



November 21, 2022

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To: The Right Honourable Justin Trudeau

This is a joint submission by the Canadian Civil Liberties Association (“CCLA”) and the British Columbia Civil Liberties Association (“BCCLA”) with respect to Canada’s shortcomings in immigration detention.

The CCLA is a national organization dedicated to the furtherance of civil liberties in Canada. The CCLA’s principal mandate is to promote and protect fundamental rights and liberties. The CCLA possesses longstanding expertise and a distinct national perspective on civil liberties and human rights. For over fifty years, the CCLA has advanced its primary mandate to hold government actors to account for incursions into fundamental rights and freedoms, and to promote transparency and accountability in government decision-making.

The CCLA has specific expertise in civil liberties as applied to the immigration context, and with respect to the Canada Border Services Agency (“CBSA”), and has been granted intervener or party status in many cases that have a direct or indirect impact on civil liberties in the context of immigration law, on numerous occasions, including before the Supreme Court of Canada. Some of those cases and submissions include:

- *Canadian Council for Refugees v Minister of Citizenship and Immigration*, decision pending: concerning the constitutional validity of legislative provisions that prevent certain categories of refugee claimants from seeking refugee protection in Canada;
- *Minister of Public Safety and Emergency Preparedness, et al. v. Tusif Ur Rehman Chhina*, 2019 SCC 29, concerning whether a *habeas corpus* proceeding should be available to individuals held in immigration detention;

- Submissions, dated March 31, 2014, before the Senate Standing Committee on National Security and Defence regarding an ongoing study on the policies and practices of the Canada Border Services Agency;
- Written submissions, dated November 13, 2012, to the Standing Committee on Citizenship and Immigration concerning Bill C-43, An Act to amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act);
- Submissions, dated April 30, 2012, to the Standing Committee on Citizenship and Immigration regarding Bill C31, An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act (Protecting Canada's Immigration System Act), in which CCLA raised strong objections to the unconstitutional changes proposed to the refugee protection system that could discriminate against, arbitrarily detain, and endanger refugees and asylum seekers;
- Submissions, dated June 3, 2011, to the Beyond Borders Working Group on the Canada-US Security Perimeter, setting out CCLA's preliminary concerns regarding threat assessment, integrated cross-border law enforcement, cyber-security, and the need for ensuring compliance with legal safeguards contained in the Charter, and in international human rights law;
- *Tiberiu Gavrila v. Minister of Justice (Canada)*, 2010 SCC 57, concerning the interaction between the Immigration and Refugee Protection Act and the Extradition Act and whether a refugee can be surrendered for extradition to a home country; and
- *Charkaoui et al. v. Canada (Citizenship and Immigration)*, 2007 SCC 9, in which the constitutionality of certain "security certificate" provisions of the Immigration and Refugee Protection Act was assessed.

The BCCLA's mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. As Canada's oldest active civil liberties association, the BCCLA has a long history of work in the areas of CBSA accountability and oversight, prisoners' rights, mental health, and has long advocated for migrant rights.

The BCCLA has significant expertise in the law and policy governing the CBSA, as well as correctional facilities in Canada. The work that BCCLA has done regarding CBSA oversight and accountability, prisoners' rights and mental health, and migrant rights includes:

- Recommending models of effective civilian oversight and accountability for the CBSA.¹

¹ BCCLA, "Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency" (2017), online: *British Columbia Civil Liberties Association* <bccla.org/wp-content/uploads/2017/06/FINAL-for-web-BCCLA-CBSA-Oversight.pdf>.

- Challenging the expansion of powers for US customs and border agents and the CBSA at preclearance sites in Canada and at the border;²
- Opposing the closure of the Canada-US land border to asylum-seekers during the COVID-19 pandemic;³
- Successfully suing Canada, alongside the John Howard Society of Canada, for laws governing administrative segregation that violated the Charter because they were inhumane and permitted prolonged, indefinite solitary confinement;⁴
- Filing a lawsuit against Canada to stop the wardens at federal prisons from unlawfully placing people in long-term solitary confinement through lockdowns and “restrictive movement routines;”⁵ and
- Advocating against the arbitrary imprisonment and cruel treatment of migrants with mental health issues.⁶

It is in the context of this continuing work that the CCLA and the BCCLA call on the federal government to end the agreements between the CBSA and the provinces, allowing immigrants and refugees to be held in provincial jails.

