is responsible for the way serious incidents and complaints involving Border and Immigration Agency (BIA) staff are handled.¹⁰⁴ The IPCC deals with complaints involving BIA staff who are exercising “police-like powers” at the time of the alleged incident, including in cases involving death or serious injury, serious assault, serious sexual offences, serious corruption, and criminal offences aggravated by discriminatory behaviour.¹⁰⁵ This includes contractors when they are exercising police-like powers.

Such incidents must be reported to the IPCC, which then determines how they will be investigated. The IPCC has its own investigators and may decide to carry out an independent investigation; it may also manage or supervise an investigation by the BIA or a police force, or refer the matter back to the BIA to be investigated locally.¹⁰⁶ Members of the public can appeal to the IPCC if the BIA refuses to deal with a serious complaint, and may also be able to appeal the results of an investigation carried out by the BIA or another police force to the IPCC.

The lack of sufficient funding and resources for the IPCC has been the subject of significant criticism. A parliamentary committee reviewing the IPCC concluded in 2012 that the IPCC is “woefully underequipped and hamstrung in achieving its original objectives. It has neither the power nor the resources that it needs to get to the truth when the integrity of the police is in doubt. ... It lacks the investigative resources necessary to get to the truth; police forces are too often left to investigate themselves; and the voice of the IPCC does not have binding authority”.¹⁰⁷ A review of its structure and operations was undertaken and a variety of reforms came into effect in January 2017, including wider powers for the IPCC to initiate its own investigations, rather than waiting for referrals from police forces.¹⁰⁸

Australia and New Zealand

In Australia, the Commonwealth Ombudsman is responsible for monitoring administrative actions of the Australian government agencies and officers, including the Department of Immigration and Border Protection.¹⁰⁹ When performing functions in relation to immigration, the Commonwealth Ombudsman may also be called the Immigration Ombudsman, and has oversight of the full range of functions undertaken by the Department of Immigration and Border

104 Independent Police Complaints Commission, “IPCC jurisdiction extended to cover Border and Immigration Agency” (25 February 2008), ipcc.gov.uk/news/ipccs-jurisdiction-extended-cover-border-and-immigration-agency.

105 *Ibid.*

106 *Ibid.*

107 House of Commons Home Affairs Committee, *Independent Police Complaints Commission: Eleventh Report of Session 2012-13*, (UK House of Commons, 29 January 2013), publications.parliament.uk/pa/cm201213/cmselect/cmhaff/494/494.pdf.

108 David Barrett, “IPCC police complaints body to be rebranded and reformed”, *The Telegraph* (7 March 2016), telegraph.co.uk/news/uknews/law-and-order/12186753/IPCC-police-complaints-body-to-be-rebranded-and-reformed.html, and see *Policing and Crime Act*, 2017 c 3.

109 Commonwealth Ombudsman, What we do, ombudsman.gov.au/about/what-we-do.



Protection (including the Australian Border Force).¹¹⁰ The Ombudsman is also required to assess the appropriateness of the immigration detention arrangements for each person detained for more than two years. The Ombudsman's assessment is provided to the Minister for Immigration and Border Protection, along with a de-identified version which the Minister must table in Parliament.¹¹¹

The Ombudsman has the ability to launch investigations in response to civilian complaints, and the ombudsman's findings are forwarded to the agency or office in question and the relevant minister of the Crown. If the recommendations are rejected by the agency in question, the ombudsman does not have the power to override that decision or make binding directives to staff. However, it is empowered to present the report to the Prime Minister and to Parliament. It can also conduct proactive investigations on its own initiative.

New Zealand has a similar Ombudsman to handle complaints and also conduct proactive monitoring.

United States

In the United States, the Citizenship and Immigration Services Ombudsman is tasked with assisting individuals and employers to resolve problems with the Bureau of Citizenship and Immigration Services (CIS), identifying areas in which individuals and employers have problems in dealing with CIS, and proposing changes in the administrative practices of the Bureau of Citizenship and Immigration Services to mitigate the problems identified.¹¹² The Ombudsman is an independent office within the Department of Homeland Security and reports directly to the Secretary and Deputy Secretary of Homeland Security. It is not part of CIS.

With respect to the Customs and Border Protection division of the Department of Homeland Security (DHS), the only current mechanism for oversight is the DHS's own internal Office for Civil Rights and Civil Liberties. There is no independent external review. This lack of review has been widely criticized, and a bi-partisan bill was proposed in the last Congressional session¹¹³ to address the problem. The bill, which was introduced but did not pass, envisioned creating a Border Oversight Commission that would have the authority to subpoena agents and examine their actions, including use of force, and search and seizures. The Commission would also be charged with evaluating policies, strategies, and programs of federal agencies operating along the borders to protect due process rights, and other civil and human rights, private property rights and the safety of agents and officers, and recommending ways to reduce the number of deaths of migrant deaths.

¹¹⁰ *Ibid.*

¹¹¹ Commonwealth Ombudsman, Immigration detention review assessments, ombudsman.gov.au/publications/immigration-reports.

¹¹² Department of Homeland Security, About the Citizenship and Immigration Services Ombudsman, dhs.gov/about-citizenship-and-immigration-services-ombudsman.

¹¹³ See H.R.3576 - *Border Enforcement Accountability, Oversight, and Community Engagement Act of 2015*, congress.gov/bill/114th-congress/house-bill/3576/all-info.

PREVIOUS RECOMMENDATIONS TO CREATE AN INDEPENDENT ACCOUNTABILITY MECHANISM FOR CBSA

OVER THE PAST 11 YEARS, various Parliamentary and inquiry reports have recommended the creation of different forms of independent accountability mechanisms for the CBSA. The most comprehensive of these recommendations proposes that both an oversight body and a review body be created to ensure CBSA's activities comply with the law, and to foster public confidence in the border agency.

ARAR INQUIRY, 2006

In 2006, the Maher Arar Inquiry recommended that the CBSA's national security activities—which were a subject of that inquiry—be subject to independent review by an agency that would also be responsible for review of the RCMP. Justice O'Connor called this the "Independent Complaints and National Security Review Agency for the RCMP", which was to be born of a re-structured and newly empowered Commission for Public Complaints Against the RCMP (CPC).¹¹⁴

Justice O'Connor recommended the following features for this review body:

- It should have the power both to investigate complaints received from members of the public and public interest bodies.
- It should have the power to conduct self-initiated reviews in order to ensure comprehensive review of the activities of the agencies, particularly of issues that arise repeatedly or that are systemic in nature.

The Maher Arar Inquiry recommended that the CBSA's national security activities—which were a subject of that inquiry—be subject to independent review by an agency that would also be responsible for review of the RCMP.

¹¹⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006) at 19-20, epe. lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf [O'Connor Report].



The federal government made significant changes to the accountability mechanism at the RCMP, transforming the CPC into the Civilian Review and Complaints Commission for the RCMP. However, the government took no action on the recommendation to extend independent review to CBSA.

