THE HUMAN AND FINANCIAL COST OF DETENTION OF ASYLUM-SEEKERS IN CANADA[1]

This study was researched and written for UNHCR by

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[3] IMPORTANT NOTE: The initial December 2011version of this report contained some statistical errors on detention that have been corrected in this document. Therefore, Tables and Figures in sections B and C of Part II have been modified accordingly.

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EXECUTIVE SUMMARY

This study provides an overview and evaluation of the Canadian immigration detention system, and its human rights impact on asylum seekers and refugees. The study relies on information gathered by the author during tours of immigration holding facilities and provincial prisons, interviews with immigration stakeholders (lawyers, legal aid, non-governmental organizations, UNHCR legal officers, Red-Cross representatives, federal and provincial officials), and the review of data and reports from governmental agencies, human rights organizations and academic literature.

The study describes key international and domestic legal principles related to the detention of asylum seekers and refugees, and explains the Canadian institutional, policy and legal frameworks for immigration detention. In addition, the study analyzes statistics on the cost and practice of immigration detention that are relevant to this research. The study compares legal principles relating to immigration detention with Canadian practices of detention for asylum seekers and refugees. To this end, the study focuses on specific grounds for detention, deals with key procedural safeguards for asylum seekers in detention and analyzes legal issues related to the care and custody of asylum seekers held in provincial prisons.

The study acknowledges CBSA's commitment to treat asylum seekers fairly and CBSA's efforts to comply with international and domestic standards on immigration detention. Nonetheless, this study is concerned about several Canadian immigration detention practices, all of which are described and analyzed in this study.

Core findings

- Statistics on immigration detention

  - There are important limitations in national detention statistics provided by the Canadian Border Services Agency (the detaining authority). This makes it difficult to reach firm conclusions regarding the variations in the number, gender and age of detained asylum seekers, as well as the variations regarding the length of time in detention. There is also a lack of readily available, up-to-date data on the cost of detention, which hinders effective public monitoring.

  - However, CBSA statistics do reveal that about 27% of "refugees" (i.e., asylum seekers and refused refugee claimants combined) are detained in penal institutions, while less than 6% of this group are suspected of criminality, representing a danger to the public or security risk. In addition, "refugees" held in penal institutions are detained for considerably longer periods than those held in Immigration Holding Centres

  - There are also substantial and unexplained regional disparities, notably with regard to reasons for detention and access to conditional release. This suggests that regional policy variations play a significant role in the likelihood of being detained and remaining in detention.

- Grounds for detention as they relate to asylum seekers.

  - Prosecution for "illegal entry", including those people who are attempting to seek protection in Canada, prevents refugee claimants from advancing their protection claims.

  - The recent government's approach to the detention of asylum seekers arriving by boat, which has been to actively oppose the release of

detainees, either by demanding more proofs of identity than usual, or by advancing arguments for inadmissibility based on security grounds, has put refugee claimants at greater risk and has had a significant impact on their ability to advance their asylum claims.

- Procedural safeguards for detained asylum seekers in Canada: notification of grounds of detention upon arrest and the right to counsel and notice thereof

    - CBSA respondents assert that upon first contact, the arresting officer always informs the detainee (verbally) of the reasons for their detention. However, sometimes, asylum seekers are not aware of the reasons for their detention. This fact leads one to question whether the reasons for detention are being communicated in a language that the asylum seeker understands.

    - In Montreal and the Greater Toronto Area (GTA), written pamphlets from CBSA distributed to asylum seekers held in CBSA-run facilities contain basic information in relation to their right to access a lawyer. In addition, asylum seekers have the opportunity to meet with NGOs while in detention, and both NGOs provide asylum seekers with information on legal aid. Asylum seekers routinely detained in provincial jails in other parts of Canada are not provided with this type of information.

    - For asylum seekers held in CBSA facilities, access to lawyers is usually not a major problem. However, there are barriers to legal representation, especially for detained asylum seekers in British Columbia and for those detained in non-CBSA facilities

- Detention in penal institutions

  - Although the separation of the criminal and non-criminal populations in detention centers is a well established principle in international law, it is common practice for asylum seekers outside Toronto and Montreal to be detained in penal institutions because there are no specialized immigration detention centres. In penal institutions, asylum seekers are held under circumstances inappropriate to their non-criminal status. They are subject to unnecessary and disproportionate restrictions on their liberty, which impedes their ability to seek protection. In addition, dispersing asylum seekers in high-security prisons, instead of minimum/medium security prisons, results in inappropriate and disproportion restrictions, given the very low security risk that the asylum seeker population presents.

  - In all parts of Canada (including Toronto and Montreal), asylum seekers who are suicidal or who have behavioral or severe mental health problems are frequently transferred to penal institutions. CBSA officials often state that they cannot adequately address these persons' needs. However, given the punitive purpose of provincial prisons, this practice raises serious concerns about the use of prisons to compensate for CBSA's lack of experience and expertise in this area.

  - The detention of asylum seekers in prisons falls under the jurisdiction of the federal and provincial governments, and there are important communication and protection gaps between these two levels of government regarding the day-to-day care and custody of the asylum seeker population held in penal institutions.

Recommendations

RECOMMENDATION 1	**When compiling and releasing public statistics on immigration detention, CBSA should make a distinction between asylum seekers and failed refugees and should specify causes related with the increase or decrease of detainees.**
RECOMMENDATION 2	**To have an accurate picture of the total number of minors in immigration detention in Canada, CBSA should include in its statistics minors accompanying a detained parent in Canadian immigration detention facilities.**
RECOMMENDATION 3	**To determine whether CBSA manages the detention of asylum seekers in a cost-effective manner, CBSA should provide readily available, up-to-date statistics on the cost of immigration detention to the public.**
RECOMMENDATION 4	**With a view to avoid inconsistencies in detention decisions, CBSA should monitor the reasons for detention between regions.**
RECOMMENDATION 5	**CBSA officers should not take into account extraneous factors such as amount of space in detention facilities when deciding whether to detain an asylum seeker.**
RECOMMENDATION 6	**CBSA officers should be particular sensitive to the possibility that asylum seekers may not immediately disclose the real reason for their travel to Canada, due to a lack of information about the refugee process.**

RECOMMENDATION 7	**In keeping with Canada's international and domestic obligations, CBSA officers should not arrest and detain someone under s. 122 of IRPA (i.e., possessing false documents) until a final decision regarding a claim for protection has been made.**
RECOMMENDATION 8	**More stringent requirements for identity verification that may put asylum seekers at risk in their country of origin should not be implemented by CBSA**
RECOMMENDATION 9	**Given its potential for arbitrary detention, s. 58 (1) c of the IRPA, which allows for the continued detention of an individual so that CBSA can investigate grounds other than those that formed the basis for the initial detention, should only be used by CBSA in exceptional circumstances.**
RECOMMENDATION 10	**Reasons for arrest and detention should be given, both orally in a language understood by the detainee and in writing.**
RECOMMENDATION 11	**CBSA should ensure that all detained asylum seekers receive written pamphlets informing them of the detention process, their rights, and providing them with available legal resources. This includes asylum seekers in both CBSA-run facilities and non-CBSA correctional centers.**
RECOMMENDATION 12	**To ensure that all detainees can meaningfully exercise their right to counsel, CBSA should ensure that asylum seekers held in non-CBSA facilities receive, upon their arrival, both written and oral information on the availability of legal aid (in a language understood by the asylum seeker).**
RECOMMENDATION 13	**If a detainee asks to speak with counsel, CBSA officers should facilitate the communication by providing telephone numbers and, if appropriate, explaining how to dial the call.**

RECOMMENDATION 14 — **CBSA should facilitate contact between legal counsel and a detainee without delay.**

RECOMMENDATION 15 — **To ensure that detainees can speak with counsel quickly, CBSA should adopt procedures and policies used by police and prison authorities and thus presume that an individual who identifies him or herself as legal representative is a member of a provincial bar association. If further information is needed, CBSA can ask for the caller's name and the number of the legal practice; a quick call to the number will verify the representative's identify.**

RECOMMENDATION 16 — **To comply with the principle of proportionality, CBSA should take decisive steps to eliminate detention of asylum seekers in penal institutions.**

RECOMMENDATION 17 — **In the event that CBSA has no alternative but to detain an asylum seeker in a provincial correctional facility, CBSA should work with provincial correctional facilities:**

1. **to ensure that asylum seekers are sent to the lowest security facilities;**
2. **to ensure that correctional services knows that immigration detainees are asylum seekers with no criminal background;**
3. **to ensure that asylum seekers are separated from the criminal population;**
4. **to establish standards for detention which are commensurate with the management of a non-criminal population, rather than standards established for the management of convicted offenders.**

RECOMMENDATION 18 — **The federal government should create a national committee composed of representatives of government, mental health specialists and legal specialists to develop detailed policy recommendations on how to deal with asylum seekers who are suicidal, aggressive or who have severe mental health problems**

RECOMMENDATION 19 **The federal government and the provinces should work together in identifying protection gaps in the detention of asylum seekers in provincial prisons and in developing common strategies to ensure that these protection gaps are addressed.**

RECOMMENDATION 20 **The federal government should provide CBSA jail liaison officers in each province where asylum seekers are held in provincial prisons. The jail liaison officer's duties would include face-to-face contacts with detained asylum to discuss their status in the refugee process and to ensure that their needs while in detention are met effectively. Asylum seekers transferred to another facility should maintain contact with their assigned jail liaison officer, or be promptly reassigned to another jai liaison officer.**

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ABBREVIATIONS

Canadian Charter	Canadian Charter of Rights and Freedoms
CBSA	Canada Border Services Agency
Convention against Torture	*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Protection Regulations
UNHCR	United Nations High Commissioner for Refugees
1999 UNHCR Revised Guidelines on Detention	*Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*
1986 UNHCR Executive Committee conclusions	*Conclusion No. 44 (XXXVII), Detention of Refugees and Asylum-Seekers*
1951 Refugee Convention	Convention relating to the Status of Refugees
1967 Refugee Protocol	Protocol Relating to the Status of Refugees
1988 Body of Principles on Detention	1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

INTRODUCTION

Although the detention of asylum seekers is well-documented in Europe (see for example Cornellisse 2010, Levy 2010, Guild 2005) and the United States (see Kalhal 2010, Schriro 2009, Brané & Christiana Lundholm 2008, Dow 2005),[4] very little has been published about the detention of asylum seekers in Canada (Auditor General of Canada 2008, Pratt, 2005, Nakache 2002, Simalchik 1998). Furthermore, the UNHCR has noted an increase in the number of asylum-seekers and refugees detained in Canada, and an increased use of provincial prisons, as opposed to "immigration hold" facilities by the Canada Border Services Agency (CBSA). The use of detention, and the use of prison facilities to detain asylum-seekers, has a significant negative impact on the protection and well-being of asylum-seekers and refugees. As a result, the UNHCR requested a consultancy report "which sets out and analyzes the human and financial costs of detention in Canada and makes recommendations regarding viable alternatives".[5]

In this study, the "human cost of detention" is understood as "the human rights impact of detention". Therefore, the study provides an overview of the human rights consequences for asylum seekers of immigration detention. The human rights impact of detention can be assessed at various levels including: legal grounds for detaining non-citizens, length of detention, access to procedural guarantees, and conditions within the detention centre for example. The detention centre, "which is a fundamental instrument used to carry out state detention policies", is "often overlooked in this array of possible analytical focal points" (Flynn 2011, 4). Yet, it is a critical element for fully understanding a country's detention regime and being able to assess the real impact of detention on asylum seekers. Therefore, the objective of this study is to provide the reader with an understanding of the policy and legal framework related to immigration detention in

[4] There is a special website of the Jesuit Refugee Service (JRS) – Europe dedicated to asylum seekers and irregular migrants in administrative detention in Europe. This website provides information by country and on the European Union, listing the reports and studies available, including those of the European Parliament and the European Commission. See: JRS http://www.detention-in-europe.org/ (last accessed: April 05, 2011). In addition, the Global Detention Project has created a database on immigration detention profiles for each country (detention policy, detention infrastructure, facts and figures). See: GDP: http://www.globaldetentionproject.org/home.html (last accessed: April 05, 2011).

[5] UNCHR 2010, "ANNEX 1 Terms of Reference for Consultants" (on file with the author).

Canada, to offer a critical analysis of the legal grounds for detention, and to reveal the realities asylum seekers face behind bars. In other words, examining legal safeguards and protection mechanisms set out in law and policy and assessing them in practice.

"Alternatives" are understood in this study as policy proposals on ways to reduce the negative impact of immigration detention on asylum seekers' rights and protections. At the time of writing this report, a UNHCR report on the current state of international law governing detention and alternatives to detention was released. The UNHCR report provides an overview of existing and possible alternatives to detention options drawn from research visits in Australia, Belgium, Canada, Hong Kong, and the United Kingdom (Edwards 2011). Therefore, in order to avoid repetitions, recommendations in this study are not aimed at offering alternatives to detention, but rather are focussed on ensuring that asylum seekers are detained only when necessary, and in conditions that do not affect their ability to seek protection.

Structure and content

The report is divided into five parts. Part I outlines the general policy and legal framework related to the detention of asylum seekers and refugees, both in Canada and internationally. Key human rights principles relevant to immigration detention are briefly outlined to show that domestic and international law limit the circumstances in which detention may be used, and require that the conditions of detention be humane. A special focus in this part is the protection of detained asylum seekers. Part II reviews and analyses CBSA statistics on immigration detention that are relevant to this research. In parts III, IV and V, the legal principles related to immigration detention are compared with Canadian practices of detention for asylum seekers and refugees. Part III focuses on the grounds for detention, and critically analyses the movement toward prosecuting asylum seekers for illegal entry and detaining asylum seekers arriving by boat. Part IV addresses procedural protections related to detention, most notably the notice of grounds of detention, and the right to counsel following detention. It is shown that there are barriers to legal representation, especially for detained asylum seekers in British Columbia and for those detained in non-CBSA facilities across Canada. Part V explores Canadian practice regarding the conditions of detention. Given that there is today virtually no literature on the conditions of detention in penal institutions for immigration

detainees,[6] the focus of Part V is on legal issues related to the care and custody of asylum seekers held in provincial prisons. As is demonstrated, there are major concerns that asylum seekers are detained in prisons, sometimes with convicted persons or prisoners on remand. Finally, the conclusion summarizes the main findings of the study.

Methodology

Research findings are based upon written sources, interviews, on-site visits and detailed statistics released by CBSA. Throughout the course of this research, detained asylum seekers or refugees were not interviewed. Therefore, this report cannot speak for the detainees. Had these interviews been possible, it would have added an important dimension to the study, and this aspect certainly warrants further investigation. Nevertheless, interviews were conducted with a wide range of immigration stakeholders, each CBSA-run immigration holding facility and two correctional facilities were visited on site (see below).

23 interviews were conducted with 30 key Canadian actors in the immigration detention system: 3 immigration lawyers, 5 NGO representatives, 3 UNHCR legal officers, 6 Red-Cross representatives, 5 staff members from legal aid, 10 CBSA officials and 1 Immigration and Refugee Board (IRB) official, 1 British Columbia and 2 Quebec correctional officers. 7 interviews were conducted in Toronto in May 2010 with 15 stakeholders in total (follow-up emails with interviewees in the summer and the fall of 2010); 8 interviews were conducted in Vancouver in June 2010 with 11 stakeholders in total (follow-up emails and phone conversations with interviewees in winter 2011); 2 interviews were conducted in Ottawa in June and July 2010 with 2 stakeholders; 6 interviews were conducted in Montreal in June and July 2010 with 10 stakeholders in total.

In addition, the following detention facilities were visited:

- Eastern Region: Laval Immigration Holding Centre, Laval (Quebec); Établissement provincial de détention de Rivière-des-Prairies (Rivière-des-

[6] The literature on conditions of detention in CBSA immigration holding facilities is scant, but some reports do exist (see for instance Auditor General 2008). In addition, a research team is currently conducting a study on the impact of detention on asylum seekers' psychological health, their opinions about detention, and the need for alternatives to detention, particularly for vulnerable persons. This study involves interviews with about 100 asylum seekers at the Laval and Toronto Immigration Holding Centres.

Prairies Detention Center), Rivière-des-Prairies (Quebec). On-site visit in July 2010.

- Central Region: Toronto Immigration Holding Centre, Toronto (Ontario). On-site visit in May 2010.
- Western Region: BC Holding Centre, Vancouver Airport, Richmond (BC); Fraser Regional Correctional Centre, Maple Ridge, BC. On-site visit in June 2010.

Terminology

This report uses the term "**immigration detention**" to refer to the detention of refugees, asylum-seekers, and other migrants, either upon seeking entry to a territory (front-end detention) or pending removal from a territory (back-end detention). It refers to detention so that an administrative procedure can be implemented. "Immigration detention" is to be distinguished from "criminal detention", which refers to detention on the grounds of having committed a criminal offence, and from "security detention", which refers to detention for national security or terrorism-related reasons (Edwards 2011; UN High Commissioner for Refugees 2006, 7; Hague Process/UNESCO 2008, 25). Immigration detention is not intended to be a punishment for a crime. Thus, migrants with irregular status may be subject to immigration detention, as they are in contravention of immigration laws and regulations, but "infractions of immigration laws and regulations should not be considered as criminal offences" (OCHCR 2000, 13). Immigration detention is an exceptional measure in which individuals are deprived of their liberty without the stringent procedural and substantive safeguards of criminal process. The lack of safeguards in immigration detention requires that detaining authorities be particularly vigilant to ensure that detention is necessary in the circumstances.

In the immigration context, various definitions of detention have emerged (Edwards 2011, 8). For the purpose of this report, **detention** is understood as the deprivation of liberty in a confined place, such as a correctional facility or a purpose-built closed holding centre.

Finally, labels can be misleading; therefore it is important to clarify several terms used in this report. The term "**migrant**" refers to a person who changes his/her country of usual residence (Hague Process/UNESCO 2008, 12). The term "**irregular migrant**" is defined as a person entering, traveling through or residing in a country without the necessary documents or permits (Hague Process/UNESCO 2008, 14). The term "**asylum seeker" (or "refugee claimant")** designates an individual whose claim for refugee protection has not yet been finally decided on by the country in which he or she has submitted it (UN High Commissioner for Refugees 2006, 7). This term includes "any person who is awaiting final adjudication of their appeals" (Field 2006, 1), which means, for the specific purposes of this report: 1) asylum seekers whose claim for refugee protection has not yet been heard; and 2) PRRA applicants (i.e., persons awaiting a decision under the Pre-Removal Risk Assessment) - they are seeking international protection and, if successful, receive the same level of protection as refugees.[7] This term does not include persons whose refugee claim or PPRA application has been rejected and who are detained pending deportation (i.e., "failed refugee claimants"). Finally, the term **"refugee"** refers to an asylum seeker who has been found to qualify for refugee protection under the *Immigration and Refugee Protection Act* (IRPA), either on the basis of criteria laid down in the 1951 Refugee Convention (i.e., a "Convention refugee" under ss. 95 and 96 IRPA), or on the basis of other international obligations of non-refoulement (i.e., a "person in need of protection" under s. 97 of IRPA).