To date, the following provinces have cancelled their agreements: Alberta⁷, British Columbia⁸, Manitoba⁹ and Nova Scotia¹⁰.

² BCCLA, “Written Submission to the Standing Committee on Public Safety and National Security Regarding Bill C-23, the Preclearance Act (2016)” (10 May 2017), online: *British Columbia Civil Liberties Association* <bccla.org/wp-content/uploads/2017/05/BCCLA-submission-Bill-C23-precleanance-May-9.pdf>.

³ BCCLA, “Letter to Prime Minister Trudeau regarding: Shutting the Canada-US Border to Refugees” (26 March 2020), online: *British Columbia Civil Liberties Association* <bccla.org/wp-content/uploads/2020/04/BCCLA-Opposes-Border-Closure-March-2020.pdf>.

⁴ *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228.

⁵ BCCLA, “Rights Group Sues to Stop Wardens from Placing Prisoners in Long-term Solitary Confinement” (13 October 2021), online: *British Columbia Civil Liberties Association* <bccla.org/news/2021/10/press-release-rights-group-sues-to-stop-wardens-from-placing-prisoners-in-long-term-solitary-confinement/>.

⁶ BCCLA, “‘We Have No Rights’: Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada” (22 July 2016), online: *British Columbia Civil Liberties Association* <bccla.org/our_work/we-have-no-rights-arbitrary-imprisonment-and-cruel-treatment-of-migrants-with-mental-health-issues-in-canada/>.

⁷ Brigitte Bureau, “Alberta ending immigration detention arrangement with CBSA” (12 October 2022), online: *CBC* <www.cbc.ca/news/canada/edmonton/alberta-cbsa-immigrant-detention-arrangement-1.6613963>.

⁸ The Canadian Press, “B.C. ending immigration detention arrangement with CBSA, citing human rights” (21 July 2022), online: *CBC* <www.cbc.ca/news/canada/british-columbia/cbsa-immigration-detention-ending-1.6528001>.

⁹ Brigitte Bureau, “Manitoba becomes 4th province to say it will stop imprisoning immigrants” (24 October 2022), online: *CBC* <<https://www.cbc.ca/news/canada/manitoba/manitoba-migrant-prison-stop-1.6625106>>

¹⁰ Lyndsay Armstrong, “Nova Scotia will stop holding federal immigration detainees in provincial jails” (21 September 2022), online: *Toronto Star* <www.thestar.com/news/canada/2022/09/21/nova-scotia-will-stop-holding-federal-immigration-detainees-in-provincial-jails.html>.

The federal government now has the opportunity to stand up for human rights across the country. We urge you to take advantage of this opportunity and to send a clear message that the current immigration detention regime is inhumane, ineffective, and contravenes international law and protocols.

This cruel and deliberately opaque system has continued for far too long. Our joint position is that the agreements should all come to an end because of Canada's international law obligations, the extensive evidence of harm caused by CBSA policies and practices, and the lack of independent oversight of the CBSA.

1) Canada's International Law Obligations

Canada is a party to several international human rights conventions and has a legal obligation to implement provisions that protect the rights of migrants, including their right to be free from arbitrary detention. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.¹¹

International human rights law establishes that immigration detention should be used only in exceptional circumstances and as a measure of last resort. The UN special rapporteur on torture concluded that detention based solely on migration status is outside of the legitimate interests of the state and should be considered arbitrary.¹² In 2015, the United Nations Human Rights Committee expressed grave concerns about Canada's immigration detention regime, as well as prison conditions, and recommended that Canada should refrain from indefinitely detaining migrants and observe a reasonable time limit and should ensure that detention is used as a measure of last resort, with non-custodial measures and alternatives to detention being used.¹³

2) Conditions in Immigration Detention and CBSA Jurisdiction

Every year, thousands of non-citizens are detained in Canada.¹⁴ Children are subject to the same legislative scheme that governs adult immigration detention. Accordingly, children may be

¹¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

¹² UN Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment," (2018), UN Doc. A/HRC/37/50, para. 24.