- It needs to be independent in the judicial sense from the RCMP, government and interested parties, with impartial members with no actual or perceived interest in the matters under review.
- It would focus not only on a particular agency, but on functions—and because it would provide review on national security matters, it should review the national security activities of the CBSA.
- It should have extensive investigative powers, similar to those of a public inquiry, to allow it to obtain information and evidence it considers necessary to carry out its reviews and investigations, including the power to force production of documents and compel witness testimony.

The reason that the recommendation in relation to CBSA was limited to its national security activities is that Justice O'Connor was limited by his terms of reference to making “any recommendations on an independent review mechanism for the activities of the Royal Canadian Mounted Police (RCMP) with respect to national security (policy review).”¹¹⁵ He concluded that this mechanism should be extended to CBSA as well:

*All of the reasons for recommending independent review of RCMP national security activities apply to the national security activities of the CBSA as well. As noted above, within the limits of its mandate, the CBSA often operates in a manner similar to that of a police force. There is a significant potential for the CBSA's activities to affect individual rights, dignity and well-being, and much of the national security activity undertaken is not disclosed to the public.*¹¹⁶

With the *Enhancing RCMP Accountability Act* of 2013,¹¹⁷ the federal government made significant changes to the accountability mechanism at the RCMP, transforming the CPC into the Civilian Review and Complaints Commission for the RCMP. However, the government took no action on the recommendation to extend independent review to CBSA.

115 Terms of reference for the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Terms_of_Reference.pdf.

116 O'Connor Report, *supra* note 20 at 564.

117 SC 2013, c 18.

SENATE COMMITTEE REPORT RECOMMENDS BOTH OVERSIGHT AND REVIEW AGENCY FOR THE CBSA, 2015

In 2015, the Senate Standing Committee on National Security and Defence issued a report on border security that accepted the BCCLA's recommendation for an independent accountability mechanism for CBSA.¹¹⁸ Its first two recommendations were as follows:

Recommendation 1– The Government of Canada establish an oversight body for the CBSA to ensure appropriate compliance with legislation and policy, including adequate protection for Canadians' privacy rights.

Recommendation 2– The Government of Canada establish an independent, civilian review and complaints body for all Canada Border Services Agency activities.¹¹⁹

The Committee stated:

Despite having broad powers, the CBSA is not subject to assessment by an independent review body or by an entity charged with independently processing public complaints. The CBSA's Recourse Directorate handles complaints about incidents but is not an independent complaints agency. The Directorate also has no authority to launch independent reviews of policy and procedure, the sorts of review that might provide insights into best-practices.¹²⁰

The Committee dealt expressly with the distinction between oversight and review, and made clear that both functions were required as part of an accountability mechanism for the CBSA—going beyond the Arar Inquiry recommendations. The Committee concluded:

Expanded responsibilities require expanded accountability. In the report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Justice Dennis O'Connor drew a distinction between review and oversight of government functions and activity. He noted that review bodies scrutinize institutional practices after the fact. Oversight, on the other hand, involves the more or less "real-time" overseeing or monitoring of executive systems of control and management relating to compliance with policy, regulations and law. The Commission report recommended a review and complaints body for intelligence and law enforcement functions concerned with immigration, but stopped short of recommending the implementation of an oversight regime.

...

Immigration intelligence and enforcement includes a complex network of domestic departments and agencies making it difficult to coordinate and oversee intelligence sharing. For this reason,

118 Senate Standing Committee on National Security and Defense, *Vigilance, Accountability and Security at Canada's Borders* (June 2015), sencanada.ca/content/sen/Committee/412/secd/rep/rep16jun15a-e.pdf > [Vigilance, Accountability and Security].

119 *Ibid* at vi.

120 *Ibid* at 5. The Directorate is also incapable of launching any independent reviews of policy and procedure which might otherwise provide insights into best-practices.



*the Committee believes there is a need for an oversight body for the CBSA which will ensure appropriate senior management compliance with legislation and policy. This would also ensure that the privacy rights of Canadians are protected and safeguarded, especially in the complex operations relating to immigration and international travel.*¹²¹

In 2006, the O'Connor Report had taken the position that an oversight body might to some extent lessen the RCMP's accountability to government and the government's responsibility for the RCMP, and could become implicated in decisions that may become subject to independent review after the fact.¹²² The Senate Committee determined that the recommendation of the O'Connor Report, which examined only the national security aspects of the CBSA's role and not its broader policing functions, was no longer adequate.

It is also important to note that, eleven years after the O'Connor Report, the RCMP's own review body, the Civilian Review and Complaints Commission (CRCC), has gone beyond its recommendations in a similar way, recommending the creation of an oversight structure that represents a wholesale change in the governance of the RCMP.¹²³ This recommendation followed the CRCC's conclusion that RCMP management has been almost wholly unable to deal with serious issues of systemic misconduct across the entirety of the RCMP in the form of harassment and bullying. In May 2017, the CRCC recommended that a new civilian governance model be implemented, possibly along the lines of a police board (which already provide real-time oversight and policy governance to police forces across Canada), or in the form of a civilian commissioner and civilian leaders in key management positions outside of direct police operations.¹²⁴ The Commission determined that such a change, which would constitute civilian oversight and involvement in RCMP decision-making, is necessary (if not necessarily sufficient) to foster the improvement of management of the RCMP and its proper adherence to law and policy. The Senate Committee adopted the same logic—that an oversight body is necessary to ensure CBSA compliance with legislation and policy, in addition to a review function for dealing with complaints.

The BCCLA agrees with this assessment. We set out our specific recommendations for oversight and review mechanisms for CBSA in the next section of this report.

Based on expert witness testimony, including testimony about mishandled intelligence sharing and mistreatment of refugee claimants in custody, the Senate Committee elaborated on what it considered necessary in order to create an effective civilian review and complaints body for CBSA, in addition to the oversight mechanism:

First, a civilian review and complaints body should deal with public complaints about the CBSA's conduct. The government might extend this to a third-party, given the vulnerabilities of most applicants.

¹²¹ *Ibid* at 3-4.

¹²² O'Connor Report, *supra* note 20 at 457-458.

¹²³ See Civilian Review and Complaints Commission for the RCMP, *Report into Workplace Harassment in the RCMP*, (16 May 2017), crcc-ccetp.gc.ca/en/report-workplace-harassment-rcmp.

¹²⁴ *Ibid*.

Second, the body should have a mandate to conduct investigations in a manner it deems necessary.

*Third, this body should have a capacity for investigation into critical and serious incidents, as these types of incidents could include serious harm, including sexual assault and deaths in custody connected to the CBSA's activities. To minimize conflicts of interest and time delays, these investigations could, where necessary, be conducted by independent, civilian organizations such as the Ontario Special Investigations Unit or the Independent Investigations Office in British Columbia.*¹²⁵

The BCCLA agrees that these are necessary components of an effective civilian review and complaints body, and elaborates on these and other necessary components in the next part of this report.