[7] The term "asylum seeker" will also include all persons awaiting a decision under the Refugee Appeal Division, which will become operational when the *Balanced Refugee Reform Act* comes into effect in June 2012.

PART I: THE LEGAL AND POLICY FRAMEWORK RELATING TO IMMIGRATION DETENTION

In this part, international legal principles relating to the detention of asylum seekers are summarised (section A); and the Canadian institutional, policy and legal framework for immigration detention is briefly explained (section B). In addition, it is explained that international and domestic law call for asylum seekers and vulnerable persons to be treated with particular attention (section C).

A. International legal principles

Immigration detention is characterized by a tension between the prerogatives of state sovereignty and the rights of non-citizens. While states have broad discretion over who is allowed to enter and reside within their borders, their decision to detain and deport is constrained by a number of widely accepted norms and principles (Flynn 2011, 3). In other words, a state's discretion in controlling entry to its territory is subject to limits stemming from international human rights guarantees. These guarantees are found in the body of international human rights standards relating to detention, which is divided into "hard law" and "soft law". "Hard-law" includes treaties which are binding on those countries which have agreed to be bound by them. The 1951 Refugee Convention, the 1967 Refugee Protocol,[8] and the 1967 International Covenant on Civil and Political Rights[9] are examples of treaties which are binding on Canada and contain provisions relating to immigration detention.[10] Under international law, treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In *Pushpanatan*, the Supreme Court of Canada has affirmed that the 1951 Refugee Convention is to be interpreted in the context of extending international protection to refugees and assuring "refugees the widest possible exercise of fundamental rights and freedoms" (Pushpanathan v. Canada 1998). "Soft-law" includes declarations, principles and rules which are not binding but have persuasive force by virtue of having been negotiated by

[8] *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.
[9] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
[10] *Vienna Convention on the Law of Treaties*, art. 31(1): *Vienna Convention on the Law of Treaties* , 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980

governments over the course of many years or adopted by international bodies. Examples of soft-law instruments which contain standards relevant to detention include the 1948 *Universal Declaration of Human Rights*,[11] the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,[12] and the 1957 *Standard Minimum Rules for the Treatment of Prisoners*.[13] Interpretations by UN bodies, such as the UNHCR, the UN Working Group on Arbitrary Detention and Special Rapporteurs of the UN Commission on Human Rights are considered authoritative forms of "soft-law," due to the expertise and neutrality of the issuing agencies (Amnesty International 2007, 4-6).

It is beyond the scope of this study to provide the range of sources from which the human rights standards relevant to immigration detention stem, and to explain in detail which international human rights standards apply to immigration detention (and how). Furthermore, extensive research on these topics already exists (see e.g., International Commission of Jurists 2011; Edwards 2011; Ricupero and Flynn 2009; Amnesty International 2007; Field 2006; Nakache 2002). Therefore, the more modest objective of this study is to highlight the main legal principles surrounding the detention of migrants, in general, and of asylum seekers, in particular. Although the focus of this section is not on the human rights principles relating to the detention of children (for more on this topic, see Edwards 2011, 45-48; ICJ 2011, 159-160), persons with mental health disabilities (Edwards 2011, 48-50), or women and the elderly (Edwards 2011, 50), some specific human rights concerns relating to the detention of these vulnerable groups of people are raised throughout this report, notably in Part V devoted to the conditions of detention. Finally, this section does not address in detail procedural safeguards which arise in detention (i.e., reasons for detention, right of access to a lawyer following detention), since Part IV of this report deals particularly with this aspect.

When distilled to essentials, international human rights law establishes that immigration detention should be the exception rather than the rule. In addition, international human rights law limits the circumstances in which detention may be used,

[11] *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[12] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).
[13] *Standard Minimum Rules for the Treatment of Prisoners,* adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

and requires that when it does take place, the conditions are humane and the human rights of detainees are respected. These principles are reviewed below.

Detention must be justified

All human beings have the right to enjoy respect for their liberty and security. The right to liberty and security of the person (for a detailed analysis of this right under international and regional human rights law, see Edwards 2011, 17-36) is so fundamental that the International Court of Justice has stated that:

> …depriving human beings of their freedom and subjecting them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[14]

However, the right to liberty and security is not absolute. Deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.

Detention must have a clear legal basis in national law and procedures

An essential safeguard against arbitrary detention is that all detentions must be adequately prescribed by law. This reflects the principle of legal certainty, by which individuals should be able to foresee the consequences of the law as it applies in their situation.. The principle of prescription by law has two essential aspects: 1) detention must be in accordance with national law and procedures; 2) national law and procedures must be of sufficient quality to protect the individual from arbitrariness (see ICJ 2011, 150; see Edwards 2011, pp.37 to 41, on procedural guarantees).[15] International case law has clarified that this requirement has particular implications in the case of migrants, since the detaining authorities are required to take steps to ensure that sufficient information is available to the detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain (ICJ 2011, 151).

[14] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, p. 42, para. 91.
[15] For more on this topic, see Part IV of this report, below.

Detention must not be unreasonable, unnecessary or disproportionate

In order to avoid arbitrariness, detention must, in addition to complying with national law, be reasonable, necessary and proportionate in the circumstances of the individual case. International human rights law relies on the principle of proportionality to minimize derogation from human rights. The principle of proportionality, which is embedded in almost every national legal system and underlies the international legal order, means that governments must not go beyond what is necessary to achieve their objectives. One way to do this is to show that other less intrusive measures have been considered and found to be insufficient (Edwards 2011, 25-26; ICJ 2011, 153). In *C v. Australia*, for example, the Human Rights Committee found a violation of Article 9.1 of the ICCPR on the basis that the State did not consider less intrusive means, such as "the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was […] arbitrary and constituted a violation of Article 9.1".[16] Thus, the length of detention can render an otherwise lawful decision to detain arbitrary (for more on this topic, see: Edwards 2011, 23-24).

Conditions of detention must be humane

Even where the detention of migrants can be justified on the basis of the principles discussed above, international human rights law imposes further constraints on the place, regime of detention, and conditions of detention. These constraints are based on the prohibition of cruel, inhuman and degrading treatment, the most relevant international standard for the treatment of detainees (for detailed rules, see ICJ 2011, 164-165; Amnesty International 2007, 52-54). For example, the Convention against Torture establishes that States have obligations to take effective measures to prevent acts of torture and of cruel, inhuman or degrading treatment or punishment, including to keep under systematic review arrangements for the custody and treatment of persons subjected to any form of detention with a view to preventing torture and ill-treatment (Convention against Torture 1987, Art. 11 & 16). Concretely, this means that immigration

[16] *C. v. Australia*, CCPR, Communication No. 900/1999, Views of 13 November 2002. Cited in ICJ 2011, 153.

detainees should be held in conditions that reflect their non-criminal status and their needs, as is explained below.

An appropriate place of detention

International law stipulates that, except for short periods, detained migrants should be "held in specifically designed centers in conditions tailored to their legal status and catering for their particular needs" (ICJ 2011, 166). Thus, the detention of migrants in unsuitable locations (i.e., police stations or prisons) may contribute to violations of freedom from torture or cruel, inhuman or degrading treatment (ICJ 2011, 166). International and regional standards as well as conclusions of UN treaty bodies and the UNHCR also consistently recommend that asylum seekers should not be detained in prison custody, or, at a minimum, that they should be kept separate from convicted persons or persons detained pending trial. Finally, in those exceptional cases where children are detained, international law requires they should be held in facilities and conditions appropriate to their age (for the detailed rules, see ICJ 2011, 167). Thus, the European Court of Human Rights found that detention of a five year old unaccompanied asylum seeker in an adult detention centre without proper arrangements for her care violated Article 3 of the European Convention of Human Rights (""inhuman or degrading treatment or punishment"),[17] since the conditions of detention were not adapted to her position of extreme vulnerability.[18]

Clearly, the length of time for which a person is held in a detention facility is often relevant to whether the detention amounts to ill-treatment. For example, detention of a migrant at an airport may be acceptable for a short period of a few hours on arrival, but more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment (ICJ 2011, 166).

Conditions of detention within the facilities must be clean, safe and healthy

The prohibition of cruel, inhuman or degrading treatment places an obligation on State authorities to ensure that those whom they deprive of their liberty are held in humane conditions. This means, concretely, that facilities where migrants are detained

[17] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
[18] *Mayeka and Mitunga v. Belgium*, ECtHR, Application no 13178/03, Judgment of 12 October 2006.

must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from cruel, inhuman or degrading treatment. The ICJ further explains:

> In the context of increasing use of immigration detention and the holding of ever-larger numbers of migrants, often in overcrowded facilities, poor or overcrowded conditions of detention for migrants have regularly been found by international courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment…Furthermore, economic pressures or difficulties caused by an increased influx of migrants cannot justify a failure to comply with the prohibition of torture or other ill-treatment, given its absolute nature (ICJ 168).

Thus, case law has found the following (ICJ 2011, 170-171):

- The cumulative effect of a number of poor conditions may lead to violation of the prohibition of ill-treatment.
- Whether conditions are cruel, inhuman or degrading must be seen in the context of the individual (sex, age, health etc.). For example, detention of asylum seekers for two months in a pre-fabricated building with poor conditions of hygiene, restricted access to the open air and no access to phones, was found in one case to violate Article 3 of the European Court of Human Rights, given that the applicants suffered from health and psychological problems following torture in their country of origin.[19]
- Inadequate healthcare or access to essential medicines for detainees may violate the freedom from cruel, inhuman or degrading treatment, either on its own or in conjunction with other factors. Although there is no general obligation to release detainees on health grounds, there is an obligation to protect their physical and mental well being while in detention, by providing medical care and medicines.

Physical assaults and use of physical restraint techniques

The detaining authority has an obligation to protect the detainee from the acts of aggression from officials or fellow detainees, or from acts of self-harm or suicide. In other words, where a person is unlawfully killed or subjected to cruel, inhuman or

[19] *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2007, paras. 52-53.

degrading treatment while in detention, there is a presumption that State agents are responsible (CIJ 2011, 177).

In addition, case law has held that the unjustifiable use of force or violence by State officials or private agents involved in the transportation of immigration detainees, including for example excessive or inappropriate use of physical restraints, may violate the right to life, freedom from torture and other cruel, inhuman or degrading treatment, or rights to respect for physical integrity. For example, handcuffing during transportation of prisoners does not normally violate the freedom from ill-treatment norm where it does not entail the use of force or public exposure beyond what is reasonably necessary, including to prevent absconding (ICJ 2011, 178).[20]

In conclusion, international human rights law has issued a set of principles relating to immigration detention. When put together, these principles establish that: immigration detention should be the exception rather than the rule; that detention, to be justified, must be in accordance with law and must not be arbitrary and that the conditions of detention be humane.

B. Detention of asylum seekers and refugees in the Canadian context

This section briefly summarizes Canadian immigration law and policy related to the detention of asylum seekers and refugees. It begins with a brief explanation on the legal framework for immigration detention and then moves to a presentation of the institutional framework in Canada. The objective is to provide the reader with some basic information regarding the regulation of asylum seeker and/or refugee detention in Canada.

The legal and policy framework for immigration detention

In the following paragraphs, the legislative and policy context for immigration detention is explained and the scope of the legal safeguards put in place for detainees is briefly described. However, this sub-section does not offer a detailed analysis of every

[20] See: *Raninen v. Finland*, Case No. 52/1996/771/972, Judgment of 16 December 1997, para. 56; *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgment of 12 March 2003, paras. 182-184.

provision of the legislation related to immigration detention, nor does it provide an overview of Canadian case law relating to the human rights of detained asylum seekers and refugees. For the purposes of this study, these two aspects are relevant only in so far as they are studied in connection with Part III, IV and V of this report, which deal with the practice of immigration detention in Canada. Therefore, these aspects are addressed in these subsequent sections.

Legislative context

The legislative framework for immigration detention is outlined in sections 54 to 61 of the *Immigration and Refugee Protection Act* (IRPA), and in sections 244 to 250 of the *Immigration Refugee and Protection Regulations* (IRPR). These sections deal with arrest, detention and release.

Section 55 of IRPA provides CBSA officers with the discretionary authority to detain foreign nationals[21] and permanent residents where the officer has reasonable grounds to believe the person is inadmissible to Canada, and the person is considered to be a danger to the public, or the person is unlikely to appear (flight risk) for immigration processes, such as examination, hearing or removal. In addition, the officer may detain a foreign national where the person has not satisfied the officer as to his/her identity. Finally, s. 55 of IRPA states that, at a port of entry, a CBSA officer may detain a foreign national or a permanent resident where it is necessary to complete the immigration examination,[22] or the officer has reasonable grounds to suspect that the person is inadmissible on security grounds or for violating human or international rights.

A CBSA officer's decision to detain a person under IRPA is subject to an independent review by a Member of the Immigration Division (ID) of the Immigration and Refugee Board (IRB) on a regular basis, that is, after 48 hours, then within the next 7 days and every 30 days thereafter (s. 57 of IRPA). If the CBSA officer deems that the reasons for the detention no longer exist, CBSA has the authority to release a detainee

[21] "Foreign National" is defined under s. 2(2) of *IRPA* as a "person who is not a Canadian citizen or a permanent resident, and includes a stateless person".

[22] CIC Policy Manual on detention explains: "Detention to complete an examination is warranted where the officer is concerned that the person may be a security risk, may have violated human or international rights, may be a danger to the public, or may not appear to continue the examination. Detention to complete an examination should never be used for administrative convenience. (CIC ENF 20, 7-8)

only prior to the 48 hour review (s.56 of IRPA). Thereafter, the authority to offer release rests with the Member of the Immigration Division of the IRB.

Regulations on detention and release provide a non-exhaustive list of factors that CBSA officers and members of the Immigration Division of the IRB shall consider. Several sections of the regulations are of particular interest to this study. According to s. 245 of the IRPR, where the person poses a potential flight risk and providing removal is not imminent and no other concerns exist (i.e., identity, danger, security or violations of human or international rights), the officer should consider all alternatives to detention (CIC ENF 20, 10). Furthermore, s.248 of the IRPR provides that when a CBSA officer or the Immigration Division determines that there are grounds for detention, the officer or the Immigration Division shall consider several factors before making a decision on detention or release, including the length of time in detention and the existence of alternatives to detention. The CIC Policy Manual on Detention outlines the need for CBSA officers to "consider all reasonable alternatives before ordering the detention of an individual," while "balancing the impact of release on the safety of Canadian society" (CIC ENF 020, 6-7). Canadian courts have further affirmed that the *Canadian Charter of Rights and Freedoms* (the Canadian Charter) requires that authorities consider alternatives to detention for asylum seekers and refugees.[23] However, the CIC Policy manual on detention specifies that the mere presence of a factor or factors should not lead to an automatic detention or release decision. "Rather, officers and members of the Immigration Division must always consider, in addition to the factors mentioned in the Regulations, all other factors and facts pertaining to the circumstances of the case when making a detention decision, as provided by S. 55 and S. 58" (CIC ENF 20, 4-5).,

In the case of minor children (under 18 years of age), IRPA, s. 60 of IRPA stipulates that detention is to be used as a last resort and the best interests of the child must be considered by decision makers.[24] S. 249 of IRPR identifies the special considerations that apply in relation to the detention of minor children under 18 years of age. The CIC Policy Manual on detention specifies that "IRPA does not allow a minor child to be detained for their protection. Child protection responsibility rests with the provincial youth protection agencies" (CIC ENF 20, 13). The Manual also stipulates that

[23] *Sahin v. Canada (MCI)* [1995] 1 F.C. 214 (FC).
[24] The Supreme Court of Canada underlined the need to give "substantial weight" to the interests of affected children. See: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817

IRPA "makes no distinction between accompanied and unaccompanied minors; therefore, officers must be guided by the principles of IRPA in all cases involving minors" (CIC ENF 20, 13). In addition, the CIC Policy Manual on detention stipulates that "detention is to be avoided or considered as a last resort for…elderly persons; pregnant women; persons who are ill; persons who are handicapped; persons with behavioural or mental health problems". It further adds: "For persons falling into these categories, alternatives to detention should always be considered. (CIC ENF 20, 15-16).

Legal safeguards for detained asylum seekers and refugees

Since the Supreme Court's decision in *Singh,*[25] every asylum seeker or refugee physically present in Canada is entitled to claim the protection of the *Canadian Charter* (Nakache and Crépeau 2006). As is discussed further below, legal rights (ss. 7 to 14 of the Canadian Charter) are particularly important in the case of detained asylum seekers and refugees, especially s. 7 (life, liberty and security of person), s. 9 (protection against arbitrary detention or imprisonment), s. 10 (right to be informed of the reason for detention and right to retain and instruct counsel without delay), s.12 (protection against cruel and unusual treatment or punishment) and s. 14 (right to an interpreter).

In sum, under the Canadian Charter, non-citizens are guaranteed most of the same rights as citizens, and discretionary powers given by law to governmental officers must be exercised in a manner consistent with Charter rights.

<u>The institutional framework</u>

This section describes the institutional framework within which detention operates. This framework was modified a few years ago, with the creation of the Canada Border Services Agency in 2003. Persons detained under IRPA may be held in a CBSA Immigration Holding Centre or in a correctional facility. Finally, through an agreement

[25] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

with the CBSA, the Canadian Red Cross visits detention centers to monitor conditions of detention against both domestic and international standards.

Roles and responsibilities of the CBSA, CIC and the IRB

The CBSA, CIC, and the IRB share responsibility for carrying out the provisions of the IRPA, but the two key players in the realm of immigration detention are the CBSA and the IRB:

Activity	CBSA	CIC	IRB
Determine the eligibility of people to claim refugee protection	Yes	Yes	No
Hold detention reviews	Yes	No	Yes
Arrest and detain people under the IRPA	Yes	No	No
Remove people from Canada	Yes	No	No
Issue security certificates	Yes	Yes	No
Make refugee and immigration policy	No	Yes	No
Decide refugee claims made by people in Canada	No	No	Yes
Decide refugee claims made by people abroad	No	Yes	No
Hold admissibility hearings to determine if people may enter or remain in Canada	No	No	Yes
Select immigrants	No	Yes	No
Hear and decide appeals on immigration matters (removal orders, sponsorship appeals, residency obligations)	No	No	Yes
Issue visitor visas, student visas, travel documents, work permits or Minister's permits	Yes	Yes	No
Determine residency obligations	No	Yes	No
Do Pre-Removal Risk Assessments (PRRAs)	No	Yes	No[26]
Decide applications to stay in Canada on humanitarian and compassionate grounds	No	Yes	No
Grant Canadian citizenship	No	Yes	No

Source: CBSA report 2010, exhibit 2.

[26] It should be mentioned that PRRAs will be transferred to the IRB in 2013.

Thus, the CBSA assumes responsibility for examinations at ports of entry and enforcement of the IRPA, including arrest, detention and removal. The IRB, on the other hand conducts admissibility hearings and detention reviews for persons detained under IRPA after the first 48 hours of arrival (the CBSA decides on detention or release options for the first 48 hours), and rules on immigration appeals such as removal orders.