¹³ United Nations Human Rights Committee, "Concluding observations on the sixth periodic report of Canada", (2015), UN Doc. CCPR/C/CAN/CO/6.

¹⁴ Canada Border Services Agency, "Detention Statistics", online: *Government of Canada* <www.cbsa-asfc.gc.ca/security-securite/detent-stat-eng.html> [CBSA "Detention Statistics"].

placed under detention orders for the same reasons as adults.¹⁵ Between 2012 and 2017, an average of 7,215 individuals were detained each year.¹⁶ Since 2013, more than 800 children have spent time in Canadian immigration detention.¹⁷ It is not clear how many children are separated from their detained parents, as CBSA has not collected this data.¹⁸

While the majority of immigration detainees are held in Immigration Holding Centres (IHCs) designated for this population, approximately a third of all detainees and the vast majority of long-term detainees are held in facilities intended for a criminalized population.¹⁹ Immigration detainees with psychosocial disabilities or mental health conditions are routinely held in maximum-security provincial jails.²⁰ In fact, CBSA policy explicitly states that detainees may be transferred from IHCs to provincial jails due to their mental health conditions.²¹ Although CBSA claims that detainees can access more specialized care in provincial jails,²² research indicates that mental health care is woefully inadequate, and that the maximum-security conditions exacerbate existing mental health condition and trigger new illnesses.²³

Once detained, there are no established criteria in law to determine the site of confinement – the decision to transfer detainees from IHCs to provincial jails is entirely within the jurisdiction of CBSA.²⁴ Research indicates that detainees' counsel are not notified of transfer decisions or the reasons for transfers, and detainees do not have the right or a meaningful opportunity to challenge this decision.²⁵ There is no effective and transparent monitoring of the conditions of

¹⁵ Immigration, Refugees, and Citizenship Canada, "ENF 20 Detention" (22 December 2015) at s 5.10, online: <www.cic.gc.ca/english/resources/manuals/enf/enf20-eng.pdf> [ENF 20].

¹⁶ *Ibid.*

¹⁷ Canada Border Services Agency, "Minors in detention – by client status" (4 November 2015) (obtained through access to information request by IHRP, A-2015-15845/MZM); Canada Border Services Agency, "Detention Statistics", online: *Government of Canada* <www.cbsa-asfc.gc.ca/security-securite/detent-stat-eng.html> [CBSA "Detention Statistics"].

¹⁸ The IHRP requested information pertaining to "the number of times child protection services or a local child-care agency has been contacted by CBSA," but according to the CBSA, this record "does not exist" (access to information request by IHRP, A-2015-15858/LIB).

¹⁹ *Ibid.*

²⁰ "We Have No Rights", supra note 16 at 78.

²¹ Canada Border Services Agency, "Arrests, detentions and removals: Detentions" (12 January 2017), online: *Canada Border Services Agency* <www.cbsa-asfc.gc.ca/security-securite/detent-eng.html> [CBSA, "Arrests, detentions and removals: Detentions"].

²² "We Have No Rights", supra note 16 at 78.

²³ Public Services Foundation of Canada, "Overcrowding and inmates with mental health problems in provincial correctional facilities" (2015) at 15, online: *Public Services Foundation of Canada* <publicservicesfoundation.ca/sites/publicservicesfoundation.ca/files/documents/crisis_in_correctional_services_april_2015.pdf> [PSFC, Overcrowding and Inmates].

²⁴ "We Have No Rights", supra note 16 at 75.

²⁵ *Ibid* at 79.

confinement for detainees held in provincial jails, as independent monitors are often barred access to these facilities and their reports are not published.²⁶

Although immigration detention deprives individuals of their liberty, the system provides inadequate legal safeguards to ensure this deprivation is justifiable. Many of the legal safeguards present in the criminal justice system, including evidentiary standards and procedures required to justify deprivation of liberty, as well as the conditions of confinement, are absent in the immigration detention context.