2017 REPORT OF THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

The May 2017 report of the House of Commons Standing Committee on Public Safety and National Security, *Protecting Canadians and their Rights: A New Road Map for Canada's National Security*, echoed the second recommendation of the Senate Committee and recommended that “the Government of Canada create an independent and external review body for the operations of the Canada Border Services Agency.”¹²⁶ The Committee noted the recommendation of the O'Connor Report: “Justice O'Connor recommended that oversight of the CBSA be provided by the body tasked with reviewing the RCMP given its important law enforcement mandate and intelligence capability.”¹²⁷

The Committee also quoted the testimony of the former president of the CBSA, Luc Portelance, who noted that the “apparent lack of external review” of the agency has been the subject of criticism and contributes to a lack of public confidence.¹²⁸ In his testimony, he endorsed a civilian review agency for public complaints against CBSA, and made an important distinction between the CBSA's role and that of other organizations more directly involved in national security:

I do believe there's a need to bring greater public confidence in terms of the activities of CBSA. [...] Oftentimes people mix the CBSA in the same conversation with CSIS, the RCMP and CSEC. The first thing you have to recognize is that CBSA is not what I would call a tier one national security organization. It doesn't collect intelligence. It doesn't generate intelligence. It is a user

¹²⁵ *Vigilance, Accountability and Security*, *supra* note 21 at 5.

¹²⁶ Report of the House of Commons Standing Committee on Public Safety and National Security, *Protecting Canadians and their Rights: A New Road Map for Canada's National Security*, (House of Commons, Canada: May 2017), ourcommons.ca/Content/Committee/421/SECU/Reports/RP8874869/securp09/securp09-e.pdf [Road Map].

¹²⁷ *Ibid* at 16.

¹²⁸ Evidence of Luc Portelance, Standing Committee on Public Safety and National Security, 22 November 2016, ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-44/evidence.



of intelligence that is developed by, mostly, CSIS, and the RCMP, and so on. [...] I think the one area that is worthy of consideration is around public complaints. The public complaints that are generated are currently investigated within the CBSA. I've always thought that an organization like the public complaints commission of the RCMP would likely be the right sort of review body, but I think the right way to do this is to look at everything the CBSA does and really focus on the one area.

The last point I'll make is that some of the initiatives I've seen in the past had the CBSA looking far more like a CSEC organization, with that kind of review requirement. It just isn't. It isn't a tier one national security organization.¹²⁹

While the House Committee did not explicitly recommend an oversight structure for CBSA, it was, like the O'Connor Report, dealing only with the national security activities of the CBSA as part of a wider review of Canada's national security activities. Those activities, the former president testified before the Committee, are limited compared to other agencies. In contrast, the Senate Committee was directly focused on the CBSA and the full range of its activities—it studied and heard testimony in relation not only to CBSA's national security activities but its general law enforcement and immigration and refugee processing responsibilities—and its recommendations were broader. In the BCCLA's opinion, the House Committee's recommendations should properly be seen as adding weight to the second recommendation that the Senate Committee made (for external review) rather than taking force away from the first recommendation (for oversight).

BILL S-205

On October 25, 2016, a private Senator's Bill introduced by Senator Wilfred Moore proposing the creation of an Inspector General of the CBSA to receive and consider complaints passed third reading in the Senate.¹³⁰ The Bill has not been sponsored by a member of the House of Commons and, at time of writing, is not proceeding to first reading in the House. Senator Moore stated that his motivation in pursuing the Bill was the death of Lucía Vega Jiménez, whose death in CBSA custody was described in the introduction to this report.

In the BCCLA's view, while its intentions are laudable, the Inspector General agency proposed in the Bill has a number of shortcomings. It is not clear whether it covers all of CBSA's operations, it does not appear to have the power to initiate its own reviews, and it does not have the ability to deal with complaints from third parties or public interest complaints. The Bill also limits the ability of the Inspector General to make its reports public.¹³¹

¹²⁹ *Ibid*; also cited in part by the House of Commons Standing Committee in *Road Map*, supra note 22 at 16-17.

¹³⁰ Bill S-205, *An Act to amend the Canada Border Services Agency Act (Inspector General of the Canada Border Services Agency)*, 1st Sess, 42nd Parl, 2015.

¹³¹ Canadian Association of Refugee Lawyers, *Reform Proposals for Canada's Inland Refugee Determination System and other Aspects of the Immigration System*, July 2016, at 45, carl-acaadr.ca/sites/default/files/CARL%20brief%20FINAL_July2016.pdf.

The BCCLA notes that in questioning before the Committee, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, was asked whether the government is looking at “separate oversight for CBSA” beyond the scope of what was proposed in Bill S-205, which would create a review mechanism. The Minister responded that “it’s a complex question of the design of the system, but in principle, yes, that’s what we’re seeking to do.”¹³²

WANTED: OVERSIGHT TO CORRECT PROBLEMATIC POLICIES

In 2011, the Canadian government published a “most wanted” list of individuals described as “suspected war criminals” and asked the public for help in tracking them down so that they could be deported. The individuals on the “most wanted” list, however, had not necessarily been charged with committing war crimes; in some cases, they were not even suspected of committing any crime at all. Moreover, Canada was not proposing any meaningful steps to bring those suspected of war crimes to justice; rather, the government was simply seeking to deport them, potentially to countries that lacked the will or the capacity to prosecute them in a fair trial.

The BCCLA and a coalition of human rights groups issued a statement expressing deep concerns about the government’s approach.¹³³ The groups noted that the presumption of innocence was undermined by the publication of the list, and publication of the names of “suspected war criminals” may violate the individuals’ right to privacy. Additionally, the publication of the list contributes to a negative perception of non-citizens as dangerous criminals. Unfortunately this is likely to reinforce existing xenophobia, hurting all newcomers, particularly in the context of repeated government messaging associating refugees and immigrants with criminality, fraud and abuse. The groups called on the government to take a more balanced approach and guard against feeding into existing xenophobic prejudices that exist in Canada as in all societies.

The publication of the list contributes to a negative perception of non-citizens as dangerous criminals. Unfortunately this is likely to reinforce existing xenophobia, hurting all newcomers, particularly in the context of repeated government messaging associating refugees and immigrants with criminality, fraud and abuse.

This is just the type of practice a CBSA accountability body should have the authority to consider and reform.

¹³² Debates of the Senate Standing Committee on National Security and Defence, Monday, May 20, 2016, sencanada.ca/en/Content/Sen/committee/421/secd/52635-e.

¹³³ Statement on publication of the “most wanted” list (September 2011), ccrweb.ca/en/statement-publication-most-wanted-list.