Places of detention

Persons detained under IRPA may be held in a CBSA Immigration Holding Centre (IHC). The CBSA operates three IHCs that are used for "low-risk detainees": Toronto Immigration Holding Centre (Ontario), with a capacity of 125 beds; Laval Immigration Holding Centre (Quebec), with a capacity of 150 beds; B.C. Immigration Holding Centre (Vancouver International Airport, British Columbia), with a capacity of 24 beds. However, it should be noted that the B.C. Immigration Holding Centre is only used to house detainees for up to 72 hours. The Kingston Immigration Holding Centre (Ontario) houses security certificate cases only, and thus is not the subject of this study.

Individuals considered to be "high-risk detainees" (defined by CBSA as "primarily persons with criminal backgrounds considered to be a danger to the public or considered to be a flight risk"- see CBSA report 2010) are held in provincial correctional or remand facilities (CIC ENF 20, 21; CBSA report 2010). However, CBSA also uses provincial prisons to house immigration detainees in all other areas not served by a CBSA IHC, and when a person exhibits mental health or behavioural problems (for more on this topic, see Part V of this report). British Columbia and the federal government have concluded a CBSA/BC Corrections Agreement (renewed on a yearly basis) that contains provisions reflecting CBSA's expectations when the province is holding CBSA detainees in its correctional facilities. Similarly, a Memorandum of Understanding between Quebec and the federal government had just been concluded when this study was finalized (November 2011), and there are discussions for an official agreement between Ontario and the federal government.(see Part V for more on this topic). For a list of provincial facilities used by the CBSA, see Appendix 1

Independent detention monitoring

In 1999, the Canadian Red Cross began monitoring immigration detention conditions in provincial correctional facilities in British Columbia. With the signing of a "Memorandum of Understanding" (MOU) in April 2002, all CBSA facilities are now subject to independent monitoring by the Red Cross. This MOU provides the Red Cross with unfettered access to immigration detention facilities, and authority to monitor conditions at the facilities to ensure that practices adhere to national and international practices and standards. Through the provisions of the MOU, the Red Cross may conduct private, confidential interviews with detainees regarding treatment and conditions at the detention facility, provided that the detainee gives consent. The Canadian Red Cross is not required to provide CBSA advance notice of the inspection and must be given access to the entire facility to conduct a proper inspection. Under the MOU, the Red Cross agrees to undertake annually at least one visit per facility.

The MOU also permits other institutions to be specified, in particular provincial correctional facilities that house immigration detainees on behalf of CBSA. Currently the Red Cross monitors immigration detention in Quebec, Alberta and BC provincial facilities. The Red Cross has signalled its readiness to expand its monitoring program into other provinces. The CBSA's answer is as follows: "The CBSA is supportive of the Red Cross desire to expand its monitoring program to all provincial facilities, particularly in Ontario which historically has the greater volumes across the spectrum of immigration activity including enforcement". To date, however, no such expansion has happened (CBSA 2009).

The Red Cross monitoring teams at the end of each visit provide their comments orally to the person in charge of the institution, but the Red Cross does not divulge publicly its findings with regards to any of its detention monitoring activities.

C. International and Canadian legal principles relating to the detention of asylum seekers and vulnerable persons

The right to seek and enjoy asylum is guaranteed by a range of international and regional instruments (for more on this topic, see Crépeau and Nakache 2006, 6). In

addition, under international refugee law, Article 31(1) of the 1951 Refugee Convention prohibits states from imposing penalties on those entering a country without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." Edwards explains: "Article 31(1) should (…) be interpreted to mean that the act of entering a country for the purposes of seeking asylum should not be considered an unlawful act. Automatically detaining asylum-seekers or stateless persons for the sole reason of their status as such would amount to an arbitrary deprivation of liberty" (Edwards 2011, 11). Furthermore, Article 31.2 addresses the specific question of detention of those asylum seekers having entered or stayed illegally. Under article 31.2 of the 1951 Refugee Convention, states are permitted to apply some restrictions on the movement of such persons, but any restrictions must be "necessary and [they] shall only be applied until their status in the country is regularized or they obtain admission into another country" (1951 Refugee Convention, art. 31(2)). In other words, restrictions on the movement of such persons other than those which are necessary are prohibited, and such restrictions should only be imposed until the individual's status is regularized (CIJ 2011, 155). Canada has incorporated these principles in the *Immigration and Refugee Protection Act* (IRPA, s. 133).

Based on these provisions, the 1999 UNHCR Revised Guidelines on Detention[27] (Guidelines 2 & 3) and the 1986 UNHCR Executive Committee conclusions[28] establish a strong presumption against detention, and the need to justify individual detentions as necessary for specified purposes. The ICJ explains:

> Detention must therefore never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be seen as an exceptional measure, and must last for the shortest possible period (ICJ 2011, 155).

In keeping with the principle of proportionality, the UNHCR maintains that detention should be used only if it is reasonable, proportional and, above all, necessary, for the following reasons: (i) to verify identity, (ii) to determine the elements on which the

[27] UN High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, UNHCR. February 1999.
[28] Conclusion No. 44 (XXXVII) *Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986, para. B.

refugee claim is based, (iii) in cases where claimants have destroyed identity documents or used false documents to mislead the authorities of the receiving State, or (iv) to protect national security and public safety (1986 Executive Committee conclusions & Guideline 3 of the UNHCR Guidelines on Detention). Therefore, as the Guidelines stipulate, detention of asylum-seekers for the purpose of deterring future asylum-seekers or dissuading them from pursuing their claims is contrary to international refugee law (Guideline 3).

To give effect to the principle of proportionality and the requirement that treatment be humane, international law also stipulates that the detention of vulnerable persons (i.e., unaccompanied elderly persons, survivors of torture or trauma, persons with mental or physical disabilities, pregnant or nursing women, and minors) should only be a *last resort* measure (ICJ 2011, 158). In line with this, Guideline 7 of the 1999 UNHCR Revised Guidelines on Detention recommends that active consideration be given to alternatives to detention for persons for whom detention is likely to have a negative effect on psychological well-being. The UNHCR Revised Guidelines also recommend that vulnerable persons only be detained following medical certification that detention will not adversely affect their health or well-being. Where such persons are detained, particular care will need to be taken in relation to conditions of detention, provision of healthcare, etc (for more on this topic, see: ICJ 2011, 172-73; see also: UNHCR 1999 Revised Guidelines on Detention, Guideline 5 on Procedural Safeguards). Thus, the Human Rights Committee found a violation of Article 9.1 ICCPR on the basis that "the State Party has not demonstrated that, in the light of the author's particular circumstances [a psychiatric illness], there were not less invasive means of achieving the same ends, that is to say, compliance with the State Party's immigration policies".[29]

These principles are reflected in Canadian legislation and policy: IRPA (s. 60), IRPR (s. 249) and the CIC Policy Manual on detention (CIC ENF 20, 5) stress that minors should be detained only as a measure of last resort, and having regard to the best interests of the child. CIC Policy Manual on Detention also stipulates that "…where safety or security is not an issue, detention is to be avoided or considered as a last resort" (p. 15) for elderly persons, pregnant women, persons who are ill, and persons with mental and physical disabilities.

[29] *C. v. Australia*, CCPR, Communication No. 900/1999, Views of 13 November 2002, para. 8.5.

PART II: STATISTICS ON DETENTION OF ASYLUM SEEKERS IN CANADA

In this part, national detention statistics provided by CBSA between January 2010 and August 2010 are summarized and analyzed. The content of this part is thus valid as of August 2010. The part begins by outlining some important limitations to CBSA statistics. This is followed by a presentation and examination of CBSA statistics in relation to the detention of asylum seekers. Finally, the part ends with a critical analysis of unexplained regional disparities emerging from CBSA statistics, notably on detention for identity reasons. It is worth noting that statistics provided and compiled by CBSA were "raw data". Tables and figures (see below) have been created for the purpose of this study.

A. Limitations to CBSA statistics

There are a number of limitations to CBSA statistics on the detention of asylum seekers including: 1) the failure to distinguish between asylum seekers and failed refugee claimants, 2) incomplete statistics on minors whose parents are detained, 3) discrepancies in the statistics, and 4) the lack of readily available, up-to-date statistics on the financial cost of immigration detention (in general) and the detention of asylum seekers (in particular).

Failure to distinguish between asylum seekers and failed refugees

Under the heading "refugees", CBSA statistics conflate two very different groups: 1) asylum seekers whose claim has not yet been heard, usually detained upon entering Canada; and 2) persons whose refugee claim has been rejected and who are detained pending deportation.

CBSA personnel repeatedly confirmed that their "refugee" or "refugee claimant" category comprises all detained persons who made a refugee claim, including those

whose claim has not yet been heard (asylum seekers), those whose claim was considered ineligible, abandoned or rejected, and refugee claimants or accepted refugees removed for criminality.[30] The 'non-refugee' category, on the other hand, is composed of a variety of non-citizens, who are detained pending removal, notably permanent residents who have committed certain types of criminal offenses, visa overstayers, and non-status persons who never made a refugee claim.

It was therefore impossible to obtain any statistics that concerned solely asylum seekers. This makes it difficult to reach any firm conclusions as to the variations in the number, gender and age of detained asylum seekers, as well as variations regarding the length of time in detention, for example. In all cases, asylum seekers are placed in the same category as failed refugees. This means, for example, that it was impossible to say whether the increase in detained "refugees" from 2004 to 2009 is due to an increase in detention of asylum seekers or an increase in detention of failed refugee claimants, or both. The analysis that follows uses the CBSA category of "refugees", which includes both asylum seekers and failed refugee claimants, as these are the only statistics available. In this section, the term "refugees" is written in quotation remarks to remind the reader that this study is referring to the CBSA category.

It is essential to correct this situation, and this can very easily be done. In practice, CBSA makes a clear distinction between asylum seekers and failed refugees: asylum seekers are on an incoming trajectory (sometimes called 'front-end detention') and failed refugees on an outgoing trajectory (sometimes called 'back-end detention'). Therefore it is surely possible for CBSA to distinguish between these two groups when compiling statistics.

[30] For example, in a May 12 2010 email, Anna Doucet wrote: ["Refugees"] encompasses refugee claimants, those that have abandoned or withdrawn their claims, those that were excluded under 1(f) of the Convention and those that received a negative decision from the IRB. It may also include some individuals who were determined to be a convention refugee but the CBSA is pursuing removal based on danger to the public." In a May 27, 2010 email, Bruno Tilgner wrote: "refugee" refers to all refugee claimants regardless of the success or failure, criminality or other status indicators."In a July 30, 2010 email, Bruno Tilgner further specified: "For simplification anyone who has made a refugee claim, regardless of their circumstances, if it was recorded in NCMS and they were detained, would be counted [under the heading "refugee" or "refugee claimant"]. Thus, for instance, someone who was ineligible to make the claim and their claim was dismissed (or they withdrew it) would still qualify based on the fact that they attempted to make the claim in the first place and were detained" (on file with the author).

RECOMMENDATION 1 **When compiling and releasing public statistics on immigration detention, CBSA should make a distinction between asylum seekers and failed refugees and should specify causes related with the increase or decrease of detainees.**

No statistics on minors in immigration holding facilities accompanying a detained parent

CBSA does not compile statistics on minors who are in detention centers accompanying a detained parent if the minors themselves are not officially detained. For example, if a female asylum seeker traveling with her 2-year-old daughter is detained, the daughter will probably not show up in CBSA statistics. CBSA's rationale is that the daughter is not personally detained and could theoretically leave at any time. Thus, the number of minors who are in fact in detention is much higher than the number shown in official CBSA statistics.

It is essential that CBSA correct this anomaly; otherwise it is impossible to have an accurate picture of the number of minors in Canadian immigration detention facilities. Compiling these figures should be straightforward, as detention centers keep track of the number of people they detain whether the individual is personally under a detention order or simply accompanying a parent.

RECOMMENDATION 2 **To have an accurate picture of the total number of minors in immigration detention in Canada, CBSA should include in its statistics minors accompanying a detained parent in Canadian immigration detention facilities.**

Discrepancies in CBSA statistics

There are some discrepancies in CBSA statistics due to the use of two different database tools. In an email communication, CBSA explained:

> …the data was taken using both our old and new database tools (i.e. the NCMS and the Cube System …"

> (…) The NCMS "is based on the number of immigration holds in a given Fiscal Year (i.e., individual detainees may be held multiple times during the course of any given fiscal year for various reasons (e.g., either through arrest after being released, for the purposes of removal, etc.)…
>
> The Cube System reflects the number of detainees.[31]

This situation sometimes made it difficult to reliably compare data across time or across situations, and there may be discrepancies among some of the figures in this report. In future, use of the Cube system will generate more accurate and consistent statistics. Where available, statistics were reported as generated by the Cube system.

Lack of readily available up-to-date statistics on the financial cost of immigration detention

In fiscal year 2008-2009, estimated annual costs of detention and removal programs were approximately $92 million annually. Detention costs amounted to $45.7 million, or an average of $3,185 per detained case. This is a 26 % increase over the 2006-2007 fiscal year (CBSA 2010 Evaluation Report).

Throughout this study, it was very difficult to get detailed and up-to-date information from CBSA on the cost of immigration detention in CBSA-run facilities and correctional facilities. In an email communication with CBSA, the following information was provided:

> In fiscal year 2008-09, the per diem range for provincial facilities across the country was $120 to $207. The per diem average range nationally was approximately $150. However for the Pacific, Ontario and Quebec the per-diem average was approximately $175 and those three regions account for approximately 97% of national totals. Please note that this covers per diem costs only, as CBSA is still responsible for costs associated with transporting detainees to hearings (if not done on site or via video conference). CBSA covers costs for transporting for medical reasons (non emergency) where required if the treatment is not available within the provincial facility. These per diems are not stagnant as there are adjustments from time to time and it likely that detention cost may be higher in fiscal year 2009-10.[32]

[31] Email from Bruno Tilgner, May 04, 2010 (on file with the author). The expression « immigration hold » refers to persons detained by CBSA under the immigration legislation (i.e., « immigration detainees » for the purpose of this study).
[32] Email from Anna Doucet, March 10, 2010 (on file with the author).

In another email, a CBSA participant indicated that CBSA had provided "a range of per diem rates for the provinces and [its] "Detentions at a Glance" document indicating that CBSA costs are approximately $200 per day". The CBSA participant added that these figures were "all [she was] able to provide".[33] Consequently, this study cannot, for example, compare detention costs in CBSA's holding facilities versus the detention costs in correctional facilities. In addition, this study cannot explain what the costs of immigration detention precisely entail. Upon request from the Auditor General in 2008, CBSA provided the following table for fiscal years 2005-2006 and 2006-2007:

CBSA facilities	Immigration holding facilities	Contractual costs (guard services)	All other costs	Total CBSA detention facility costs
2005–06	Toronto	$4,078,235	$4,178,868	$8,257,103
	Montreal	4,232,568	3,052,140	7,284,708
	Vancouver	663,275	191,247	854,522
Total				**16,396,333**
2006–07	Toronto	4,247,369	3,923,410	8,170,779
	Montreal	4,198,356	2,898,973	7,097,329
	Vancouver	682,369	161,408	843,777
Total				16,111,885

Provincial facilities	Total CBSA payments for provincial facilities
2005–06	$18,838,766
2006–07	20,188,444

Source: CBSA 2010 evaluation report, 13.

Commenting on data drawn from this table, the Auditor General criticized CBSA for its lack of a national oversight mechanism for detention costs. The Auditor General explains:

> Officials told us that they believe that the rates the provinces charge are based on the cost to house provincial inmates and that they are reasonable compared with the cost to house federal inmates. However, unlike criminal inmates, immigration detainees do not participate in rehabilitation programs. Further, as previously noted, the Agency does not have good data on the

[33] Email from Anna Doucet, May 12, 2010 (on file with the author).

> number of people detained and length of detention at the national level. This information is essential to manage detention costs (Auditor General 2010, 14).

Building immigration holding centers, running them, and contracting with provincial prisons to hold asylum seekers (and other immigration detainees) in several parts of Canada represents a huge cost to taxpayers. The lack of readily available, up-to-date data on the cost of detention therefore hinders effective public monitoring, because it becomes difficult to ascertain whether or not Canada's detention policy is cost-effective. It is therefore essential that CBSA provides readily available information on the cost of immigration detention to the public. This can be easily done through information in CBSA's report to Parliament or on CBSA's website.

RECOMMENDATION 3 **To determine whether CBSA manages the detention of asylum seekers in a cost-effective manner, CBSA should provide readily available, up-to-date statistics on the cost of immigration detention to the public.**

B. Statistics on "refugees" in detention

Number of "refugees" detained per year

The total number of "refugees" detained in Canada increased steadily from 2004 to 2009, then dropped in 2009-2011 (see Table 1). It is too early to say whether this decrease reflects a trend, or whether it is a temporary dip. The decrease in detention of asylum seekers may be linked to the decrease in asylum seekers entering Canada due to visa restrictions imposed on countries such as Mexico and the Czech Republic..

Table 1. Overview of detention of "refugees", 2004-2011

Year	Total immigration holds	Detained "Refugees"	"Refugees" as a % of all immigration holds	Average "Refugee" detention (days)	"Refugees" detained in a CBSA facility (IHC)	"Refugees" detained in a non-CBSA facility	Refugee claims referred to IRB
2004-2005	10770	4475	42%	18 days	72%	28%	24412
2005-2006	11660	5107	44%	18 days	73%	27%	20843
2006-2007	12837	5198	40%	17 days	73%	27%	23452
2007-2008	13977	5803	42%	17 days	74%	26%	30518
2008-2009	14347	5961	42%	17 days	72%	28%	36242
2009-2010	9423	4125	44%	24 days	66%	34%	29913
2010-2011	8838	4151	47%	n/a	n/a	n/a	22500

Although the absolute number of detained "refugees" rose from 2004 to 2009, it increased more slowly than the number of refugee claims referred to the IRB over the same period. The proportion of "refugees" out of all immigration detainees in Canada remained stable at about 43% from 2004 to 2011.

Gender and age composition of detained refugee claimants

From 2004 to 2010, the gender composition of the detained adult "refugee" population remained stable, averaging 24% women and 76% men (Table 2).

Table 2: Gender of detained "refugees", 2004-2010

Year	Detained "refugees"	Adult detained "refugees"	Adult male "refugees"	Men as a % of adult "refugees"	Adult female "refugees"	Women as a % of adult "refugees"
2004-2005	4475	4203	3230	77%	973	23%
2005-2006	5442	4989	3563	76%	1113	24%
2006-2007	5538	5172	3656	75%	1196	25%
2007-2008	6189	5627	3840	73%	1428	27%
2008-2009	6373	5803	4051	75%	1376	25%
2009-2010	4125	3925	3169	77%	956	23%
Average 2004-2010	5374	4953	3585	76%	1174	24%

The proportion of minors in the detained "refugee" group rose steadily from 6% in 2004-2005 to 9% in 2008-2009, then dropped back to 5% in 2009-2010 (Table 3). It is too early to say whether this reflects a change in policy or simply a chance variation. The actual numbers of minors who are immigration detainees is considerably higher than shown here, since, as noted earlier, CBSA does not keep statistics on minors who are accompanying their detained parents in detention facilities.