While CBSA makes the initial decision to detain, the decision to continue detention is under the jurisdiction of the Immigration Division of the Immigration and Refugee Board.²⁷ Detention review hearings are quasi de-novo, which means that instead of reviewing previous decisions for potential mistakes, adjudicators take the findings of previous decisions at face value and only look for “clear and compelling reasons to depart from previous decisions.” In practice, this shifts the burden onto the detainees to prove that they should be released.²⁸ This is particularly challenging because detainees often do not have legal representation at detention review hearings.²⁹ Importantly, the totality of these systemic flaws is further aggravated because there is no limit to the length of detention, and instances of detention can continue for months and even years; the longest instance of immigration detention in Canada was 11 years.³⁰

3) Extensive Evidence of Harm Embedded in CBSA Policies and Practices

Evidence of harm enacted by Canada’s immigration detention regime has been detailed extensively through tribunal and court decisions, as well as audits and reports stemming from exhaustive research and submissions. All of these reports and decisions have condemned the policies, practices, and culture of CBSA and advocated for reform.

2018 Audit Report Exposed Cruelty of Detention System

In 2018, an external audit commissioned by the chair of the Immigration and Refugee Board (“IRB”) condemned the culture and practices of CBSA and the Immigration Division and

²⁶ Canadian Red Cross Society, “Annual Report on Detention Monitoring Activities in Canada” (2011) (obtained through access to information request by IHRP, A-2014-09720) at 6; see also, “We Have No Rights”, at 84.

²⁷ IRPA, s 54.

²⁸ “We Have No Rights”, supra note 16, at 5; *Scotland v Canada (Attorney General)*, 2017 ONSC 4850.

²⁹ *Ibid.*

³⁰ Geoffrey York, “Freed from Canadian Detention, South African Man Left in Limbo” (14 June 2016), online: *The Globe and Mail* <beta.theglobeandmail.com/news/world/freed-from-canadian-detentionsouth-african-man-left-in-limbo/article30462108/?ref=http://www.theglobeandmail.com&>.

recommended that authorities “address the enormous problem of affording fair and humane treatment to persons in detention who are living with mental illness.”³¹

The audit found that cases involving persons with substance use issues and psychosocial disabilities faced persistent lack of treatment and counselling services in provincial correctional institutions, and that lack of access to these services not only impacted their health, but their ability to demonstrate certain factors supporting their release. Canadian courts have found that continued detention without treatment could constitute cruel and unusual punishment contrary to s. 12 of the Charter³² or would violate ss. 7 and 9 Charter rights due to the unavailability of treatment.³³

The audit also found that detention decision-making had strayed from CBSA’s mandate of ensuring public safety and the presence of persons for deportation purposes and called for greater transparency in decisions and rigorous detention reviews in alignment with the principle that release is the default position.

The audit further concluded that the Immigration Division tended to rely, uncritically, on the submissions of CBSA Hearings Officers. These submissions often misstated facts and other critical details in the file and can play a significant role in a decision to continue detention, especially when the bar to continue detention was dangerously low. People were often continually detained on the basis that *any* risk of failure to appear was enough risk to justify continued detention. The audit recommended that detention based on mere risk that the person will miss an appointment or commit a minor offence was not enough—the evidence must establish that the risk is greater than 50%. The audit also noted that in many cases, the reason for continued detention is unclear—and that is in cases where there were any reasons at all. In many detainee files, reasons and decisions recommending continued detention were often missing.

The CCLA and the BCCLA oppose the use of prolonged, indefinite lockdowns and restrictive movement routines in all carceral contexts, including immigration detention. They are devastating to the physical, psychological, social, and spiritual health of incarcerated people. Those who are subjected to extended usage of these procedures suffer from a wide variety of adverse effects, including: anxiety; hallucinations; panic; paranoia; ruminations and intrusive obsessional thoughts; self-harm; social withdrawal; suicidal thoughts and behaviours; and mental illness.

³¹ Immigration and Refugee Board of Canada, “Report of the 2017 / 2018 External Audit for Detention Reviews (20 July 2018), online: *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx>.

³² *Ebrahim Toure v. Minister of Public Safety*, 2017 ONSC 5878.