BCCLA'S RECOMMENDED MODEL FOR OVERSIGHT AND REVIEW OF CBSA

The BCCLA recommends two separate accountability mechanisms for the CBSA. One of these bodies should be charged with providing real-time oversight of CBSA's policies and practices, and one should be charged with conducting investigations and resolving complaints.

THE BCCLA RECOMMENDS two separate accountability mechanisms for the CBSA, in line with the recommendations of the Senate Committee on National Security and Defence in 2015.¹³⁴ One of these bodies should be charged with providing real-time oversight of CBSA's policies and practices, and one should be charged with conducting investigations and resolving complaints.

Oversight

In terms of oversight, we recommend the creation of an independent, civilian-led oversight commission with a mandate to provide real-time oversight and policy governance to the CBSA. As recommended by the Senate Committee, the oversight commission should ensure appropriate compliance with legislation and policy, including adequate protection for Canadians' privacy rights.¹³⁵ The commission should be charged with conducting proactive assessments of CBSA policies and practices and ensuring they respect the rights of the people CBSA officers interact with every day.

The oversight commissioners should be responsible for:

- Setting standards against which CBSA's activities are evaluated;
- Reviewing proposed and existing policies, practices and procedures;
- Implementing and enforcing recommendations;
- Imposing discipline when necessary.

¹³⁴ *Vigilance, Accountability and Security*, *supra* note 21.

¹³⁵ *Ibid.*

The oversight commission should be comprised of a chief commissioner, a deputy chief commissioner, and a team of general commissioners with expertise in law enforcement oversight. The commissioners must be knowledgeable of human rights and privacy law, as well as the particulars of the immigration context, and trained on the policies, procedures and operations of CBSA. As described in more detail below, there must be a transparent appointment process and, in order to minimize the potential for bias and the appearance of bias, it should be a goal to have a civilian staff that have not had law enforcement careers. The commission should report to Parliament, and its decisions must be made publicly available, along with annual reports describing and providing statistics on its work. Given the scale of CBSA operations across Canada and abroad, the agency must have sufficient resources to be able to respond to issues across this wide geographic range.

The commission should be charged with conducting proactive assessments of CBSA policies and practices and ensuring they respect the rights of the people CBSA officers interact with every day.

Review

The second component of independent accountability for CBSA the BCCLA recommends is a civilian review and complaints body. The review and complaints body should be responsible for:

- Receiving complaints from the public, including third party complaints and complaints from public interest groups;
- Initiating its own reviews;
- Facilitating the investigation of critical incidents, which would be conducted by existing provincial bodies created for this purpose, such as the Independent Investigations Office of BC and the Alberta Serious Incident Response team.

As will be described in more detail below, CBSA officers should not be investigating complaints against other CBSA officers; to maintain public trust in the credibility of investigations, the investigation of complaints should generally be conducted by the external review and complaints body. The body should have broad jurisdiction to investigate complaints involving all aspects of CBSA's work, including conditions of detention.

The review and complaints body should be able to consider off-duty conduct and the conduct of officers working overseas, as well as any actions of officials at IRCC that interact with CBSA personnel in connection with that individual's case. It should also have the power to review the actions of third parties who act for CBSA under contract such as provincial corrections staff and private security.

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“BORDER SECURITY”: A CASE FOR INDEPENDENT OVERSIGHT

This report has detailed a number of instances and examples in which independent oversight of CBSA policies and practices would have been useful to assess their compliance with human rights and privacy standards (Project Guardian, for example). An additional example of a situation that illustrates the need for independent oversight is CBSA's participation in the reality television show “Border Security”, which chronicles the work of border guards and involves filming of vulnerable migrants and citizens being interrogated, detained and deported.

As part of a campaign to cancel the show led by impacted families, human rights groups and cultural producers, the BCCLA filed a privacy complaint with the federal Privacy Commissioner on behalf of Oscar Mata Duran, who was removed to Mexico following a CBSA raid of his Vancouver workplace in 2013.¹³⁶ The raid was filmed for the show with the consent of CBSA, and at least seven other men at the site were also deported.

In his decision, **the federal Privacy Commissioner found that CBSA broke the law by participating in the show's production, violating key provisions of the *Privacy Act*, and relying on inadequate consent.** The Commissioner found that the “consent” the CBSA relied on to justify the disclosure of people's private information was grossly insufficient. “In large part due to the context in which filming occurs, individuals are not providing full and informed consent to the disclosure of their personal information, as would be required by the Act,” the Commissioner wrote.¹³⁷ “Individuals from countries with different legal systems may feel that they have to comply with uniformed individuals and have no choice but to sign documents presented to them. Moreover, individuals being detained or facing the prospect of deportation may not be in the best frame of mind to provide informed and free consent.”

In Mr. Mata Duran's case, he was not asked for his consent until well after the filming had taken place. Confused and scared about what would happen to him, he signed the consent form without reading it. He was never given a thorough explanation as to how the footage would be used.

In light of the Commissioner's recommendation and massive public pressure, CBSA agreed to end its involvement in the show, which aired for three seasons. While its decision is welcome, it should not have taken such sustained advocacy and outcry to force this change. An independent oversight body should have been called on to make findings on the legality of the CBSA's participation in the show's production before it ever agreed to participate.

136 BC Civil Liberties Association, “Border agency broke law with reality TV self-promotion, says BCCLA” (21 March 2013), bccla.org/news/2013/03/border-agency-broke-law-with-reality-tv-self-promotion-says-bccla/.

137 Privacy Commissioner of Canada, *Report of Findings: Investigation into the personal information practices of the Canada Border Services Agency (CBSA) in respect of its participation in a television series entitled, “Border Security: Canada's Front Line”* (6 June 2016), bccla.org/wp-content/uploads/2016/06/Letter-of-Finding-CBSA-Border-TV-Program-June-6-2016-2.pdf.

The review and complaints body must be able to conduct effective investigations that deliver meaningful results to complainants. The body must be able to access the information it needs, and must have the power to compel production of relevant information and documents in the possession of the CBSA. It must also be able to compel testimony from CBSA officers regarding the incident under investigation. If it finds a complaint to be well-founded, the body must be able to order redress and make binding remedial orders. Government should explore whether this should include monetary compensation to complainants.

Before describing these requirements for effective oversight and review in more depth below, we turn now to the broad general principles that ought to guide the development, mandate and work of these proposed oversight and review mechanisms for CBSA.