Although fewer "refugee" minors were detained in 2009-2010, they were held for longer periods, as shown in Table 4. This is a cause for concern

Table 3: Detained "refugee" minors, 2004-2010

Year	Detained "refugee" minors	Minors as a % of detained "refugees"	Accom-panied "refugee" minors	Unaccom-panied "refugee" minors	Female "refugee" minors	Male "refugee" minors
2004-2005	272	6%	239	33	130	142
2005-2006	431	8%	387	44	200	231
2006-2007	346	7%	308	38	169	177
2007-2008	535	9%	506	29	263	272
2008-2009	534	9%	493	41	266	268
2009-2010	200	5%	177	23	n/a	n/a
Average 2004-2010	387	7%	352	35	n/a	n/a

Table 4: Time in detention, "refugee" minors, 2005-2010

Year	Under 48 hours	2-9 days	10 days or more
2005-2006	67%	21%	12%
2006-2007	65%	20%	15%
2007-2008	64%	27%	9%
2008-2009	62%	25%	13%
2009-2010	37%	42%	21%
Average 2005-2010	59%	27%	14%

Time spent in detention

In Table 5.1, the proportion of "refugees" detained by time period from 2005 to 2010 is shown for all facilities, both CBSA facilities (i.e., immigration holding centres) and non-CBSA facilities (provincial and municipal prisons). The breakdown for CBSA and non-CBSA is shown in Tables 5.2 and 5.3 respectively.

Table 5.1: Time in detention, "refugees", all facilities, 2005-2010

Year	Less than 2 days	2-9 days	10-39 days	40-89 days	90 days or more
2005-2006	40%	25%	20%	9%	6%
2006-2007	39%	27%	20%	9%	5%
2007-2008	39%	30%	20%	7%	4%
2008-2009	37%	29%	23%	7%	4%
2009-2010	23%	32%	28%	9%	8%
Average 2005-2010	36%	29%	22%	8%	5%

Table 5.2: Time in detention for "refugees", CBSA facilities, 2005-2010

Year	Less than 2 days	2-9 days	10-39 days	40-89 days	90 days or more
2005-2006	50%	23%	17%	7%	3%
2006-2007	48%	24%	18%	7%	3%
2007-2008	37%	35%	22%	5%	2%
2008-2009	44%	29%	21%	5%	1%
2009-2010	28%	34%	27%	8%	3%
Average 2005-2010	41%	29%	22%	6%	2%

Table 5.3 Time in detention for "refugees", non-CBSA facilities, 2005-2010

Year	Less than 2 days	2-9 days	10-39 days	40-89 days	90 days or more
2005-2006	12%	30%	27%	16%	15%
2006-2007	11%	33%	27%	17%	13%
2007-2008	11%	29%	28%	17%	16%
2008-2009	14%	29%	30%	14%	14%
2009-2010	12%	27%	29%	15%	18%
Average 2005-2010	12%	30%	27%	16%	15%

Table 6 compares the average time in detention in CBSA and non-CBSA facilities for 2005-2010. Perhaps the most troubling fact that emerges from these figures is that "refugees" detained in non-CBSA facilities tend to be detained for much longer periods than those held in CBSA facilities. For example, a massive 31% of the "refugees" detained in provincial or municipal prisons were held for over 40 days, as compared to 8% of the "refugees" detained in CBSA facilities, as illustrated in Figure 1.

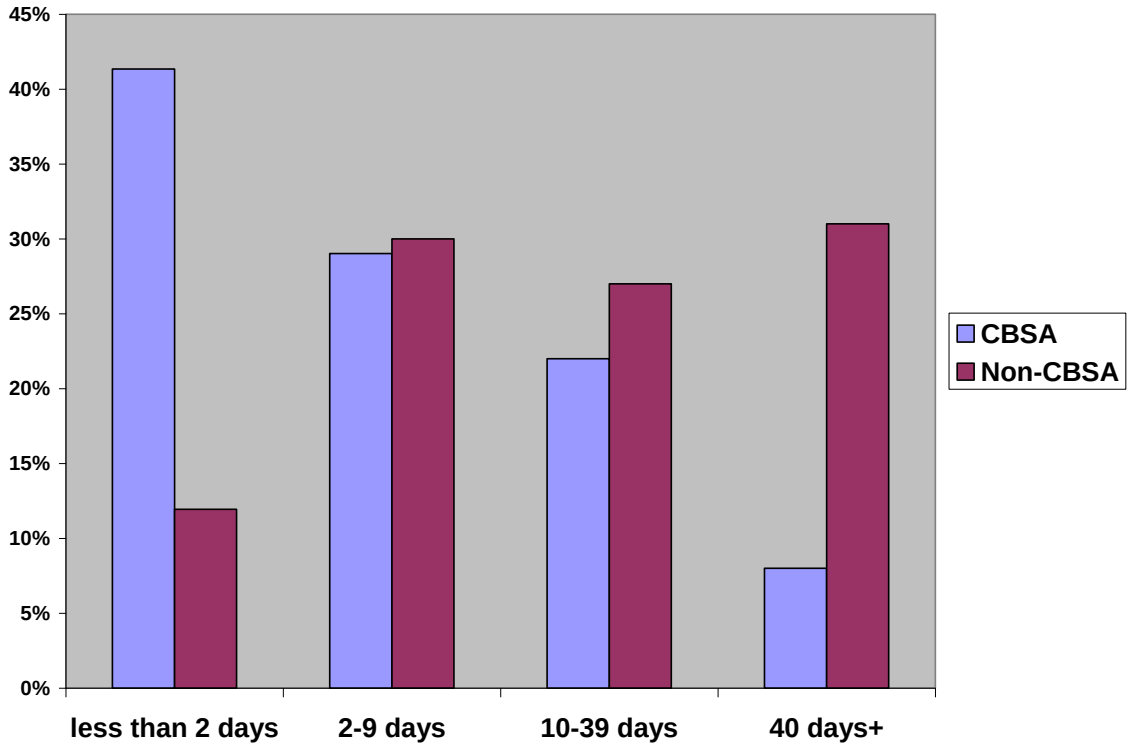
Table 6: Time in detention for "refugees", 2005-2010 average:

Comparison of CBSA and non-CBSA facilities

Type of facility	Less than 2 days	2-9 days	10-39 days	40-89 days	90 days or more
CBSA	41%	29%	22%	6%	2%
Non-CBSA	12%	30%	27%	16%	15%
All facilities	36%	29%	22%	8%	5%

Figure 1.2: Time in detention for "refugees", 2005-2010 average:

Comparison of CBSA and non-CBSA facilities



Reasons for detention and place of detention

As shown in Table 7, during the 2004-2009 period, an average of 6% of all detained "refugees" were held because they were considered to be a security risk or a danger to the public, whereas an average of 94% were detained for reasons unrelated to security or danger to the public. During the same period, an average of 28% of all "refugees" was held in provincial or municipal prisons. CBSA also explained that in 2008-2009, 36% of all immigration detainees hold in provincial prisons (i.e., "refugees" and non-refugees combined) were considered to be low risk. CBSA defines a low-risk

detainee as “one who is not detained for reasons of security or danger and does not have a criminal background”.[34]

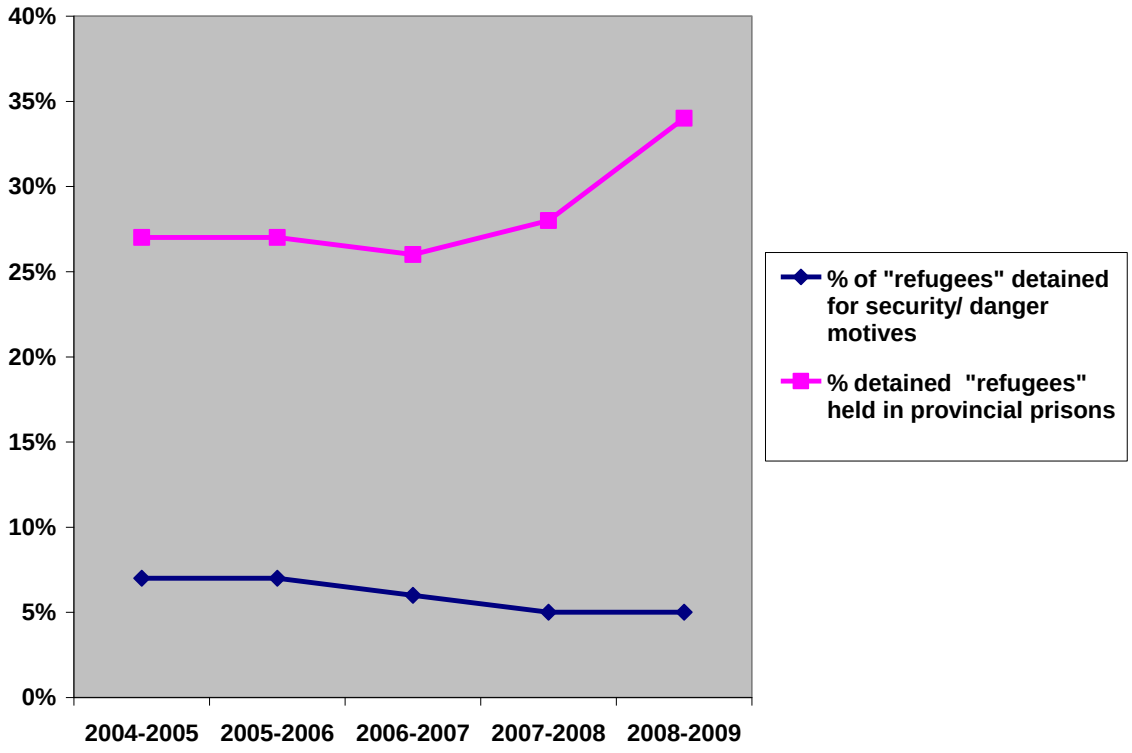
The proportion of “refugees” detained in non-CBSA facilities (i.e., provincial prisons) remained steady at about 27% from 2004 to 2008, and then climbed sharply to 34% in 2009-2010. For the moment it is impossible to know whether this reflects a trend or a mere chance fluctuation. If it reflects a trend, this would be cause for concern, as “refugees” held in provincial prisons are often mingled with ordinary criminals (see Part V for more on this topic).

Table 7: Percentage of "refugees" detained for danger/security motives compared to percentage held in provincial prisons

Year	% of "refugees" detained for security/ danger motives	% of "refugees" detained for non security/ danger motives	% detained "refugees" held in non CBSA facilities (provincial prisons)
2004-2005	7%	93%	27%
2005-2006	7%	93%	27%
2006-2007	6%	94%	26%
2007-2008	5%	95%	28%
2008-2009	5%	95%	34%
Average 2004-2009	6%	94%	28%

[34] Emails from Bruno Tilgner (April 23, 2010 and July 30, 2010).

Figure 2: Percentage of "refugees" detained for danger/security motives compared to percentage held in provincial prisons



Based on these figures and interviews with stakeholders, it would appear that a high proportion of “refugees” detained in provincial prisons are neither criminal nor suspected of presenting a security risk. Instead, many are detained for the same reasons as “refugees” in IHCs, either for lack of valid ID or because they are considered a flight risk. As explained in Part V, it is problematic that many refugees are detained in provincial prisons even though they are neither criminals, nor are they suspected of presenting a security risk. As is demonstrated, “refugees” are held under circumstances inappropriate to their non-criminal status, and the co-mingling of asylum seekers and the criminal population is frequent. Furthermore, there is no obvious reason why “refugees” in non-CBSA facilities are detained for longer periods of time than those in CBSA facilities.

C. Regional disparities in reasons for detention

A number of unexplained regional disparities emerge from CBSA statistics, as shown in Table 8 and Figure 3, which compare the grounds for detention of "refugees" in the Greater Toronto Area (GTA), the Quebec region, and all other regions combined. These statistics indicate that detention for reasons of identity is far more prevalent in the Quebec Region than in other parts of Canada, particularly the GTA. The majority of detentions in the GTA are for flight risk reasons while the majority of detentions in Montreal are founded on identity concerns. One CBSA respondent from the GTA explained that, "except for cases of lack of [identity]", there are less reasons to detain at the front end because asylum seekers are more likely to cooperate and show up for their proceedings. At the back end, when the claim has been rejected, "the risk of flight increases".[35] This explanation is helpful in understanding why, according to CBSA, there are more "back end" than "front end" detainees in the GTA, but this does not explain why most asylum seekers are detained for flight risk (and not for identity reasons) in this region.

Table 8: Reasons for detention of "refugees", 2004-2010[36]

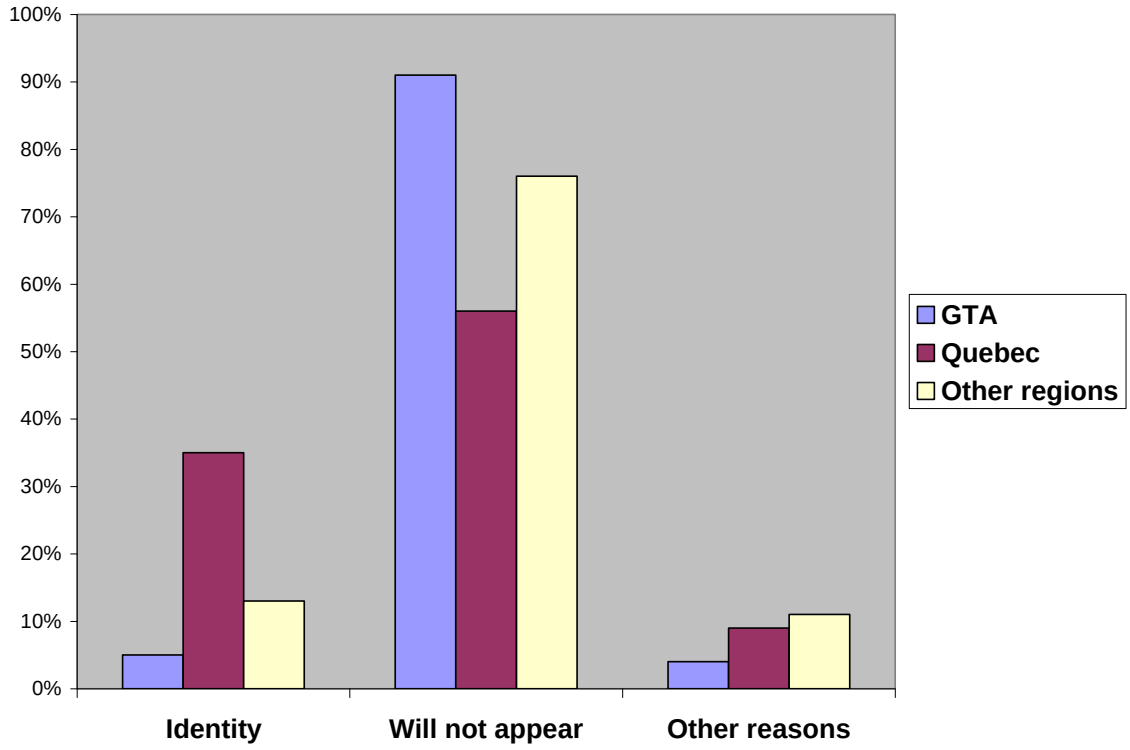
Year	Region	Identity	Will not appear	Other
2004-2005	GTA	9%	87%	4%
	Quebec	38%	58%	5%
	Other regions	13%	70%	18%
2005-2006	GTA	6%	90%	4%
	Quebec	31%	65%	4%
	Other regions	13%	77%	10%

[35] Reg Williams, Director of the Greater Toronto Enforcement Centre (CBSA), Interview June 20, 2010 and follow-up email August 2, 2010.

[36] "Other" includes all reasons for detention other than "Identity" and "Will not appear".

2006-2007	GTA	6%	92%	3%
	Quebec	31%	42%	16%
	Other regions	13%	84%	8%
2007-2008	GTA	3%	95%	2%
	Quebec	38%	56%	7%
	Other regions	11%	72%	18%
2008-2009	GTA	4%	94%	2%
	Quebec	39%	55%	6%
	Other regions	6%	77%	17%
2009-2010	GTA	2%	90%	7%
	Quebec	35%	59%	6%
	Other regions	21%	74%	5%
Average 2004-2010	GTA	5%	91%	4%
	Quebec	35%	56%	9%
	Other regions	13%	76%	11%

Figure 3: Reasons for detention of "refugees", 2004-2010 average



These regional disparities are disturbing, as there is no particular reason to believe that asylum seekers arriving in Quebec pose more identity problems than those arriving in the GTA, or that asylum seekers arriving in the GTA are a bigger flight risk than those arriving in Quebec. In other words, the likelihood of being detained appears to depend to a significant degree on the Port of Entry where the asylum seeker arrives. These observations accord with the findings of the Auditor General of Canada, who noted the lack of consistency in decisions made by CBSA officers on whether to detain, use an alternative to detention or release, adding:

> One region with limited holding space was more likely to release individuals on terms and conditions, while another region with more available beds held individuals for similar reasons until review by the Immigration and Refugee Board. If the number of people to be detained exceeds the available capacity, the Agency may exceed the capacity temporarily or may transfer some detainees to provincial facilities (Auditor General of Canada 2008, 11).

There is no reason to believe that the situation has improved since then.

Several CBSA respondents have indicated that regional disparities in grounds for detention cannot be solved, given that there are regions where the numbers of detainees is much larger than other regions, and then the volume and size of detention would be determining factors in detention. However, the only factors that should be considered by CBSA officers in their decision to detain or release are those found in the immigration legislation (IRPR, Ss. 244 and s. 248): this how immigration officers are expected to their immigration powers, in order to "allow for limitations on immigration detention, particularly in the case of long-term detention" (CIC Policy Manual on Detention, 13).