³³ *Ali v. Canada (Attorney General)*, 2017 ONSC 2660.

Not only is the presence of psychosocial disabilities and suicidality in immigration detainees often used by CBSA to justify continued detention and placement in provincial jails, it is also often the basis for using prolonged segregation. The CCLA and the BCCLA condemn this practice and call on the federal government to cease enabling it.

4) Lack of independent oversight of CBSA

An independent, civilian-led oversight commission with a mandate to provide real-time oversight for the CBSA is required. There is no justification for the continued unfettered discretion and latitude afforded to the CBSA, and any steps to limit that discretion should be taken immediately.

In addition to cruel treatment of those with psychosocial disabilities and substance use issues, the 2018 IRB audit found an inconsistent, regionally-specific approach to detention demonstrated by the CBSA where it may be more likely to recommend release from detention in certain parts of the country rather than others, where they were more biased towards continuing detention. The report also discussed the culture of delay at CBSA that can unnecessarily extend detention *by years*, in certain cases. These inconsistencies and delays have resulted in egregious infringements of human rights, and warrant extensive oversight.

The federal government has previously stated its support for the creation of an accountability mechanism for CBSA, and the Senate Standing Committee on National Security and Defence also made this recommendation in its report *Vigilance, Accountability and Security*, stating that the agency should ensure appropriate compliance with legislation and policy. So far, national initiatives including the National Immigration Detention Framework (NIDF), the Alternatives to Detention Program, and the Ministerial Direction to CBSA on Minors in Immigration Detention indicated the possibility of structural and institutional change but ultimately failed to deliver.

Since the NIDF was implemented, the number of immigration detainees has steadily increased each year and more than one fifth of immigration detainees have been held in provincial jails across the country, with the vast majority being detained on the basis of being a flight risk. Since the onset of the COVID-19 pandemic, the CBSA has relied even more heavily on provincial jails, incarcerating 40% of immigration detainees there in the 2020-21 fiscal year and more than doubling the average length of detention. If the immigration detainees are to be treated fairly, humanely, and provided with the requisite support, there must be extensive, independent, and external oversight of CBSA. It remains to be seen whether the oversight mechanism currently proposed by Bill C-20 will provide the necessary level of accountability.

Summary and Recommendations

The agreements between the provincial governments and the CBSA ensure complicity in breaching international law, perpetuating harm, and violating human rights. Permitting the agreements to stand protects a critical piece of Canada's inhumane immigration regime and endorses the CBSA's cruel status quo that costs people their lives. We are calling on the federal government to choose progress and to prioritize the health, safety, and well-being of immigrants and refugees.

These agreements must come to an end. The treatment of vulnerable individuals in immigration detention demonstrates clear and inhuman violations to the rights to equality, liberty and security of the person, and the right to an effective remedy. CBSA policies and practices are institutionally flawed and inconsistent resulting in extensive harm of immigrants and refugees. Evidence of these harms has been detailed comprehensively through tribunal and court decisions, continuously demonstrating the damaging impact to the physical, psychological, social, and spiritual health of immigrants and refugees. The lack of independent oversight of the CBSA allows for continued cruel, inhumane, and degrading treatment of immigrants and refugees and egregious infringements of their human rights.

Finally, the CCLA and the BCCLA wants to be clear that in recommending a dissolution of immigration detention in provincial jails we are not advocating for more IHCs, increased detention in the IHCs already built, or increasing reliance on alternatives to detention. Detention in the immigration regime remains an option of last resort and enforcement measures should not be used against people who should otherwise be released. If detention is required, the least intrusive method of doing so is to be employed.

The CCLA and the BCCLA further endorse the recommendations set out in *I Didn't Feel Like a Human in There*,³⁴ the report on immigration detention published by Human Rights Watch and Amnesty International.

Sincerely yours,



Meghan McDermott
Policy Director
British Columbia Civil Liberties Association



Gillian Moore
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Canadian Civil Liberties Association

³⁴ Human Rights Watch and Amnesty International, "I Didn't Feel Like a Human in There" (2021), online: *Human Rights Watch* <www.hrw.org/sites/default/files/media_2021/06/canada0621_web.pdf>.