GUIDING PRINCIPLES FOR BOTH OVERSIGHT AND REVIEW

To be effective in providing accountability for CBSA and bolstering public confidence in its work, an accountability mechanism—whether it is charged with oversight or review of CBSA’s activities—must have the following features, at a minimum:

- **INDEPENDENCE**—The agency must be external to the CBSA, both physically and organizationally. The agency must be free from interference by the government and the CBSA, and be run by a leader who is non-partisan and who is not a former member of CBSA or another law enforcement agency;
- **ABSENCE OF BIAS**—The investigations conducted by the agency must be free from investigator bias, including bias held by supervisors, and the perception of bias. A complaints system in which CBSA officers investigate each other is not likely to enhance public confidence in the system.
- **EFFECTIVENESS**—The agency must be effective in undertaking investigations, monitoring CBSA activities and, for the review process, responding to complaints. Its findings must be enforceable and have meaningful legal consequences.
- **OPENNESS AND TRANSPARENCY**—The public has a right to understand the process that is used, and the end results. The results of investigations, recommendations and decisions on disposition should be subject to public scrutiny.
- **SUFFICIENT POWERS OF INVESTIGATION**—The agency must have adequate powers to investigate and review, including the power to compel witnesses who are members of CBSA and other law enforcement agencies, if necessary.
- **SUFFICIENT JURISDICTION**—The agency should have the power to investigate the widest possible range of CBSA policy and practice, including policy respecting CBSA’s work overseas. With respect to the review mechanism, the agency must be able to investigate all allegations misconduct and wrongdoing, including off-duty conduct, conduct of



contractors, and conduct that occurred outside of Canada, and should be able to pursue investigations of officers who have resigned or retired.¹³⁸

- **SUFFICIENTLY RESOURCED**—The agency must have the resources and personnel it needs to do its job effectively and maintain public confidence. Importantly, staff must be knowledgeable of the particulars of the immigration context, including the particular vulnerabilities of refugee claimants and other newcomers to Canada who may not be familiar with Canada’s legal system or have ability to communicate in an official language, which is different than the context of other law enforcement operations.

STANDARDS TO WHICH CBSA MUST BE HELD

Both an oversight and a review agency must hold CBSA—both individual officers and the institution as a whole—to the highest standards of integrity and ethics.

As a government agency, the CBSA must comply first and foremost with the *Canadian Charter of Rights and Freedoms*, which prohibits unreasonable search, seizure and detention, and protects people in Canada from discrimination. Importantly, *Charter* protections extend to everyone physically present in Canada, not just citizens or those with lawful immigration status.

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Importantly, and in contrast with some other jurisdictions, that protection extends to non-citizens who are physically present not only within, but also at Canada’s borders, without distinguishing between those who seek and those who have secured entry into the country.¹³⁹

A second basic expectation is that CBSA and its officers comply with relevant governing legislation and rules, including the *Canada Border Services Agency Act*, *Criminal Code*, *Immigration and Refugee Protection Act* (IPRA), the *Canadian Human Rights Act*, and federal privacy laws.

The CBSA should also conduct itself in conformity with international human rights instruments to which Canada is signatory, including the *Convention Relating to the Status of Refugees* and the *Convention on the Elimination of all forms of Racial Discrimination*. Indeed, section 3(3)(f) of IPRA states that it is to be “construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.”

138 The BCCLA endorses the model for CBSA accountability proposed by the Canadian Council for Refugees, from which many of these principles are adapted, ccrweb.ca/sites/ccrweb.ca/files/ccr-cbsa-accountability-model.pdf; These principles are also based on those articulated by the BCCLA in its report by David McAllister, *Police-Involved Deaths—The Failure of Self-Investigation* (2010), bccla.org/wp-content/uploads/2012/05/20101123-McAllister-Report-Police-Involved-Deaths-The-Failure-of-Self-Investigation.pdf.

139 *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177. See also Arbel, *infra* note 156 at 5-8.

The CBSA is also accountable under its own internal *Code of Conduct*, as well as the *Values and Ethics Code for the Public Sector*, which emphasize respect, integrity and professionalism.

Finally, we endorse the Canadian Council of Refugees' recommendation¹⁴⁰ that CBSA also be accountable for its conformity with the following principles, which are adapted from the *RCMP Act*:¹⁴¹

- a) to respect the rights and dignity of all persons, without discrimination;
- b) to act at all times in a courteous, respectful and honourable manner;
- c) to show particular sensitivity to the best interests of children;
- d) to maintain the integrity of the law, law enforcement and the administration of justice;
- e) to maintain transparency and accountability;
- f) to act impartially and diligently, in accordance with the law and without abusing the authority of the CBSA;
- g) to avoid any actual, apparent or potential conflict of interests;
- h) to be incorruptible.

REQUIREMENTS FOR A CIVILIAN REVIEW AND COMPLAINTS BODY

To achieve the objectives set out above, a body charged with responding to complaints against CBSA requires the following components.

Able to receive individual complaints

Individuals with grievances against CBSA officers must have an accessible, easy-to-understand avenue for registering their complaints. The review body should be able to receive complaints by letter, telephone, email and through a web-based form, and there should be no limit on the length of the complaint or the attachments that may be included to provide additional evidentiary support. Complaints may pertain to CBSA activities and actions anywhere, both in Canada and overseas, including ports of entry, overseas airports, hearings at the Immigration and Refugee Board, and in communities.

140 Canadian Council for Refugees, *Proposed CCR Model for a CBSA Accountability Mechanism*, March 2016, ccrweb.ca/sites/ccrweb.ca/files/ccr-cbsa-accountability-model.pdf.

141 *Royal Canadian Mounted Police Act*, RCS 1985, c R-10, s 37.



Complaints may also pertain to the activities or actions of private security contractors¹⁴² hired by the CBSA, which may outnumber CBSA employees in some cities.¹⁴³

All complaints should be received directly by the review body, and should not have to go through CBSA first. Requiring that complaints be made to CBSA compromises the appearance of independence of the complaints process. Moreover, a requirement to file a complaint with the CBSA could serve as a deterrent to individuals who are still dealing with CBSA and may be concerned about retribution. This is not a theoretical concern. We have been made aware of instances in which complaints made to CBSA—even by third party organizations rather than the detained individual concerned—are referred to by the CBSA in the context of the person’s detention review hearing.¹⁴⁴

An additional way to deal with concerns about retribution that should be explored is to accept anonymous complaints and/or to allow complainants to make an application, where warranted in the public interest, to have their identity concealed from any CBSA officer connected with the complainant’s case. The Military Police Complaints Commission, for example, has conducted a public interest investigation based on an anonymous complaint related to alleged abuse of military police detainees.¹⁴⁵ While in some instances it may be difficult to conduct an investigation fairly if there is no opportunity for an officer who is subject to a complaint to know the identity of the accuser, there may also be instances in which there is a significant public interest in accepting and dealing with such complaints while protecting the accuser’s identity, or where that identity is unknown. While some police complaints bodies in Canada do not accept anonymous complaints or shield complainant identities, the particular vulnerability of certain complainants in the immigration and refugee context justifies leaving the door open to such complaints against CBSA.

Able to receive third-party complaints

It is critical that the complaints process not be limited to just individual complainants. The body must also be able to receive complaints from third parties, including non-governmental and public interest organizations.