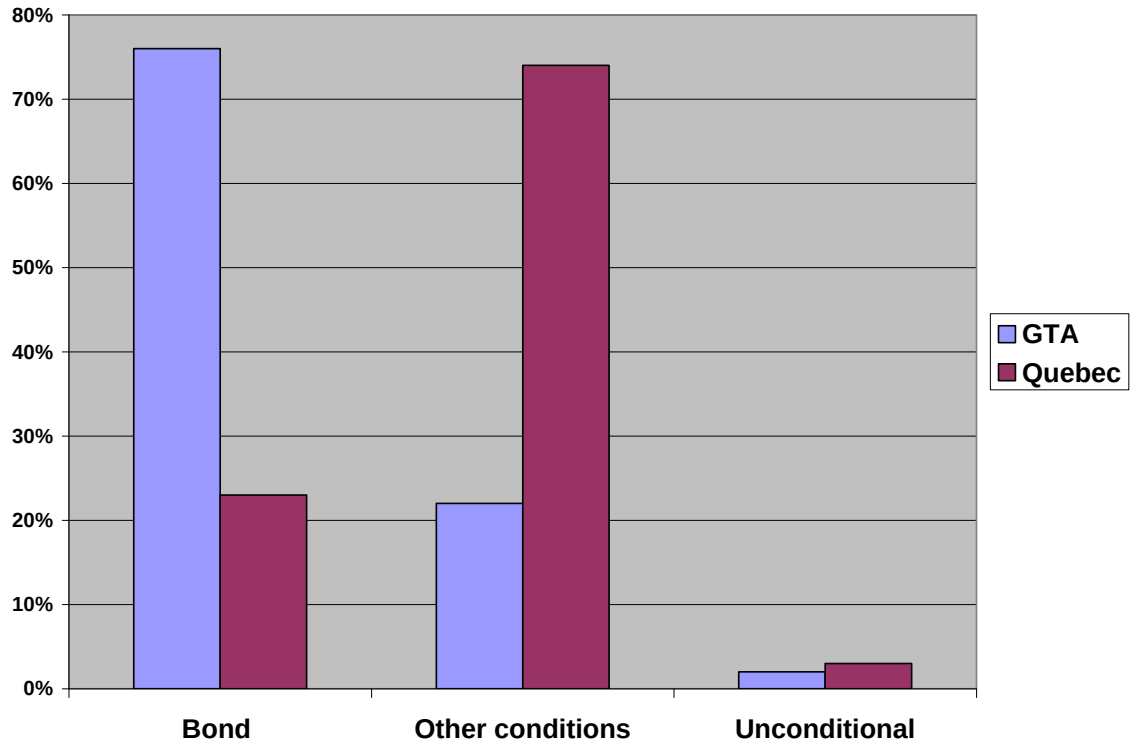
Another very striking regional disparity concerns the types of conditions imposed on "refugees" upon release from detention. In Table 9 and Figure 4, we compare the situation in the GTA and the Quebec region.

Table 9: Disparities in release conditions between GTA and Quebec region, "refugees", 2005-2010

Year	Conditions	GTA	Quebec region
2005-2006	**Bond**	83%	37%
	Other conditions	16%	59%
	Unconditional	1%	4%
2006-2007	**Bond**	83%	25%
	Other conditions	15%	74%
	Unconditional	1%	1%
2007-2008	**Bond**	75%	16%
	Other conditions	22%	80%
	Unconditional	3%	4%
2008-2009	**Bond**	68%	15%
	Other conditions	31%	83%
	Unconditional	1%	2%
2009-2010	**Bond**	72%	20%
	Other conditions	25%	75%

	Unconditional	3%	5%
Average 2005-2010	**Bond**	76%	23%
	Other conditions	22%	74%
	Unconditional	2%	3%

Figure 4: Release conditions for «refugees", GTA and Quebec regions, 2005-2010 average



"Refugees" detained in the GTA are far more likely to be required to provide a bond as a condition for release than those in the Quebec region, for reasons that remain unclear.

RECOMMENDATION 4 **With a view to avoid inconsistencies in detention decisions, CBSA should monitor the reasons for detention between regions.**

RECOMMENDATION 5 **CBSA officers should not take into account extraneous factors such as amount of space in detention facilities when deciding whether to detain an asylum seeker.**

PART III: GROUNDS FOR DETENTION

As mentioned in Part I, s. 55 of IRPA specifies that CBSA officers have the power to detain foreign nationals and permanent residents where they have reasonable grounds to believe the person is inadmissible to Canada, and the person is considered to be a danger to the public, or is unlikely to appear for immigration processes, such as examination, hearing or removal (thus representing a flight risk). In addition, an officer may detain a foreign national where the person has not satisfied the officer of his/her identity [or even the legitimacy of his/her identity]. Finally, at a port of entry, a CBSA officer may detain a foreign national or a permanent resident when it is necessary to complete the immigration examination, or when the officer has reasonable grounds to suspect that the person is inadmissible for security reasons or due to previous violations of human or international rights.

There are specific concerns about the grounds for detention as they relate to asylum seekers. To begin, prosecution for "illegal entry", including of people who are attempting to seek protection in Canada, prevents refugee claimants from advancing their claim for protection. Secondly, punitive measures directed at asylum seekers and refugees who arrive by boat, without regard to the genuineness of their need for protection, disable asylum seekers from mounting a proper advancement of their case.

A. Prosecution for illegal entry (under s. 122 of IRPA)

Article 31 of the 1951 Refugee Convention provides that countries shall not punish refugees for illegal entry providing they present themselves without delay to the authorities and show good cause for their illegal entry. This principle is reflected in IRPA section 133, which provides that refugee claimants shall not be charged with offences relating to use of fraudulent documents for the purpose of travel to Canada until the claim for refugee protection has been finalized. However, a UNHCR legal officer noted that asylum seekers are sometimes arrested and prosecuted under s. 122 of IRPA (i.e., possessing false documents in order to contravene the Act).[37] This is a cause of concern

[37] UNHCR legal officer, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).

for two reasons. First, charges under s. 122 of IRPA are laid before a final claim for protection has been made. Secondly, given the difficulties that detainees face in retaining and instructing counsel while in detention - a point that is addressed in greater detail in Part IV-, there are fewer chances that the person in detention will be successful in his or her claim for protection.

To illustrate this point, the same UNHCR legal officer shared the story of an African national who had been charged at a Port of Entry under s. 122 of IRPA for entry into Canada using a fake French passport. He was then found to be inadmissible to Canada, and a removal order was issued against him. The applicant then said he was seeking refugee protection and had lied because he feared he would be denied entry if he disclosed his intention to claim protection before being admitted to Canada. The CBSA officer informed him that he was ineligible to make a claim for refugee protection because section 99(3) of IRPA does not allow a person who is subject to a removal order to make such a claim. He was allowed, however, under section 112 of IRPA to make a pre-removal risk assessment (PRRA) application. He did so and was ultimately successful in his application for protection. He now has the status of “protected person” in Canada, which means that he can stay in Canada and apply to become a permanent resident. As mentioned in the methodology section of this study, the status of “protected person” confers the same level of protection as the status of “convention refugee”.

Referring to this case, the UNHCR legal officer highlighted that filing a PRRA while being detained is extremely difficult, since the detained person does not have internet access, has limited phone access, cannot communicate with his or her family, and cannot get all the necessary documents- all of these points are addressed in Part IV of this study. The UNHCR legal officer added that given the difficulties that detainees face in retaining and instructing counsel, it is unlikely that the asylum seeker described above would have succeeded in the PRRA application had he remained in detention.[38] Given the low acceptance rate for PRRAs (around 2 % in 2009, see: CBSA report 2010), it is essential that the asylum seeker be given the opportunity to prepare his/her claim for protection outside of the detention setting.

In addition, the person in the case study, who now had a successful PPRA, was at the same time convicted for entry to Canada with false documents, and therefore

[38] *Ibid*

ineligible to apply for permanent residence. In relation to this case, the British Columbia Court of Appeal firmly reiterated that a PRRA application constitutes a claim for refugee protection for the purposes of s. 133 of the IRPA, and that "the accused should not have been charged with the offence under s. 122 pending determination of his claim for protection" (Agbor 2010, para. 7). In other words, a person who has made a claim for protection may not be charged with an offence under section 122 pending the processing of their claim for protection. Yet, in reality, some claimants are still charged with an offence under s. 122 of IRPA pending determination of their claim for protection.[39]

In summary, in keeping with Canada's obligations under both art. 31 of the 1951 Refugee Convention and art. 133 of the IRPA, CBSA officers should not lay charges against an asylum seeker under section 122 of IRPA until a final decision has been made regarding a claim for protection. This is particularly important in a context where, as research has clearly shown (Crépeau and Nakache 2006), stricter border controls are creating an environment that is conducive to irregular migration.

RECOMMENDATION 6 **CBSA officers should be particular sensitive to the possibility that asylum seekers may not immediately disclose the real reason for their travel to Canada, due to a lack of information about the refugee process.**

RECOMMENDATION 7 **In keeping with Canada's international and domestic obligations, CBSA officers should not arrest and detain someone under s. 122 of IRPA (i.e., possessing false documents) until a final decision regarding a claim for protection has been made.**

[39] *Ibid*; Peter Adelman, immigration and criminal law lawyer, Interview June 10, 2010, Vancouver (follow-up email February 28, 2011).

B. A growing movement toward seeking to keep refugee claimants arriving by boat in detention

The recent government's approach to the detention of asylum seekers arriving by boat has been to actively oppose the release of immigration detainees, either by demanding more proofs of identity than usual, or by advancing arguments for inadmissibility based on security grounds. For example, among the 492 Tamils arrived aboard the MV Sun Sea in August 2010, 443 were detained (children were detained with their mothers at the Burnaby Youth Custody Services Centre but unaccompanied minors were not detained). During the first 7 months, in the majority of cases where release was ordered, the Minister applied for a judicial review of the decision. In roughly 20 % of these cases, the Minister applied to stay the release, in some cases applying to stay multiple consecutive release orders.[40] In the case of B386, for example, the Immigration Division ordered his release at three successive detention review hearings, and in each case the Minister requested a stay of the release pending judicial review of the decision. Justice Blanchard of the Federal Court wrote:

> Potentially, this cycle could be unending and the Respondent would never benefit from a positive decision of the Court upholding a release order. This cannot be what was intended by Parliament. The purpose of requiring a detention review every 30 days was to protect the Respondent's liberty interests by affording him a timely review of his detention and clearly not to provide a mechanism to prolong that detention or keep the Respondent in indefinite detention. Yet, this would be the effective result if we accept the Minister's submission. In my view, this would result in nothing short of an abuse of the court process.[41]

The objective here is not to dispute the fact that Canada has an interest in securing its borders. However, the government's aggressive efforts to keep asylum seekers who have arrived by boat in detention is a cause of concern for two main reasons.

To begin, in the past identity documents, such as a driver's license or national ID card, would have been sufficient to prove identity (especially when supplemented by

[40] BC Legal Society Services, Interview June 11, 2010, Vancouver (email correspondence, March 2011).
[41] *Canada (Minister of Citizenship and Immigration) v. B386*, 2011 FC 175, at para. 11.

secondary ID such as a Birth Certificate or a Marriage Certificate). Now, the Minister is seeking continued detention until CBSA has independently verified ID through a process abroad. This new approach, which put refugee claimants at risk since their ID could be disclosed to sources in their home country, has unfortunately not been quashed by the Federal Court yet. Highlighting that "the obligation to establish one's identity rests first and always with the claimant",[42] and that "identity is the lynchpin of Canada's immigration regime",[43] the court held, in several decisions on stay of detainee release applications made by the Minister in MV "Sun Sea" arrivals, that the statutory scheme in place requires the Immigration Division to extend a high level of deference to the Minister in the exercise of its mandate, thus limiting the Immigration Division's discretion in assessing the factors considered in the terms and conditions of release.

Secondly, in security detention cases, the risk to unduly or indefinitely detain these persons is real. To illustrate this point, a specific analysis of s. 58(1)(c) of IRPA, which refers to continued detention sought by the Minister to investigate a suspicion that the detainee is inadmissible on security grounds, is necessary.

S. 58 (1) c of IRPA states the following:

> The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that (...) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights.

S. 58 (1) c of IRPA, which allows for continued detention to pursue investigation on grounds other than those that formed the basis for initial detention, has been increasingly used by the government in the last two years to justify the continued detention of asylum seekers arriving by boat.[44] Yet, as the Supreme Court of Canada put

[42] *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 (Justice Phelan), at para. 24.
[43] *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1009 (Justice Lemieux), at para.15; *Canada (Minister of Citizenship and Immigration) v. XXXX*, 2010 FC 1095 (Justice Phelan), at para. 23.
[44] Douglas Cannon, immigration lawyer, Interview June 8, 2010, Vancouver (follow-up phone conversation, January 28, 2011); UNHCR legal officer, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011); BC Legal Society Services, Interview June 11, 2010, Vancouver (email correspondence, March 2011); Peter Adelman, immigration and criminal law lawyer, Interview June 10, 2010, Vancouver (follow-up email February 28, 2011).

it in *Mann*,[45] investigative detention is a serious infringement on one's right to be free from arbitrary detention, and "reasonable grounds" to detain should always be the appropriate standard for investigative detention throughout the course of a criminal investigation.

The threshold for "taking necessary steps to inquire into a reasonable suspicion" in security detention cases was recently judicially interpreted in a Federal Court case as being very low. In this decision rendered by Justice Barnes, XXXX was one of the 76 Sri Lankan migrants arrested in October 2009 after their arrival without visa off the shores of Canada aboard a vessel named the Ocean Lady. Upon being arrested, XXXX made a claim for refugee protection. During his first detention hearing, the Minister sought the continued detention of XXXX on the basis that he was unlikely to appear for removal. The Immigration Division of the IRB granted his request. During his second detention hearing, the Minister advised the Immigration Division that they were now satisfied as to his identity but sought the continued detention of XXXX pursuant to section 58(1)(c) of the IRPA, on the basis that continued detention was required so that they could investigate a suspicion that XXXX was inadmissible on security grounds. The Minister wanted to determine if XXXX was a member of the Liberation Tigers of Tamil Eelam (LTTE), which is a group designated by Canada as a terrorist organization. The Immigration Division of the IRB ordered XXXX's continued detention on that basis. In December 2009, at his fourth detention review, the Immigration Division of the IRB ordered XXXX's release from custody on terms and conditions, on the basis it found the respondent credible and did not find the Minister's expert witness credible. The Board found that the ship was LTTE controlled and may have had members and traces of explosives on board, but nothing connected the respondent to the LTTE. The Board also criticized the necessity and quality of the Minister's investigation and concluded it was unlikely to uncover anything important. In his February 2010 decision, Justice Barnes granted the Minister's application for review and overturned the order for release. He held that the Immigration Division was required to give deference to the Minister in the exercise of its mandate under ss.58 (1)(c) (para. 13). He also held that the Immigration Division was not entitled to carry out a *de novo* assessment of the available evidence as it did (para. 14) and erred in conducting credibility assessments and substituting its own views, "effectively usurp[ing] the Minister's role to weigh the available evidence in

[45] *R. v. Mann*, [2004] 3 S.C.R. 59.

formulating a suspicion" (para. 17). The appeal was declared moot because the person had been released.[46]

The government is increasingly using the XXXX case to justify continued detention of asylum seekers. In two recent federal court cases where the Minister initially argued for immigration detention on the basis of identity and subsequently sought continued detention because of a suspicion that detainees are inadmissible on the grounds of security, motions by the Minister of Citizenship and Immigration to stay release from detention were allowed. In these two cases, the judges gave a very high level of deference to the Minister's investigation, while referring to the XXXX case.[47] As one immigration lawyer noted, it is very difficult for the counsel of detainees to judicially review a decision as often times the person is released before a judicial review is heard and the judicial review becomes moot but the precedent remains.[48]

In sum, when the Minister alleges that CBSA has a suspicion that someone might be inadmissible, then they are permitted to keep them in custody while they investigate that suspicion. This provision gives the Minister a tremendous discretionary power based solely on his "suspicions", which prevents the IRB from being able to independently decide whether the detainees should be released. Consequently, there is a real potential for a violation of the Charter's rights.

RECOMMENDATION 8	**More stringent requirements for identity verification that may put asylum seekers at risk in their country of origin should not be implemented by CBSA**
RECOMMENDATION 9	**Given its potential for arbitrary detention, s. 58 (1) c of the IRPA, which allows for the continued detention of an individual so that CBSA can investigate grounds other than those that formed the basis for the initial detention, should only be used by CBSA in exceptional circumstances.**

[46] *XXXX v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 27.
[47] *Canada (Minister of Citizenship and Immigration) v. B232*, 2011 FC 257; *Canada (Minister of Citizenship and Immigration) v. B479*, 2010 FC 1227.
[48] Douglas Cannon, immigration lawyer, Interview June 8, 2010, Vancouver (follow-up phone conversation, January 28, 2011).

In conclusion, although the 1951 Refugee Convention stipulates that states should not to punish refugees coming directly from a country of persecution on account of their illegal entry or presence (article 31), some asylum seekers are prosecuted for illegal entry of people while attempting to seek protection in Canada. Given the difficulties that asylum seekers face in preparing a PRRA in detention, CBSA officers should never lay charges under section 122 of IRPA until there has been a final decision in a claim for protection. Furthermore, the recent policy changes aimed at keeping detainees longer in detention negatively impact the detained persons' rights and liberties because they have the potential to extend the period of detention. As such, the "spectre of an abuse of process" is real, as noted by Justice Blanchard in a recent Federal Court decision where the Minister was applying to stay the third consecutive release order of a detainee.[49]

A balance must be found between enabling the government to do what is reasonably necessary to perform its duties while preventing excessive intrusions on the liberty of the individual concerned. Furthermore, earlier experience with boat arrivals shows that long-term detention is not necessary. For example, those who arrived on the Ocean Lady in 2009 have all being complying with their bail conditions.[50] In addition, only a very small number of the Tamils that arrived on the MV Sun Sea have been accused of links to Tamil Tiger fighters in Sri Lanka (Naumetz 2011). The lengthy detention of this group of Tamils is particularly problematic given that many of them had been exposed to severe trauma in Sri Lanka. In particular, many of them were in the Vanni war zone during the final months of the war, and were exposed to heavy shelling, lack of food and water, traumatic loss and multiple other forms of extreme trauma documented in the recent Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka (UN Secretary general Report 2011) They had also suffered from insufficient food and water on the Sun Sea. The Canadian government does not appear to have taken these traumatic antecedents into account, either in making the initial decision to detain the Sun Sea migrants or the decision to keep them in detention.[51] Finally, prolonged detentions are expensive to taxpayers. Supplementary estimates tabled in Parliament in February 2011 reveal that the Canada

[49] *Canada (Minister of Citizenship and Immigration) v. B386*, 2011 FC 175, at para. 11.
[50] On the morning of October 17, 2009, the Ocean Lady entered Canadian waters with 76 newcomers on board. They were not only the first asylum seekers to arrive in Canada by boat in more than 20 years, but also the first large group of people to arrive in Canada since the end of the war in Sri Lanka.
[51] Anonymous source.

Border Services Agency (CBSA) spent over $ 22 million for the MV Sun Sea detentions. The costs for the Immigration and Refugee Board, largely for the detention reviews, total $900,000 (Treasury Board of Canada 2011, 64, 100, 168-170). As the Canadian Council for Refugees (CCR) notes, these costs would be lower if the government had given the MV Sun Sea passengers the same treatment as other asylum seekers (CCR February 2011).

In June 2011, the federal government proposed legislative changes that would impose severe penalties on asylum seekers and refugees who came to Canada as part of an irregular arrival (mandatory detention and long term detention- without IRB Immigration Division review for 12 months). For the reasons outlined above, these changes should not be implemented, as they would have a significant impact on the ability of refugee claimants to advance their asylum claims.[52]

PART IV: PROCEDURAL SAFEGUARDS FOR DETAINED ASYLUM SEEKERS IN CANADA

As explained in Part I, deprivation of liberty may be "arbitrary" either because there is no legitimate basis for detention or because it does not follow procedural requirements. In this part, it is the second dimension of "arbitrariness" of deprivation of liberty which is addressed, i.e., the procedural safeguards that apply to detention.