The CBSA deals with people in highly vulnerable circumstances: they may have fled conflict and be making refugee claims, or their legal status in Canada may be otherwise uncertain. They may not speak English or French and may be unfamiliar with the Canadian legal system. They may have come from a country where making a complaint against a government entity is fruitless at best, and dangerous at worst. In short, individuals without secure status in Canada may be understandably reluctant to complain about their treatment by CBSA officials, who hold great

142 References in this report to “CBSA officers” include private contractors.

143 David P. Ball, “Private security outnumber border services in big cities”, *The Tyee* (7 October 2014), thetyee.ca/News/2014/10/07/Private-Guards-Outnumber-Border-Services-Officers-Major-Cities/.

144 Discussion between refugee advocate and authors.

145 Military Police Complaints Commission, Decision to conduct a Public Interest Investigation - MPCC 2015-005 - November 4, 2015, accessed at mpcc-cppm.gc.ca/03/305/2015-005f-eng.aspx.

power to make decisions affecting their own and their families' lives. Moreover, some individuals may be deported before they are able to register a complaint. In addition, third parties and public interest organizations may be able to identify systemic or recurring problems with CBSA practices.

For these reasons, a CBSA accountability body must be empowered to accept and investigate complaints from third parties, including non-governmental and public interest organizations.

Able to initiate its own reviews

In addition to receiving public complaints, the review body must be able to initiate its own reviews and investigations if it considers it to be in the public interest, even where there is no complaint or the complaint has been withdrawn. In many cases, as noted above, individuals may not make complaints when they have experienced mistreatment. Moreover, a range of CBSA's activities occur in secret, and individuals and non-governmental organizations may never become aware of problematic activities. Therefore, the review body should have the capacity to initiate its own reviews, including systemic reviews of policies, practices, programs and procedures. It should also have the power to conduct an inquiry or hearing where necessary.

The review body should report publicly on its work and should make recommendations to CBSA, to the Minister of Public Safety and to IRCC when opportunities for improvement are discovered. It should coordinate with the CBSA oversight commission to ensure that its efforts complement and do not duplicate that body's work.

Advocates highlighted that accountability is needed for systemic issues, not just individual complaints:

"Accountability is needed for the most basic, daily things you can imagine. Like the poor quality of food that detainees, including children, are provided with. But there are more systemic issues, too. After we learned that a teenage refugee claimant from Syria had been kept in solitary confinement for weeks, I asked for the CBSA's policy on putting minors in detention. They said they didn't have one. If that's not a lack of accountability, I don't know what is." —Refugee advocate

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CBSA officers should not investigate complaints against other CBSA officers

In the BCCLA's report on accountability models in policing, we canvassed in detail the difficulties in terms of outcomes and public confidence presented by police officers investigating allegations of misconduct or criminal wrongdoing by other police officers.¹⁴⁶ This was determined to be a critical weakness of police accountability mechanisms in the provinces, federally, and in other jurisdictions such as England and Wales.

At present, the CBSA's Professional Standards Investigations Unit reviews allegations of *Code of Conduct* violations by CBSA officers. The 2015 Audit of Professional Standards found that few CBSA members completed training in professional standards, and that professional standards investigations were inconsistent across Canada.¹⁴⁷ The audit observed: "Should professional standards training remain optional, employees may not understand the Agency's expectations related to professional standards."¹⁴⁸ Additionally, despite a requirement imposed in 2011 for the

Complainants, the general public, the BCCLA and other civil society organizations have expressed a great deal of dissatisfaction over time with police self-investigation.

regions to report allegations of misconduct to CBSA headquarters, this was not being done consistently in 2014-2015. The audit concluded that "Limited tools and formal training were available for investigators and managers involved in misconduct investigations. To compensate, regions developed their own tools and guides."¹⁴⁹ On the positive side, the audit determined that where discipline was determined to be necessary

through the process, CBSA followed through in nearly all of cases sampled.¹⁵⁰ Nevertheless, the lack of independence in these investigations erodes public trust and perceptions of meaningful accountability.

In his 2009 recommendations for reform of his own agency, Chair of the then-Commission for Public Complaints Against the RCMP, Paul Kennedy, expressed his concern about police investigating police after conducting a review of a range of complaints concerning incidents of varying severity: "In reviewing the sample of cases, Mr. Kennedy found serious cause for concern with more than two-thirds of the cases being handled inappropriately. In a quarter of the cases in the sample, the investigator personally knew the officer under investigation. In one-third of the cases, the investigator was of an equal or lower rank than the officer under investigation."¹⁵¹

146 McAllister, *supra* note 138.

147 *Audit of Professional Standards*, *supra* note 77.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.* CBSA stated that it accepted the findings and the recommendations to improve training, guidance and tools and to make training mandatory, and that they would be implemented by December 2016. The BCCLA is not aware of the status of implementation at the time of writing.

151 McAllister, *supra* note 138 at 15, citing Paul Kennedy, *Police Investigating Police: Final Public Report* (Ottawa: Commission for Public Complaints Against the RCMP, 2009) at 69. Mr. Kennedy recommended that other police agencies investigate serious cases such as police-involved deaths, instead of the RCMP. In 2010, this recommendation was accepted by the RCMP, but in the intervening years, many serious complaints have continued to be investigated by other RCMP officers (though often times in different detachments).

Complainants, the general public, the BCCLA and other civil society organizations have expressed a great deal of dissatisfaction over time with police self-investigation, even when subject to potential review by an oversight body (the model used in relation to the RCMP and numerous municipal and provincial police services across Canada).

In his 2017 Ontario Independent Police Oversight Review report, Mr. Justice Tulloch recommended that Ontario's independent complaints body investigate *all* public conduct complaints in relation to the police:

150. A commonly expressed view at my consultations was that “the police should not be investigating police.” Nonetheless that is the current state of affairs. The OIPRD [Office of the Independent Police Review Director] is largely a screening body and not an investigative one.

151. As I indicated in my introductory comments to section 7.300, this is not a failure of the function of the OIPRD, but a failure of its form. The OIPRD was not created to be the sole investigative agency for public complaints against police, but rather to review complaints and oversee the complaints process.

152. The OIPRD, as currently constituted, is not adequately resourced to investigate all public conduct complaints. Fiscal and geographical constraints compel the OIPRD to refer many complaints back to police services even when the circumstances of a particular complaint may justify independent investigation.

153. In my view, the preferred approach is for all public conduct complaints to be received, reviewed, and investigated by the OIPRD. Independent and impartial investigation of complaints will help foster public trust in not only the complaints system, but policing more generally.

154. Many of the people with whom I spoke expressed a strong desire to have an independent, civilian body investigating police misconduct rather than police services themselves. Irrespective of issues of actual bias, they noted the potential for a perception of bias when police officers investigate other police officers in their same force.

155. I recognize that having the OIPRD conduct all public conduct complaint investigations will require a commitment of time and resources. Nonetheless, I believe it is an achievable goal toward which the OIPRD can work over time.¹⁵² [emphasis added]

There is no compelling reason, in the BCCLA's view, to recommend otherwise for the CBSA. While there will always be a role for professional standards in dealing with internal performance, security and disciplinary issues that are not the subject of a complaint, the investigation of complaints should generally be conducted by an external accountability agency if public trust is to be maintained.¹⁵³ In saying this, we note that in cases involving less serious allegations of misconduct, such as a failure to provide a certain level of service, rudeness, motor vehicle infractions by CBSA officers, and complaints related to customs issues, it may be more efficient,

¹⁵² Tulloch, *supra* note 101.

¹⁵³ McAllister, *supra* note 138 at 75.



and acceptable from a public confidence standpoint, to have them handled by the relevant professional standards unit within CBSA or the Recourse Directorate under the supervision and direction of the external agency.

Broad jurisdiction

The actions and activities of CBSA officers should be within the scope of the accountability agency, including the exercise of their powers to question, search, seize, detain, make eligibility determinations, and impose penalties. Complaints should also be able to be filed regarding CBSA policies, programs and initiatives, instead of being limited to individual actions.

Where individuals are detained by CBSA, the actions of CBSA and conditions of detention, as well as the actions of third parties who act for CBSA under contract such as provincial corrections staff and private security, should all fall under the purview of the review body. While the body

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may not be able to make binding decisions in relation to provincial officials, it could nevertheless make findings and recommendations, and make decisions that bind the CBSA in its dealings with such outside bodies, including the standards that are insisted upon in those relationships.

The review body should also be able to consider off-duty conduct. CBSA already considers that off-duty conduct can constitute misconduct, as noted in the 2015 Audit of Professional Standards.¹⁵⁴ Public confidence in the CBSA can be directly impacted by off-duty conduct,

so any accountability mechanism needs to be able to deal with complaints related to such conduct.

In many instances, the subject matter of an individual's complaint may relate to the actions of officials at IRCC that interact with CBSA personnel in connection with that individual's case. It does not make sense for the review body to be unable to consider IRCC actions and how those may have affected the case. The review body should be able to consider the actions of IRCC that may be relevant to a complaint, and make findings and recommendations in relation to IRCC's actions where the agency considers it necessary to do so.

The review body must have the ability to coordinate with law enforcement, or an independent investigation service in relation to critical incidents (as described below), where there is a potential for criminal charges to arise from the facts of a given incident.

In proposing that the review body have a broad scope, we do not intend the body to be the mechanism to dispute outcomes of decisions or the imposition of penalties made by the

¹⁵⁴ *Supra* note 77.

CBSA. Determinations made by CBSA should continue to be subject to review through the Recourse Directorate (in relation to customs determinations) or the Federal Court (in relation to admissibility determinations and other determinations currently reviewable by that court).

Independent civilian review of critical incidents

Civilian investigators (i.e., members of the public who are not law enforcement personnel) should be tasked with investigating critical incidents, including those that could give rise to criminal liability, involving CBSA officers and individuals with whom they interact. These critical incidents include deaths, serious injuries, and sexual assaults.

In setting up the Independent Investigations Office in BC, the agency has encountered difficulties in recruiting enough investigators who have not been recently employed as police officers, notably, due to a lack of training. For similar reasons, we recognize that it may not be possible for the review body to have its entire staff comprised of civilians at the outset, civilianization should be its ultimate goal, to be achieved within a clearly defined and relatively short period of time.¹⁵⁵

Power to compel CBSA to provide information

To be effective, an accountability body must have access to the information it needs to investigate and respond to complaints. In many cases, such information will not be in the possession of the person filing the complaint, and will be held by CBSA. The accountability body must have the power to compel production of relevant information and documents in the possession of the CBSA. It must also be able to compel testimony from CBSA officers regarding the incident under investigation. The body also needs to have the power to search CBSA and IRCC property, insofar as IRCC actions are connected with a complaint.

Power to order remedies

After investigating a complaint and finding it to be well-founded, the body must be able to order redress and make binding remedial orders. Government should explore whether this should include monetary compensation to complainants. It should also have the power to impose penalties against CBSA officers found to have breached laws or policies, including fines, suspension from duty and, in some cases, termination of employment. It should also have the power to require changes to operational policies and procedures, and be able to superintend over the CBSA to ensure that necessary changes are implemented.

¹⁵⁵ It has been identified to the BCCLA that there is a lack of training programs specifically catered to civilian investigation of alleged police misconduct. It may be worthwhile for the federal government to collaborate with provinces in establishing such a training program at an educational institution, in order to help create a stream of civilian investigators over time.



Capable of reviewing CBSA's overseas activities

Under the Multiple Borders Strategy (“MBS”) unveiled in 2002, CBSA posts “liaison officers” in offshore locations—principally airports—to block asylum seekers from boarding planes or boats bound for Canada. The MBS’s stated goal is to “push the border out”—outside of Canada’s geographic perimeter—to keep refugees and other so-called “undesirable travellers” away from Canada’s territorial frontiers and block them from seeking asylum.¹⁵⁶ Part of a liaison officer’s job is to enlist third-party carriers, including airlines, railways and shipping companies, to reject passengers without proper documentation. Hungarian Roma—a population that has experienced decades of racism and discrimination in Hungary and throughout Europe—are among those targeted for interrogation and exclusion.¹⁵⁷

Canada currently positions liaison officers in 47 countries around the world, and between 2001 and 2014, liaison officers intercepted over 86,000 people, many of whom were likely refugees.¹⁵⁸ Because they operate outside of Canadian soil, liaison officers can more easily circumvent Canada’s refugee protection obligations: Canadian law does not require them to consider the individual circumstances of interdicted individuals, to differentiate between refugees and other travellers, or ensure that intercepted individuals are not sent back to countries where they will face persecution.¹⁵⁹ Their accountability is arguably even less than that of regular CBSA officers; in some instances, it appears they do not even identify themselves or who they work for to the people they are targeting.¹⁶⁰ Their activities must be covered by both the review and the independent oversight bodies for the CBSA.

Transparent process

The review body’s process must be easy to understand and access by the public, and the body should set service standards for timeliness of response. Information about the complaints process should be made available in a range of different languages online and at CBSA offices, including ports of entry.

It may be possible to resolve some, and perhaps many complaints informally through mediation or an exchange of correspondence led by the accountability agency. On the basis of its investigation, which may include interviewing the parties involved and reviewing relevant documentation, the agency may make recommendations that are accepted by CBSA and acceptable to the complainant, and the file may be closed.

156 See Efrat Arbel, “Bordering the Constitution, constituting the border” (2016) 53(3) Osgoode Hall Law Journal 1 at 2-3.

157 Nicholas Keung, “Roma say they’re being barred from flights to Canada” *Toronto Star* (6 May 2017), thestar.com/news/immigration/2017/05/06/roma-say-theyre-being-barred-from-flights-to-canada.html.