International law has devised a range of procedural safeguards to protect detained asylum seekers and refugees from arbitrary detention. These include the right to be informed promptly of the reasons for detention, the right to challenge the lawfulness of detention judicially, and the right to reparation for unlawful detention. They

[52] In June 2011, the federal government adopted Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. According to Bill C-4, any group of two or more refugee claimants that is designated as part of an irregular arrival could be subject to mandatory detention. While detentions under IRPA currently must be justified by considerations of inadmissibility, risk of flight or danger to the public, the mandatory detention clause of Bill C-4 does not require such justification. In addition, under Bill C-4, refugee claimants will be detained for a minimum of 12 months, with no review of the grounds of detention until twelve months have passed, which is unprecedented in immigration law, even in cases where there are significant security concerns (i.e. security certificate cases). These legislative changes would constitute a breach of Canada's obligations under Article 31 of the 1951 Refugee Convention and under ss. 9 and 10 of the *Canadian Charter* (for more on this topic, see: CBA 2010).

also include fundamental safeguards following detention, such as the right of access to a lawyer, the right to inform family members or others of detention, and the right of access to UNHCR (for more on this topic, see ICJ 2011, 178-190). It is beyond the ambit of this study to examine the scope and content of each procedural right and to analyze whether each single right is respected in practice in the Canadian immigration detention context. Rather, this part focuses on two main procedural safeguards: notification of grounds of detention upon arrest and the right to counsel and notice thereof. For each safeguard, the legal framework is highlighted and contrasted with the realities of detained non-citizens in Canada. As is shown, these two principles are clear on paper, but the reality is different. Asylum seekers have sometimes informed respondents that they do not know the reason for their detention. In addition, written information on the detention process is not provided to asylum seekers detained in provincial jails (A). What's more, access to lawyers is usually not a major problem for asylum seekers held in CBSA facilities, but for those detained in non-CBSA facilities, barriers to legal representation are significant (B).

A. Notice of grounds of detention upon arrest

International hard law instruments affirm that a person detained for any reason, including for immigration purposes, has the right to be informed promptly of the reasons for detention (for more on this, see ICJ 2011, 178). The Inter-American Court of Human Rights has held that information on the reasons for detention must be provided "when the detention takes place, [which] constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defence of the individual detained".[53] In addition, the European Court of Human Rights has specified that "promptly" means within hours of detention. For example, the right to be provided with reasons for detention has been found to have been violated where reasons were provided only after 76 hours.[54] The right to be informed of the grounds for

[53] *Yvon Neptune v. Haiti*, IACHR, Series C No. 180, Judgment of 6 May 2008, para. 105.
[54] *Saadi v. United Kingdom*, ECtHR, GC, Application No. 13229/03, Judgment of 29 January 2008, paras 81-85.

detention is also affirmed by international standards and guidelines relating to the detention of migrants and asylum seekers. Thus, the 1999 UNHCR Revised Guidelines on Detention provide that detained, asylum-seekers are entitled to "receive prompt and full communication" of the reasons for detention, including detention orders, and "of their rights in connection with the order, in a language and in terms which they understand" (UNHCR 1999 Revised Guidelines on Detention, Guideline 5 on Procedural Safeguards). This means that information provided on the reasons for detention must be in simple language and sufficiently comprehensive and precise to allow the detainee to challenge his or her detention judicially (ICJ 2011, 179). This principle may require, in the case of migrants, that it be translated (1988 Body of Principles on Detention, Principle 14).

In Canada, there is a constitutional guarantee forbidding arbitrary detention (section 9 of the 1982 Canadian Charter). In addition, the 1982 Canadian Charter specifically provides for the right to be informed of the reasons for detention (section 10(a)) and the right to counsel (section 10(b)).[55] In *Mann* (R. v. Mann 2004, para. 21), the Supreme Court of Canada made clear that section 10(a) of the 1982 Canadian Charter applies to any type of detention, including immigration detention . The Court also explained that person must be told "in clear and simple language" of the reasons for the detention. Thus, the CIC Policy Manual on Detention states: "In accordance with Section 10 of the [Canadian Charter]and in accordance with the rules of natural justice, the detained person must be informed of the reason for their detention, the right to an interpreter and the right to retain and instruct counsel without delay" (CIC Policy Manual on Detention, 19).[56]

While these principles are clear on paper, the reality is different. CBSA respondents asserted that detainees are always informed verbally, upon first contact by the arresting officer, of the reasons for detention. However, several respondents – NGOs

[55] Section 10(a) and (b) of the 1982 Canadian Charter states: "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons thereof; [and] (b) to retain and instruct counsel without delay and to be informed of that right".

[56] The Manual also stipulates (page 19):

> In accordance with Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention"), a person detained in a foreign country must be advised of their right to contact consular officials of their own country without delay;
>
> The officer must complete an Order for Detention (IMM 0421B). The original of this form will be given to the authority responsible for detaining the person and a copy must be placed in the detained persons file. The purpose of the detention order is to detain the person in accordancewith the provisions of IRPA.

and a UNHCR local officer- noted that asylum seekers have sometimes informed them that they do not know the reason for their detention. This raises the question of whether the reasons for detention are communicated in a language that the detainee is able to understand.

The ability of detainees to understand what is happening when they are arrested is essential: asylum seekers, in particular, may experience a high degree of anxiety if they are handcuffed at a port of entry after having disclosed a need for protection to a person in authority. CBSA officers have access to interpreters at the point of entry (or over the phone) to assist them in communicating the reasons of arrest to the detainee.[57] Therefore, CBSA officers should always check with detainees that they understand English or French before the reasons for arrest are communicated to them; if not, they should always be assisted by an interpreter.

At present, asylum seekers held in CBSA facilities in Toronto and Montreal receive written information from CBSA on the detention process ("Information for People Detained under the Immigration and Refugee Protection Act", BSF5012). In Toronto, each detainee receives in addition an information package with basic detention centre information (messages, meals, telephone use, health services etc.). The package also contains a flyer about the Toronto Refugee Affairs Council (TRAC), an NGO visiting detainees on a regular basis that has an office within the CBSA-run facility, and the Red Cross "First Contact" (a program providing refugee claimants with access to emergency assistance, information and referral through a 24/7 multilingual phone line).[58] Each detainee also meets a CBSA officer the day after their arrival, who reviews with them the written information (which is in the folder), explains their rights (including their right to access legal aid), answers any questions about the written information they may have and about their immigration case.[59] In Montreal, detainees receive additional oral information from a CBSA officer about the detention center and their right to access a lawyer the day of their arrival.[60]

[57] Rob Johnston, former Executive director of CBSA (Pacific Region), Interview June 10, 2010, Vancouver. Interview with Fred Franklin and Lois Anne Bordowitz (Toronto Refugee Affairs Council), Toronto, May 18, 2010.
[58] On-site visit, July 21, 2010.
[59] Tina Karsakis, former manager of Toronto Immigration Holding Centre (CBSA), Interview May 19, 2010, Toronto (follow-up email July 21, 2010).
[60] On site visit, July 5, 2010.

Asylum seekers routinely detained in non-CBSA facilities outside Toronto and Montreal are not provided with this type of information (for more on the routine use of penal institutions for asylum seekers in other parts of Canada, see Part V of this study). With a view to helping these individuals overcome this problem, the UNHCR started distributing pamphlets to detainees at the Toronto West Detention Centre. These pamphlets contain important information on detention and detainees' rights and obligations under Canadian law. They are written by the Ontario Working Group on Detention, a group composed of UNHCR and non-governmental organizations, based on documents found on the Citizenship and Immigration Canada (CIC), Immigration and Refugee Board (IRB) and CBSA websites.[61] In British Columbia, BC legal aid duty counsel also try to reach as many detainees as possible at the beginning of the detention process (i.e., within the time frame of the 48-hour detention review) to provide detainees with advice regarding procedures and their legal rights.[62] In some BC correctional centres, such as Fraser Regional Correctional Centre (FRCC), BC Corrections staff have also started distributing booklets to asylum seekers on making a refugee claim and contacting legal aid (but this document are in English only).[63] These initiatives deserve recognition; however, to ensure uniformity across Canada, CBSA should ensure that written pamphlets on the detention process are made available to all its immigration detainees across Canada (including those held in provincial jails), and in a language that they understand.

[61] UNHCR legal officer, Interview May 21, 2010, Toronto (follow-up email August 6, 2010 & January 27, 2011).

[62] Immigration detainees meet legal aid lawyers during their first 48-hour detention review that takes place in a single location in Vancouver (300 West Georgia Street). Since duty counsel gain access to this location, BC Legal Society Services indicated that they believe all immigration detainees are seen by duty counsel at the beginning of their detention process. However, if CBSA cannot get the immigration detainee to Vancouver within the first 48 hours, the 48 hour detention review will take place over the phone or by videoconference. This is rare, but may happen, and in this case, detainees may not be informed by duty counsel of the reasons for detention: Colby Brose (CBSA detention manager, British Columbia), Ross Fairweather (CBSA director of Inland Enforcement, British Colombia), Nicole Goodman (previous CBSA detention manager in British Columbia), Interview June 8, 2010, Vancouver; BC Legal Society Services, Interview June 11, 2010, Vancouver (email correspondence, March 2011).

[63] Earl Preiss, Assistant Deputy Warden (Fraser Regional Correctional Centre), Interview June 9, 2010, Maple Ridge.

RECOMMENDATION 10	**Reasons for arrest and detention should be given, both orally in a language understood by the detainee and in writing.**
RECOMMENDATION 11	**CBSA should ensure that ALL detained asylum seekers receive written pamphlets informing them of the detention process, their rights, and providing them with available legal resources. This includes asylum seekers in both CBSA-run facilities and non-CBSA correctional centers.**

B. Right to counsel and notice thereof

International law clearly states that non-citizens placed in detention have the right to prompt access to a lawyer, and must be promptly informed of this right. International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided (for more on this topic, see ICJ 2011, 180).[64] In addition, translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should also respect the confidentiality of the lawyer-client relationship (ICJ 2011, 181).[65] Access to legal advice and representation is especially important in the case of asylum seekers, since they are ill equipped to effectively pursue their legal rights or remedies (Report on Arbitrary Detention, 1998). In Canadian law, the same principles apply. The Supreme Court of Canada has held that the section 10(b) caution (i.e., right to retain and instruct counsel) must be given immediately to persons subject to any type of detention. Therefore, from the moment an individual is detained, the detaining authority has the obligation to inform the detainee of his or her right to counsel, and must do everything required under section 10(b) to facilitate that right.[66] In

[64] Thus, the Inter-American Court of Human Rights has found that the provision of legal assistance is an obligation inherent to the habeas corpus and due process rights, and that in cases involving detention, free legal assistance is an "imperative interest of justice". See: *Vélez Loor v. Panama*, IACHR, Series C No. 218, Judgment of 23 November 2010, paras 132-133 & para. 146.

[65] Interference with the confidentiality of lawyer/client discussions in detention has been found to violate the right to challenge the lawfulness of detention under European human rights law. See: *Istratii v. Moldova*, ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87-101.

[66] *Chevez v. Canada* (Minister of Citizenship and Immigration), [2007] F.C.J. No. 957.

addition, the Supreme Court of Canada has ruled that the arresting authority must facilitate the detained person's access to counsel, including access to legal aid services and duty counsel (R. v. Brydges, 1990; R. v. Bartle, 1994).[67] In the case of detained non-citizens, this duty falls on CBSA when they arrest or detain a person under IRPA (s. 103.1(14); see also R. v. Subaru, 2009).[68] In summary, under Canadian immigration law, the right to counsel (and notice thereof) includes two obligations for the CBSA: 1) to notify the person of their right to counsel and 2) to facilitate access to counsel.

In Montreal and the Greater Toronto Area (GTA), written pamphlets distributed to asylum seekers held in CBSA-run facilities (on the detention process) contain basic information in relation to their right to access a lawyer. In addition, asylum seekers have the opportunity to meet with NGOs while in detention. Toronto Refugee Affairs Council in Toronto (TRAC) visits detained asylum seekers in Toronto twice a week. TRAC has an office in the detention centre but they are not allowed into the common areas (except when escorted by a CBSA officer): detainees have to come to the office to speak with someone from TRAC. In Montreal, Action Refugiés Montréal visits immigration detainees once a week: although they have no office in the detention center, they are allowed into the common areas and have thus direct access to detainees. Both NGOs provide asylum seekers with information on legal aid.[69] Montreal legal aid is sometimes difficult to reach (you often have to leave a phone message and give a phone call-back number), so Action Réfugiés Montréal also provides detainees with a list of private practice lawyers who accept legal aid mandates, depending on the language spoken by the detainee.[70]

For asylum seekers held in CBSA facilities, access to lawyers is usually not a major problem. Some respondents raised concerns about the fairly long driving distance from downtown Montreal to the Laval Immigration Holding Centre (45 to 60 minutes), noting that few immigration lawyers do in fact visit detained asylum seekers. Furthermore, they also indicated that CBSA recently limited lawyers' access to these

[67] R. *v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Bartle*, [1994] 3 S.C.R. 173.
[68] It should be noted that the Federal Court had already held in the past, in several decisions concerning the right to counsel for detained non-citizens, that the right to counsel arises from the moment the person is ordered to be detained. See: *Dragosin v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 110; *Chevez v. Canada* (Minister of Citizenship and Immigration), [2007] F.C.J. No. 957.
[69] Fred Franklin and Lois Anne Bordowitz (Toronto Refugee Affairs Council, TRAC), Interview May 18, 2010, Toronto; Glynis Williams (Action Refugiés Montréal, Director) and Maude Côté (Action Refugiés Montréal, Detention Coordinator), Interview June 26, 2010, Montreal.
[70] *Ibid.*

facilities. In Montreal, for example, lawyers used to have access to the CBSA Immigration Holding Centre facility in Laval 24 hours a day and 7 days a week; now their access is limited to visiting hours (2-4pm/7-9pm).[71] In Toronto, CBSA does not allow anyone from Legal Aid Ontario to enter the Toronto Immigration Holding Centre without a security clearance from CBSA (the process is long and can take anywhere from 1 to 6 months). This was not the case before.[72]

However, it is much harder for Quebec and Ontario immigration lawyers to get in touch with, and to gain physical access to asylum seekers in correctional (i.e., non-CBSA) facilities.[73] For example, Legal Aid Ontario explained that legal aid posters are not always posted on the wall (there is no notice posted at the Toronto Jail for example), or are posted in a wrong location (at the Vanier Centre for Women, for example, notices are only posted in the waiting room through which immigration detainees initially enter the facility). In addition, Ontario Legal Aid has recently experienced more restricted access to immigration detainees in some correctional facilities. At the Toronto West Detention Centre, for instance, they used to see immigration detainees in the actual wings, but now, they have to ask for detainees by name, one by one, to be brought to a counsel room to interview them. It means a lot of waiting around and it depends on how co-operative the guards happen to be that day. In addition, very few asylum seekers seem to know that someone from legal aid is at the facility that day: most of the time, they are informed by chance or by word of mouth. Finally, most asylum seekers seem to think that legal aid is for criminal matters only, so they do not call the legal aid number.[74] This situation could be corrected if asylum seekers held in non-CBSA facilities received, upon their arrival, both written and oral information on the availability of legal aid. Some guards do notify asylum seekers about who to contact at legal aid, but this is, according to Ontario Legal Aid, an exception to the rule. Ontario Legal Aid also indicated that sometimes guards take away detainees' immigration documents (including the PIF and other important immigration documents) when they confiscate their personal belongings upon arrival at the facility, which is, a violation of detainees' legal rights.[75] To correct this problem, the UNHCR has put into place some initiatives, such as the Ontario Detention Working Group. This group, composed of volunteer law students, informs

[71] Annick Legault, immigration lawyer, Interview July 07, 2010, Montreal.
[72] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[73] *Ibid.* Annick Legault, immigration lawyer, Interview July 07, 2010, Montreal.
[74] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[75] *Ibid;* UNHCR legal officer, Interview May 21, 2010, Toronto (follow-up email August 6, 2010 & January 27, 2011).

Corrections/Immigration staff in various detention facilities in Ontario about asylum issues and the profile of immigration detainees. They also offer information sessions to immigration detainees who are asylum seekers and persons awaiting a pre-removal risk assessment (information on the refugee determination system, including detention issues, and contact information of local NGOs and lawyers).[76]

In British Columbia, access to counsel is very challenging for detained asylum seekers. This situation is exacerbated by two important facts: first, all immigration detainees who are held for over 72 hours are detained in provincial prisons, alongside remand and sentenced prisoners; second, in British Columbia there is no NGO that assists asylum seekers while in detention, nor are there weekly visits by lawyers to monitor conditions of detention and to respond to issues as they come up. Several detained asylum seekers have reported to the UNHCR that they have not been told by the CBSA how to contact counsel. This means that even if CBSA officers do inform detainees of their right to counsel upon arrest, neither CBSA nor the prison necessarily advise them on how to reach a lawyer.[77] UNHCR was also told by some detainees that when they asked to speak to counsel, they were not permitted to do so. For example, in February 2010, a female asylum seeker with limited English informed the UNHCR that she had asked the CBSA to speak to a lawyer when she was first arrested, and repeated her request several more times over the course of the weekend. She said that her requests were ignored, and that she was not given the opportunity to speak with counsel until her detention review, more than 48 hours later. Even then, the communication was a brief consultation with Duty Counsel, who was appointed to assist multiple detainees at their detention reviews.[78]

Lawyers have difficulty accessing immigration detainees in BC. They are not allowed to visit their clients at the CBSA short-term BC Holding Centre[79] and they usually don't visit their clients in BC correctional facilities (even if they are allowed to) because these centres are located in very remote areas (close to 1.5 hours drive from Vancouver). As a result, communications between lawyers and detainees are usually only by telephone.

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[76] *Ibid.*
[77] *Ibid*
[78] *Ibid.*
[79] According to CBSA, access to lawyers is not allowed for a reason of space (i.e., there is not enough space in the center for a private room for lawyers to speak with their clients) : Colby Brose, CBSA Detention Manager (British Columbia), Follow-up email February 09, 2011.

Lawyers explained that giving advice by telephone is very problematic, particularly given obvious linguistic barriers and trust problems. One lawyer said: "when you escaped the regime and could not trust any member of the official regime, why would you trust the fact that they gave you a phone number and tell you "oh yes, those guys are lawyers". Several said that a face-to-face interview is needed to even start creating a certain level of trust.