158 Arbel, *supra* note 156 at 14.

159 *Ibid.*

160 Raffy Boudjikianian, “Hungarian Roma regularly prevented from boarding Canada-bound flights” *CBC News* (5 October 2015), cbc.ca/news/canada/montreal/hungarian-roma-refugee-claim-cbsa-air-transat-budapest-gabor-luka%C3%A7s-1.3257661.

The body should have the power to dismiss a complaint on the basis that it is frivolous, vexatious or made in bad faith.

Complainants unsatisfied with the body's resolution of their complaint should be able to seek review through an internal process within the review body before seeking judicial review in Federal Court. The ability to seek review of the disposition of a police complaint is commonplace, and should be a feature of this process as well.

FEATURES COMMON TO BOTH A REVIEW AND AN OVERSIGHT AGENCY FOR CBSA

Public reporting

Both agencies should publish their findings and decisions on their websites, anonymizing identifying details about the complainant where necessary to protect the complainants' safety or privacy interests. The review body should keep statistics regarding the number and nature of the complaints received, the number informally resolved, the number that proceed to a full hearing, and the average and median length of time elapsed between receipt of the complaint and its resolution. These statistics should be published in annual reports.

Reporting to Parliament

Both agencies should be required to report to Parliament. The United Nations *Handbook on Police Accountability, Oversight and Integrity* establishes reporting to the legislature as a best practice for the establishment of police accountability agencies.¹⁶¹ The agency should be treated as an arms-length agency not subject to ministerial interference.

Transparent appointment process

To ensure a degree of independence, the executive in charge of the agency should be appointed by the Governor in Council to a term of between five and seven years (eligible for reappointment), terminable only for cause, to ensure a degree of independence.¹⁶²

In the BCCLA's submission, the recent recommendation of the Independent Police Oversight Review in Ontario in relation to the Special Investigations Unit is apt: when appointing the

¹⁶¹ United Nations, *supra* note 56 at 50.

¹⁶² The Report of the Independent Police Oversight Review in Ontario recently recommended a five year security of tenure, terminable only for cause, re-appointable only once, for police oversight heads in that province in order to ensure independence. See Tulloch, *supra* note 101 at s 4.510.



executive, the candidate's understanding of the requirements of effective investigations, a functioning public accountability mechanism, the needs and concerns of the community and stakeholders, and the added value of a candidate's work or cultural background and ensuring that leadership and staff at the agency reflect the diversity of society should be factors for consideration.¹⁶³ In the CBSA context, it is also critical for a candidate to have a knowledge of human rights and immigration law and policy and an understanding of the unique circumstances of newcomers to Canada. A strong familiarity with these areas of law and policy is crucial to understanding the actions of CBSA officers and the degree of seriousness of any alleged misconduct.

The agency should be staffed by people who have expertise in law enforcement oversight. Staff must be trained so as to become familiar with the policies, procedures and operations of CBSA. As set out above, in order to minimize the potential for bias and the appearance of bias, it should be a goal to have a civilian staff that have not had law enforcement careers. The Braidwood Commission of Inquiry into the death of Robert Dziekanski at Vancouver International Airport recommended that an independent investigation agency for law enforcement must be staffed by civilians: "I share [the] view that the proposed independent investigative body can, if properly resourced, perform competently without reliance on police officers to serve as investigators. In my view it must, if it is to address the public's distrust of the police investigating themselves."¹⁶⁴

The Braidwood Commission recognized that this can be difficult to achieve immediately and recommended a phased approach. Along the lines of what the Commission recommended, we suggest, as a transitional measure, that the agencies should have the flexibility to employ former law enforcement officers but they must not have worked at CBSA within the last five years. Ontario's recent Independent Police Oversight Review also recently recommended that that province's police accountability agencies actively recruit civilian investigators who are not former police officers, and suggested a cap on the former police officer complement of those agencies (25% for the general complaints body, and 50% for the special investigations body).¹⁶⁵

Sufficiently resourced

If it is to be effective, the accountability body will require sufficient resources, staffing and budget, to respond to complaints in a timely way and to undertake investigations on its own initiative. Given the scale of CBSA operations across Canada and abroad, the agency must have sufficient resources to be able to quickly respond across a wide geographic range. This could involve employing on-call investigators at strategic locations across the country to respond to urgent situations. The body should also have sufficient resources to communicate with and to educate the public about its functions, as well as to deal sensitively with complainants and their families, who may be vulnerable individuals and who may not be able to deal easily with government agencies in English or French.

¹⁶³ *Ibid*, Recommendation 4.6.

¹⁶⁴ Braidwood Commission of Inquiry, *Phase Two Report: Why? The Robert Dziekanski Tragedy* (2010) at 419, <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf>.

¹⁶⁵ Tulloch, *supra* note 101, Recommendations 4.14-4.16.

CONCLUSION

IT HAS BEEN 11 YEARS since Mr. Justice O'Connor first recommended independent oversight for CBSA.¹⁶⁶ Since then, the calls for accountability for this large and powerful law enforcement and security agency have only gotten louder. Media, advocacy groups and the courts have been instrumental in exposing numerous failures of CBSA policy and practice: deaths of migrants in custody, deplorable conditions of prolonged confinement in immigration detention facilities, and far too many examples of egregious officer conduct. Thanks to this sustained pressure, the Canadian government has finally recognized that independent oversight and accountability for CBSA is badly needed, and we expect to see reforms in the near future. These developments are most welcome, if badly overdue.

The BCCLA has a long history of advocating for effective civilian oversight and accountability for law enforcement. In this report, we propose a two-pronged approach to extending this kind of accountability to the CBSA, which in some circumstances has even greater powers than the police, yet lacks any kind of independent civilian review. The evidence presented here, including interviews with lawyers and advocates who work with migrants and refugees every day, demonstrates that both oversight and review of CBSA activities are needed to hold the agency accountable for upholding the rights of the vulnerable people with whom it interacts, and to foster public confidence in its operations.

The Inquest into Lucía Vega Jiménez's death concluded that there is "no independent, realistic method for immigrants to bring forward concerns or complaints." This report offers a roadmap and a set of criteria for creating that independent and realistic alternative. Now, it is time to act.

This report offers a roadmap and a set of criteria for creating that independent and realistic alternative. Now, it is time to act.

¹⁶⁶ O'Connor Report, *supra* note 20.





Canada Border
Services Agency

**Welcome
to Canada**

**Please stop
and report**

Agence des services
frontaliers du Canada

**Bienvenue
au Canada**

**Veuillez arrêter
pour les formalités**

The British Columbia Civil Liberties Association was established in 1962 and is the oldest continuously active civil liberties association in Canada. Its mandate is to preserve, defend, maintain, and extend civil liberties and human rights in British Columbia and across Canada.



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