In addition, telephone conversations are often short and thus, do not allow lawyers to go through the entire file with their clients.[80] Another problem is accessing BC legal aid over the phone. At the CBSA short-term BC Immigration Holding Centre at Vancouver airport, for example, a phone number for legal aid is posted beside the telephones in the men's and women's common rooms. Once you dial the number, you reach a voice mail which states you have reached the "Brydges Line" and should leave a call-back number. However, CBSA refuses to post a call-back number by the telephone that would allow detainees to provide the required information. CBSA replied that a call-back number would not help, as those phones cannot receive incoming calls. When the UNHCR asked how legal aid could get in touch with detainees, CBSA staff replied that immigration lawyers know they have to call CBSA at the airport, who will forward a message to the B.C. Immigration Holding Centre. One cannot presume that all immigration lawyers will know what to do in these circumstances: a direct phone number is thus an important tool to ensure that detainees can exercise their right to contact counsel.[81]

Finally, UNHCR indicated that they have received several complaints from lawyers in BC about the inability to speak with an individual in custody until CBSA has received an authorization from the detainee. This requirement thwarts the ability of detainees to speak with counsel in a timely fashion. The following is a typical scenario. A detainee or relative calls a lawyer's office and leaves a message requesting assistance. When the lawyer returns the call, CBSA will not confirm that the detainee is in custody or permit the lawyer to speak with the detainee until they have a "Use of Representative" form. The lawyer must complete the form, which is then given to the detainee, but the detainee does not necessarily understand what is being asked. As one lawyer

[80] BC Legal Society Services, Interview June 11, 2010, Vancouver (email correspondence, March 2011); Peter Adelman, immigration and criminal law lawyer, Interview June 10, 2010, Vancouver (follow-up email February 28, 2011); Douglas Cannon, immigration lawyer, Interview June 8, 2010, Peter Adelman, immigration and criminal law lawyer, Interview June 10, 2010, Vancouver (follow-up phone conversation, January 28, 2011).

[81] UNHCR legal officer, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).

expressed it: “Does the guy know me? How does he trust me? And how can I speak to him if I have no translator over the phone?” As a result, several lawyers reported that the individual had been removed before the authorization had been completed.[82]

In summary, access to legal advice and representation is important in the case of asylum seekers, so they can effectively pursue their legal rights or remedies counsel. However, for asylum seekers held in penal institutions, this access is very difficult.

RECOMMENDATION 12 — **To ensure that all detainees can meaningfully exercise their right to counsel, CBSA should ensure that asylum seekers held in non-CBSA facilities receive, upon their arrival, both written and oral information on the availability of legal aid (in a language understood by the asylum seeker).**

RECOMMENDATION 13 — **If a detainee asks to speak with counsel, CBSA officers should facilitate the communication by providing telephone numbers and, if appropriate, explaining how to dial the call.**

RECOMMENDATION 14 — **CBSA should facilitate contact between legal counsel and a detainee without delay.**

RECOMMENDATION 15 — **To ensure that detainees can speak with counsel quickly, CBSA should adopt procedures and policies used by police and prison authorities and thus presume that an individual who identifies him or herself as legal representative is a member of a provincial bar association. If further information is needed, CBSA can ask for the caller’s name and the number of the legal practice; a quick call to the number will verify the representative’s identify.**

[82] *Ibid.* Immigration lawyer Doug Cannon made the same point: Douglas Cannon, immigration lawyer, Interview June 8, 2010, Vancouver (follow-up phone conversation, January 28, 2011).

PART V: DETENTION OF ASYLUM SEEKERS IN PENAL INSTITUTIONS

As noted in Part I, international human rights law imposes several constraints on the places of immigration detention and on the conditions of detention. In this part, international legal standards are contrasted with the reality of the conditions of detention for detained asylum seekers in Canada. Conditions of detention for asylum seekers detained in CBSA-run facilities generally comply with international standards related to detention. Nonetheless, there are concerns that asylum seekers are detained in prisons, sometimes with convicted criminals or prisoners on remand (A). Given that the detention of asylum seekers in prisons falls under the jurisdiction of the federal and provincial governments, concerns are also raised at the serious communication and protection gaps within the day-to-day care and custody of this population (B).

A. The inappropriate use of penal institutions for asylum seekers

> The use of jails to hold migrants in immigration detention poses serious questions with respect to whether authorities are endeavoring to confine migrants in an environment that does not resemble incarceration (...) A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offense" (CPT 2010, 38).

International law prohibits cruel, unusual or degrading treatment and requires that conditions of detention be humane. In addition, the principle of proportionality also requires that detention be as non-intrusive as possible. To meet the goals of proportionality and respect for the inherent dignity of the person, international and regional standards as well as conclusions of UN treaty bodies and the UNHCR consistently reject the detention of asylum seekers or other migrants in prisons, requiring that other facilities be put in place or, at a minimum, that asylum seekers and migrants be kept separate from accused and convicted persons (for more on this topic, see Part I of this report). Clearly, these key principles are based on the fact that criminal detention is punitive in nature (i.e., it works as a deterrent), whereas administrative/immigration detention should never be punitive. As one lawyer put it, when reasons of detention are

"flight risk" or 'unlikely to appear", it does not make sense to detain asylum seekers in a criminal law context.[83] As previously mentioned, CBSA statistics show that 36% of the group they call "refugees" (i.e., detained asylum seekers and failed refugee claimants) held in penal institutions are "low-risk". These individuals are detained for the same reasons as "refugees" in CBSA-run facilities, either for lack of valid ID, or because they are considered a flight risk (see Part II of this report), yet they are held in prisons.

In summary, although separation of criminal and non-criminal is a well established principle, it is common practice for asylum seekers outside Toronto and Montreal to be detained in penal institutions. The situation in British Columbia is discussed in depth to illustrate the inherent problems in detaining asylum seekers in penal institutions, but the situation is broadly similar across Canada. The only CBSA-run facilities are in Toronto and Montreal, (except for detention of less than 72 hours in Vancouver), therefore asylum seekers in other parts of Canada are necessarily held in penal institutions. Transferral by CBSA to penal institutions in response to certain types of behavioural or mental health problems in all parts of Canada (including Toronto and Montreal) is also discussed below.

Detention in penal institutions in British Columbia

In British Columbia, detained asylum seekers are brought to the BC Immigration Holding Centre for the first 72 hours (individuals considered "not suitable for the BC Immigration Holding Centre" – i.e., persons with medical concerns or those considered to be higher-risk- may be detained at the Vancouver city jail for the first 72 hours in exceptional cases[84]). As previously noted, the BC Immigration Holding Centre is only used to house detainees for up to 72 hours. After 72 hours, asylum seekers are automatically transferred to provincial prisons.

In British Columbia there are two types of provincial prisons: high-security and medium security. According to BC Corrections, the distinction between a "high security" prison and a "medium security" prison is as follows:

[83] Peter Adelman, Immigration and Criminal Law Lawyer, Interview June 10, 2010, Vancouver (follow-up email February 28, 2011).
[84] Colby Brose, CBSA detention manager (British Columbia), Follow-up email February 28, 2011.

> Pretrial and regional correctional centers have high levels of physical and technological security that ensure inmate control and separation, and community protection (…) Inmates classified to medium correctional centers do not generally require the higher level of supervision of a regional correctional centre (BC Corrections, 2007).

Thus, inmates classified to high-security prisons require a higher level of supervision.

> BC Corrections uses the following criteria to determine a high-risk classification:
>
> The inmate is considered dangerous to the community (…)
> The inmate is likely to escape (…)
> The inmate has presented a serious management problem (…)
> Information available about the inmate is insufficient to determine the level of security required (…) is contradictory and inconclusive (…) and/or shows need for more checks on the inmate's background (…)
> A medical or psychological assessment is required (…)
> **The inmate needs to be available for legal counsel or has pending legal concerns**. Examples include [a]dditional criminal charges; **[i]mmigration hearing**; [u]pcoming trial; [o]ngoing investigation; [o]rder for deportation; and/or [a]ppeal of sentence or conviction (BC Corrections, 2006; emphasis added).

Thus, asylum seekers are always detained in "high security" prisons in British Columbia. Most male asylum seekers are detained at Fraser Regional Correctional Centre (FRCC), a prison designed for sentenced male offenders. Asylum seekers may also be detained at North Fraser Pretrial Services Centre, and on occasion, at Surrey Pretrial Services Centre. As for the few women asylum seekers in prisons (typically 2-3 according to CBSA), they are usually held at Surrey Pretrial Services Centre.[85] These two centers incarcerate inmates who have been remanded in custody pending trial or sentence.

As previously noted (see Part IV), access to counsel in detention is seriously hindered when asylum seekers are held in fairly remote locations (1.5 hour drive outside of Vancouver with no nearby public transportation). In that sense, the two pre-trial

[85] UNHCR legal officer, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011); Colby Brose (CBSA Detention Manager, British Columbia), Ross Fairweather (CBSA Director of Inland Enforcement, British Colombia), Nicole Goodman (former CBSA Detention Manager, British Columbia), Interviews June 8, 2010, Vancouver. In 2010-2011, because the Surrey Pretrial Services Centre could not accommodate all the women from the Sun Sea, these women were instead detained at Alouette Correctional Centre for Women, a medium-security facility. Alouette Correctional Centre for Women is building a high security wing, and asylum seekers will be sent to this wing when it is ready.

centers that are closer to downtown Vancouver (roughly a 30 minute drive) may be seen by BC Corrections as "convenient places" to hold asylum seekers, offering them - in the words of BC Corrections Branch - an increased "availability for legal counsel". However, assigning asylum seekers to facilities where they are housed with pre-trial and sentenced inmates is not an acceptable solution. Furthermore, given that the vast majority of asylum seekers are currently being held at the FRCC (not in pretrial centers), which is in a very remote area, they are faced with not only a distance problem, but also inappropriate conditions of detention that disproportionately restrict their liberty, security and their ability to seek protection. These points are elaborated below.

Asylum seekers are subject to all institutional rules, with no exceptions. For example:

- They are required to wear prison uniforms, as opposed to their own clothing, which tends to stigmatize them as "criminals". Detainees report particular discomfort at having to wear "communal" underwear.[86]

- They have a very limited ability to move from/around their unit, and may require an escort to access the library or other facilities. [87]

- They are subject to significant restrictions on incoming and outgoing telephone calls. For example, calls may only be placed during periods when inmates are in the common area. Calls cannot be made during outdoor recreation or gym-time, during the daily lock-downs, after the cells are locked for the night, or during head-counts. Calls are also automatically terminated when the line detects unusual sounds (beeps, whistles, etc.). While calls must be placed with calling cards issued by the institution, calling cards do not work for certain countries or continents (for example, detainees at Fraser Regional Correctional Centre in BC are unable to place calls to Iran). Local calls are free in CBSA-run facilities, but detainees must pay for local calls in prisons (typically $.90 per call) and long distance calls are fairly expensive. Indigent detainees may request a card which permits them to call legal counsel without charge, but the card cannot be used to

[86] UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).
[87] On-site visit, Toronto (May 18, 2011);

call relatives, friends or others.[88] These restrictions affect the ability of detainees to communicate with the persons who can assist them in obtaining identity documents (family, friends, lawyers, UNHCR etc.). They are also a barrier to effective legal representation, a point addressed in Part IV.

They also do not have access to internet, including email,[89] which limits communication with their family and friends, limits their ability to obtain corroborative evidence in support of their applications for protection, and severely limits their ability to inform themselves about Canadian immigration and refugee processes.

According to BC Corrections, restrictions on outgoing calls are designed to minimize harassment of the public and to prevent access to pornographic centers by criminal offenders.[90] Such restrictions may be justified for a criminal population, but not in the case of asylum seekers. In addition, the inability of asylum seekers to communicate easily with the outside world may result in prolonged detention and limit their ability to seek protection. On a positive note, BC Corrections eventually allowed Sun Sea passengers ten-minute calls for husbands to speak with their wives (held at Alouette) or wives and children (Sun Sea mothers and their children were held at the Burnaby Secure Youth Custody Centre, which is operated by Ministry of Child and Family Development, not by BC Corrections.) After a couple of months, BC Corrections also allowed periodic face-to-face visits between fathers and their children and wives detained in different facilities.[91]

BC Corrections repeatedly asserts that they want to treat all detainees the same, so as to avoid any discrimination between inmates. As a result, there is no special consideration for asylum seekers - they are subject to the same rules as all other

[88] Earl Preiss, Assistant Deputy Warden (Fraser Regional Correctional Centre), Interview June 9, 2010, Maple Ridge; UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011); Peter Adelman, Immigration and Criminal Law Lawyer, Interview June 10, 2010, Vancouver (follow-up email February 28, 2011).
[89] *Ibid.*
[90] Earl Preiss, Assistant Deputy Warden (Fraser Regional Correctional Centre), Interview June 9, 2010, Maple Ridge; UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).
[91] UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).

inmates. The problem is that the "rules" impact asylum seekers profoundly. As previously mentioned, local and long distance calls are costly. Few of the asylum seekers have money when they arrive, thus asylum seekers are unlikely to have the funds for long distance cards, and they are less likely to have access to legal counsel.

A UNHCR Representative told the story of a female asylum seeker fleeing gender persecution in Iraq, detained in 2010 for reasons of identity in a high-security prison in British Columbia. UNHCR records from Turkey, which were shared with CBSA, identified her as psychologically vulnerable. When the woman objected to the strip search (a common procedure for all inmates entering the prison), the guards ignored her and she understood them to say to each other “stupid woman”. A few days later, the woman stopped eating. When the prison authorities tried to get her to eat, she understood them to say that if she did not eat, she would be put into segregation and force-fed. UNHCR clarified the misunderstanding between the asylum seeker and the prison authorities, but only after the asylum seeker suffered acute anxiety at the prospect of being force-fed. The asylum seeker appeared increasingly despondent and lethargic throughout the 4 week detention, and appeared to lose considerable weight.[92] This example shows that the rules, when applied with no special consideration for the vulnerability of asylum seekers, may have detrimental effects on the persons subjected to them.

Guards are not informed of the immigration status of detainees: BC Corrections’ system does not distinguish between criminal remands, asylum seekers and other classes of migrants.[93] In other words, BC Corrections does not know the proportion of inmates in their prisons who are asylum seekers. Prison guards do not make any distinction between the criminal population and the immigrant population. This, in itself, is very problematic because there is no chance for detained asylum seekers to be treated differently in BC prisons. As we explain later, the same reasoning applies to the transfer of detainees between prisons, which is a major concern when pregnant asylum seekers, for example, are being moved from one prison to the other, with no consideration for their special circumstances. In fact, the only place where detained asylum seekers are allowed special consideration from BC Corrections is in the immigration wing of Fraser Regional Correctional Centre (FRCC). Guards working in

[92] *Ibid*.
[93] Earl Preiss, Assistant Deputy Warden (Fraser Regional Correctional Centre), Interview June 9, 2010, Maple Ridge.

immigration wing are required to speak several languages, to undergo cultural sensitivity training and to learn how to recognize resources and access available to CBSA detainees.[94]

Although CBSA endeavors to minimize co-mingling of asylum seekers and convicted persons,[95] there are also concerns that a proportion of asylum seekers are detained with convicted detainees. In fact, Fraser Regional Correctional Centre (FRCC) is the only prison with a distinct immigration wing. The wing has the capacity to hold 36 individuals, but this number can increase if needed. If there are just a few detainees within the immigration wing, they may be transferred to a smaller wing in the prison, but FRCC will not co-mingle them. Other prisons in BC commingle CBSA detainees (including asylum seekers) with criminal populations. The official reason for co-mingling is that the number of CBSA detainees is often too small to allow them to be separated from the rest of the population. Given that co-mingling is a clear violation of international law, asylum seekers should never be detained with the criminal population.

A 2009 report by Schriro, a senior official from the US Department of Homeland Security, acknowledged that in the United States most detainees are held -systematically and unnecessarily- under circumstances inappropriate for immigration detention's non-criminal purposes. The report states: "… correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control […] impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population" (Schriro 2009, 2). The report also highlights that correctional facilities are designed to hold criminal suspects and offenders, not detainees held for immigration reasons, and that most detention officials have experience in "law enforcement" but not with the immigrant population. Similarly, asylum seekers in British Columbia and many other parts of Canada are held under circumstances inappropriate to their non-criminal status. They are subject to unnecessary and disproportionate restrictions on their liberty, which impedes their ability

[94] *Ibid.*

[95] In an email communication between the author and R. Johnston (former Executive Director, CBSA Pacific Region), of June, 16, 2010, Mr. Johnston noted that the following sentence was recently added to the CBSA/B.C. Corrections agreements: 'We follow the principles laid out in the U.N. Standard Minimum Rules for the Treatment of Prisoners and, where ever possible, prevent the mingling of CBSA detainees with the regular prison population".

to seek protection. In addition, dispersing asylum seekers in high-security prisons, instead of medium security prisons, is a disproportionate management of the asylum seeker population, given the very low security risk that asylum seekers present. While asylum seekers are often shocked at their treatment as "criminals",[96] it is also concerning to see that CBSA - which considers the holding of asylum seekers in maximum security facilities not as requirement of "theirs", but "as a requirement of BC Corrections"- does not even question BC Corrections Branch's decision to send asylum seekers to high-security correctional centers.[97] This clearly raises the question of who is ultimately responsible for the safety and well-being of detained asylum seekers, a question that is addressed further in this report.

Transferral to penal institutions in response to certain types of behavioural or mental health problems

As previously mentioned (Part 1, Section C), Canadian and international law state that vulnerable persons should be detained only as a *last resort*. In practice, however, vulnerable asylum seekers are routinely detained in Canada, both in Immigration Holding Centres and in penal institutions. The term "vulnerable persons" includes unaccompanied elderly persons, survivors of torture or trauma, persons with mental or physical disabilities, pregnant or nursing women, and minors. There is no systematic screening process to identify vulnerability, and CBSA facilities do not offer any type of counseling services.

The issue of vulnerable persons in immigration detention is a very complex and important one, but only one specific aspect of this question will be discussed in depth in this report: the use of transferral to penal institutions to deal with asylum seekers who exhibit psychotic symptoms, suicidal tendencies or aggressive behaviour. CBSA generally justifies such transferrals on the grounds that it does not have the resources to provide specialized treatment or to control behaviour that could be dangerous to self or others.

[96] UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).
[97] Colby Brose, CBSA Detention Manager (British Columbia), follow-up email February 28, 2011.

In Toronto and Montreal, a family physician working on a part-time contractual basis provides general medical services to persons detained in CBSA-run immigration holding facilities. If a person's psychotic symptoms can be controlled by medication prescribed by the Centre's physician, the person will sometimes remain in the Immigration Holding Centre. Usually, however, especially if the person is agitated or aggressive, he or she will be transferred to a penal institution. More generally, detainees who are considered aggressive may be transferred to a penal institution even if they do not have mental health problems. Detainees who express suicidal intentions are placed under 24/7 surveillance, often in segregation. In Montreal, suicidal detainees usually stay at the Holding Centre. In Toronto, on the other hand, suicidal detainees are usually transferred to a maximum-security penal institution.[98] In their experience, respondents from Legal Aid Ontario have seen suicidal detainees placed on suicide watch and held in isolation in maximum-security prisons.[99] In general, transfers to penal institutions in response to certain types of behavioral or mental health problems are more frequent in Toronto than in Montreal.[100] Legal Aid Ontario mentioned, for example, the case of a Pakistani man who was upset that his room was changed and then was transferred to a provincial prison after acting up and punching a wall. He eventually came back to the Toronto Immigration Holding Center after complaints were formulated by the Refugee Law Office.[101]

Prison overpopulation has led Quebec correctional services to reduce the number of CBSA detainees in their prisons, and to inform CBSA that they would only take the "highest security" risk detainees. This development, combined with the fact that the Laval Holding Centre is rarely full, has led CBSA to keep suicidal detainees under close individual surveillance at the CBSA-run immigration holding facility instead of transferring them to a prison.[102] Although no precise figures were available, it would seem that asylum seekers are less likely to be detained in prisons in Quebec than elsewhere in Canada.

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[98] On site-visit, Laval Immigration Holding Centre, Laval (Quebec), July 5, 2010; on-site visit, Toronto Immigration Holding Centre, Toronto (Ontario), May 18, 2010. The same response was provided by all interviewees.
[99] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[100] Quebec CBSA officials, Interview July 06, 2010, Montreal; UNHCR Representative, Interview June 29, 2010, Montreal.
[100] *Ibid.*
[101] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[102] Quebec CBSA officials, Interview July 06, 2010, Montreal.

In Quebec, male asylum seekers who are transferred to a prison for behavioural or mental health reasons are usually sent to RDP Detention Centre (Rivière-des-Prairies). They may be moved from RDP Detention Centre to Bordeaux Detention Centre (Montreal) because of RDP Detention Centre's overcrowding. CBSA Quebec policy is to send as few women as possible to prisons. As a result, except for women with a criminal background who are sent to Tanguay Detention Centre (Montreal), most women asylum seekers remain at the CBSA-run immigration holding facility.[103]RDP Detention Center has room for 600 detainees and can hold up to 40 CBSA detainees. Usually, about half of the 40 CBSA detainees held at RDP are there for behavioural reasons (not for criminal reasons). The proportion of asylum seekers among these CBSA detainees is unknown.[104] RDP Detention Centre has wings with different security levels, to ensure that inmates are placed in the correctional setting that most appropriately meets their programming and custodial needs. There is no special immigration wing, and immigration status is not a characteristic per se to classify detainees.[105]This is of concern for two main reasons: 1) asylum seekers are first assigned a high security classification by the institution, which is revised later on; 2) they co-mingle with the criminal population. As in British Columbia, Quebec's Corrections' system does not indicate the proportion of its inmates who are asylum seekers, since there is no distinction within the system between CBSA detainees on criminal remands, asylum seekers and other classes of migrants. However, in contrast to the BC Corrections 'official interviewed, Quebec Corrections' official indicated that he would like to get more information on each immigration detainee, which would allow him to analyze all relevant documentation relating to the detainee before proceeding to their classification and placement in the appropriate wing.[106] RDP Detention Centre also has a mental health wing, which can host up to 60 detainees. Detainees considered by CBSA to be aggressive, and detainees with major mental health problems (primarily psychotic symptoms) may be placed in that wing.[107]

In Ontario, male asylum seekers who exhibit behavioral or severe mental health problems are usually transferred to Central East Correctional Centre (known as the

[103] UNHCR Representative, Interview June 29, 2010, Montreal.
[104] Francois Landreville, Director (RDP Detention Centre) and Chantal Bergevin, Assistant Director Advisor (RDP Detention Centre), Interview July 06, 2010, Montreal.
[105] *Ibid.*
[106] *Ibid.*
[107] Francois Landreville, Director (RDP Detention Centre) and Chantal Bergevin, Assistant Director Advisor (RDP Detention Centre), Interview July 06, 2010, Montreal.

"Lindsay Super jail") if it is for a long period of time, and to the Toronto West Detention Centre, if it is for a shorter period of time. Male asylum seekers with suicidal tendencies are generally sent to Toronto West Detention Centre. Central East Correctional Centre is a medium/maximum security prison and Toronto West Detention Centre is maximum security remand facility. Female asylum seekers are usually sent to Vanier Centre for Women, a medium and maximum security facility for both remanded and sentenced female offenders.[108] Although Ontario Correctional Services' policy is to keep immigration detainees separated from other inmates, not all jails have a separate immigration section for immigration detainees. Furthermore, in prisons with distinct immigration wings, immigration detainees (including asylum seekers) may co-mingle with other inmates because of overcrowding problems.[109]However, Legal Aid Ontario emphasized that overcrowding is not the only reason to mix the populations: sometimes immigration detainees co-mingle with other inmates, based on random decisions by the guards having to do with the detainee's look or color of the skin for example.[110] Immigration detainees who are fearful and require protection are placed in "protective custody", to be kept away from the inmate(s) they fear.[111] A CBSA respondent emphasized that "protective custody" is not "isolation",[112] but, according to other respondents, the effect of a protective custody is that the person is usually held in custody in isolation from other inmates.[113]

In British Columbia, an asylum seeker who shows signs of psychosis, suicidal tendencies or aggressive behaviour is not kept at the BC Immigration Holding Centre during the first 72 hours. Instead, he or she is sent directly to a BC correctional facility, usually the North Fraser Pretrial Services Centre, which has a specialized mental health care unit. [114] CBSA views BC Corrections as the "experts" in this area, and do not hesitate to defer the matter to them. If the person shows signs of serious mental health problems, then he or she may be detained under the BC *Mental Health Act* (after having seen a specialized doctor) and can be sent to a hospital under psychiatric care. The advantage of being detained under the *Mental Health Act* is that the individual can get

[108] This response was provided by several interviewees.
[109] Ontario CBSA official, Interview May 19, 2010, Toronto (follow-up email July 29, 2010).
[110] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[111] Ontario CBSA official, Interview May 19, 2010, Toronto (follow-up email July 29, 2010).
[112] Ontario CBSA official, email communication, November 28, 2011.
[113] Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[114] Colby Brose, CBSA Detention Manager (British Columbia), Follow-up email February 09, 2011; Rob Johnston, former Executive director of CBSA (Pacific Region), Interview June 10, 2010, Vancouver.

treatment. On the other hand, if he or she remains in detention under the immigration legislation, there is no obligation for CBSA to offer treatment to that person. Persons with suicidal tendencies are usually placed in segregation.

Access to psychological care is also a concern for asylum seekers detained in prisons. For example, in British Columbia, there is a dedicated mental health wing at North Fraser Regional Correctional Centre, with specialized programs and weekly meetings with psychologists and mental health coordinators.[115] Even if asylum seekers have - in theory - access to all prison programs, they have on several occasions recounted to the UNHCR Representative that they feel they do not have the same access to medical/psychological procedures as convicted persons. Some report that the doctor has the attitude that care should be prioritized for Canadians over persons who are going to be deported. Another concern is that the mental health questionnaire given to all "inmates" on admission is tailored to identify mental health problems for a criminal population (broken families, history of alcoholism/substance abuse, prior prison experience, etc.). It is not likely to capture the mental health problems of people coming from situations of prolonged civil war or violence.[116] In Ontario, asylum seekers do not have access to most of the prison programs (except at the Vanier Centre for Women). The Toronto West Detention Centre is a remand centre, so asylum seekers do not have – like detained persons pending trial - access to the same services as persons serving a sentence at a correctional facility. In other prisons, decisions to allow asylum seekers' access to programs/services are made on a case-by-case basis and there is no uniform policy in this regard. However, CBSA does not seem willing to pay for "rehabilitation programs", and thus access to mental health programs is very limited – even in prisons hosting convicted persons.[117] In Montreal, however, all asylum seekers held in the RDP Detention Centre have (like all immigration detainees) access to prison programs/services.[118]

[115] Earl Preiss, Assistant Deputy Warden (Fraser Regional Correctional Centre), Interview June 9, 2010, Maple Ridge.
[116] UNHCR Representative, Interview June 10, 2010, Vancouver (follow-up email February 21, 2011).
[117] UNHCR Representative, Interview May 21, 2010, Toronto (follow-up email August 6, 2010 & January 27, 2011); Legal Aid Ontario, Interview May 20 and May 21, 2010, Toronto (follow-up email August 10, 2010).
[118] Francois Landreville, Director (RDP Detention Centre) and Chantal Bergevin, Assistant Director Advisor (RDP Detention Centre), Interview July 06, 2010, Montreal (follow-up email July 8, 2010).

CBSA officials often state that they send asylum seekers who are suicidal or have behavioral or mental health problems to prisons because they cannot address their needs properly. For example, one CBSA official explained: "They are transferred to a non-CBSA facility when they are a threat to themselves or others, and their needs cannot be fully met at the TIHC. For example, the TIHC does not have 24hr medical care or psychiatrist on site. Transferring an individual from the TIHC to a provincial facility is not the first option but if CBSA cannot fully provide for their care, then they are transferred".[119] CBSA's argument is thus that the needs of these persons cannot be fully met in CBSA-run facilities and that they must be transferred to a facility where appropriate care is available. However, given the punitive purpose of provincial prisons, one can seriously call into question the use of such jails to compensate for CBSA's lack of experience and expertise in this area. Of course, there is no simple solution to such a complex situation: CBSA, as the detaining authority, has an obligation to protect detainees from the acts of aggression from fellow detainees, or from acts of self-harm or suicide (CIJ 2011, 177). But this obligation applies to *all* detainees, including detainees with certain types of behavioral or mental health problems, and it is questionable whether prisons are the appropriate location to host these persons. Several participants have also raised concerns that detention in penal institutions increases – instead of decreasing - the person's vulnerability. International law is clear in this area: where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions, continued detention may amount to cruel, inhuman or degrading treatment. The Human Rights Committee, for example, found a violation of the norm of ill-treatment as a result of the prolonged detention of a person with a serious psychiatric illness which the authorities knew was the result of his detention. Consequently by the time this individual was eventually released, his psychiatric illness was so serious that it had become irreversible.[120] Furthermore more, even where the detention of a mentally ill person is justifiable, consideration should be given to whether the person should be held in a special psychiatric facility, or whether the person should be accommodated in a designated psychiatric ward in a detention centre (ICJ 2011, 172). Irrespective of the place of detention, inadequate mental healthcare, alone or in combination with other inappropriate conditions of detention, can constitute or lead to cruel, inhuman or

[119] Reg Williams, Director of the Greater Toronto Enforcement Centre (CBSA), Interview June 20, 2010 and follow-up email August 2, 2010

[120] *C. v. Australia*, CCPR, Communication No. 900/1999, Views of 13 November 2002, para. 8.4.

degrading treatment. In assessing whether the conditions of detention of a mentally ill person amount to ill-treatment, the courts have taken into account the person's vulnerability and, their inability, in some cases, to complain coherently or effectively about how they are affected by the conditions of their detention (ICJ 2011, 172-173).

The issue of how to deal with asylum seekers (and more generally, immigration detainees) who are suicidal, aggressive or who have severe mental health problems is a very complex one. The broader issue of vulnerable persons in immigration detention is even more complex. This study therefore recommends the creation of a committee composed of representatives of government, mental health specialists and legal specialists to develop detailed policy recommendations. Already, since 2008, in Ontario, there is a Mental Health Advisory Committee, with participants from UNHCR, the IRB, CBSA, Refugee Law Office, COSTI,[121] the Canadian Centre for Victims of Torture, medical practitioners and psychologists. This committee meets 6 times a year (every 2 months) and it has varying objectives: to train front line detention decision makers to identify asylum seekers with mental health issues (as of August 2010, CBSA officers had not yet been trained); and to make recommendations to CBSA etc. The group has made several recommendations, including the creation of a separate mental health wing at the CBSA-run Toronto Immigration Holding Facility and the designation of a representative on mental health issues.[122] It would be useful to extend this type of cooperation to other parts of Canada, and these and other recommendations could be examined by a national committee.

RECOMMENDATION 16 **To comply with the principle of proportionality, CBSA should take decisive steps to eliminate detention of asylum seekers in penal institutions.**

[121] COSTI Immigrant Services is a community-based multicultural agency providing employment, educational, settlement and social services to all immigrant communities, new Canadians and individuals in need of assistance.

[122] UNHCR Representative, Interview May 21, 2010, Toronto (follow-up email August 6, 2010 & January 27, 2011). Fred Franklin and Lois Anne Bordowitz (Toronto Refugee Affairs Council, TRAC), Interview May 18, 2010, Toronto.

RECOMMENDATION 17

In the event that CBSA has no alternative but to detain an asylum seeker in a provincial correctional facility, CBSA should work with provincial correctional facilities:

1. **to ensure that asylum seekers are sent to the lowest security facilities;**
2. **to ensure that correctional services knows that immigration detainees are asylum seekers with no criminal background;**
3. **to ensure that asylum seekers are separated from the criminal population;**
4. **to establish standards for detention which are commensurate with the management of a non-criminal population, rather than standards established for the management of convicted offenders;**

RECOMMENDATION 18

The federal government should create a national committee composed of representatives of government, mental health specialists and legal specialists to develop detailed policy recommendations on how to deal with asylum seekers who are suicidal, aggressive or who have severe mental health problems.

B. Who is ultimately responsible for the care of asylum seekers detained in provincial jails? Jurisdictional gap between CBSA and provincial correctional services

CBSA (and CIC prior to CBSA's creation) has had longstanding agreements where the province, upon request by CBSA, accepts to house a CBSA detainee temporarily in a provincial correctional facility. In exchange, CBSA pays the province an agreed-upon per diem rate. As we have seen, CBSA requests this assistance from Quebec and Ontario where the asylum seeker presents behavioral or mental health problems. In other provinces, it is common for asylum seekers outside Toronto and Montreal to be detained in penal institutions. As this study acknowledges, there are

major concerns related to the use of penal institutions to detain asylum seekers: asylum seekers are held under circumstances inappropriate to their non-criminal status, and therefore Canadian detention standards are not in line with international human rights detention standards in this area. Even more worrying is that CBSA has no control as to where asylum seekers are held in provincial prisons. CBSA is not allowed to intervene in provincial prison management and has no say on provincial prison detention standards.[123] In addition, CBSA is rarely informed about segregation or punishment of one of its detainees; neither does CBSA know when one of its detainees is being transferred to another prison (except in British Columbia where CBSA has access to the B.C. Corrections' database which notifies CBSA when an immigration detainee has been moved and where they are being sent to).

The situation of CBSA (i.e. immigration) detainees in provincial prisons is complex. According to the *Constitution Act*, 1867, the federal government has exclusive jurisdiction to regulate the entry and stay of foreigners (which includes arrest and detention powers) and to administer "penitentiaries". However, provinces retain sole jurisdiction over the "prisons". This means that offenders sentenced to imprisonment of two years or more serve their time in a federal penitentiary (and are under the federal government's jurisdiction) while those sentenced to less than two years serve their time in provincial prisons (and are under the province's jurisdiction).[124] Asylum seekers held in provincial prisons therefore fall – like all immigration detainees- under the jurisdiction of the federal and provincial governments. Asylum seekers are under the exclusive care, custody, and control of provincial prisons, but CBSA, as the detaining authority, is ultimately responsible (by law) for their conditions of detention. This situation is causing friction between the two levels of government. For example, Quebec has expressed on several occasions that it does not have space in its correctional facilities, and it no longer wishes to house CBSA detainees. Quebec has told CBSA that it has sought legal advice, and that Quebec is not under any legal obligation to accept CBSA's detainees. CBSA sought its own legal advice on this matter, and came to the same conclusion, noting that, "in the absence of a written agreement stating otherwise, Quebec is free to decide if and when they will house CBSA detainees in provincial detention facilities. The corollary is that Quebec may legally decide, at any time, to stop housing CBSA

[123] All local CBSA respondents provided the same response to this question.
[124] *The Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3, sections 91 and 92.

detainees".[125] Consequently, CBSA has entered into negotiations with Quebec to establish a Memorandum of Understanding that will govern these arrangements. While the present study was being finalized, CBSA and Quebec concluded the MOU (November 2011). Most importantly, this jurisdictional division between federal and provincial authorities is likely to create huge protection gaps for detained asylum seekers in provincial prisons. A telling example in this regard is the use of restraints on pregnant women in British Columbia: CBSA explained on several occasions that CBSA policy is to NOT handcuff or shackle pregnant women detained under CBSA's authority; however, CBSA has been unable to convince BC Corrections to do the same, as BC Corrections has experienced on several occasions assaults and escape attempts even from late-term pregnant women. Therefore, CBSA routinely receives pregnant women in restraints. CBSA guards are under instruction to remove the restraints from pregnant women once they are in CBSA care and for transportation.[126]

Some CBSA respondents indicated that correctional services have been very good partners to them, that the working relationship between CBSA and correctional services is "excellent", and that they trust correctional services are taking good care of its detainees. For example, if an incident occurs in prison with an immigration detainee, CBSA has no problem leaving the matter in the hands of the corrections facility, as CBSA trusts that the facility is competent to deal with the incident. One CBSA respondent mentioned that they have "always been satisfied with their service" and that they don't want interfere in correctional services' internal affairs because this would be a sign that they don't trust the work they are doing. As this respondent said, "In effective partnerships, you cannot interfere".[127] In contrast, other respondents expressed serious concerns related to this situation. Noting that this is a sensitive area involving federal-provincial relations, some respondents indicated that CBSA does not have much leverage when the only choice available to it is provincial prisons. One respondent even mentioned that the situation today reflects a highly ineffective use of taxpayers' dollars, since CBSA is paying so much for the correctional facilities but has no "control" over what provincial prisons are doing. Given that "CBSA is in the business of detention", the

[125] "Is the province of Quebec under an obligation to accept CBSA detainees into their provincial correctional facilities?", CBSA Legal Advice, March 26, 2010 (on file with the author).
[126] Colby Brose, CBSA detention manager (British Columbia), Follow-up email February 09, 2011.
[127] Respondents are not identified in this section to ensure full confidentiality to other CBSA respondents who asked to remain anonymous in addressing this specific question.

same respondent asked that this study emphasize the level of responsibility that CBSA has in detaining someone, which is currently quite unclear.[128]Another CBSA respondent noted that it is paradoxical to see CBSA being given budget money to pay correctional services to take care of its detainees. All these respondents recommended that CBSA get more resources and an increased budget to deal with its detainees independently. One respondent suggested that building multi-purpose CBSA-run facilities in the three big cities (Toronto, Vancouver, and Montreal) to host all types of immigration detainees would allow CBSA to have a clear responsibility over its detainees. These facilities would have several units (for women, men, families, persons with mental health problems), several security levels (depending on the level of risk of the detained population), and would be built for medium to long-term detention.[129]

Given that the federal government ultimately bears responsibility in the safety of asylum seekers in provincial prisons, the federal government cannot simply "pass the buck" of responsibility for the conditions of detention to the provinces.

Some steps toward greater involvement of the federal government have already been taken.

For example, in Ontario there is a CBSA "jail liaison officer" whose official function is to visit provincial prisons, to see CBSA detainees, to monitor their needs, to action any concerns/issues that are brought forward, either by them or by the prison, and to contact prison management to resolve any issue from inmates, CBSA queries etc.[130] The liaison officer has contributed to improving the relationship between CBSA and prisons and to further the understanding of each actor's role. This is an important development, given that the liaison officer is the only physical point of contact between provincial prisons and CBSA. The liaison officer also acts as an interface between NGOs and immigration detainees. For example, the liaison officer picks up written requests from immigration detainees to see TRAC and brings these requests to TRAC at the Toronto CBSA-run facility (TRAC has an office there).[131] However, it is difficult to see how the liaison officer can fully and effectively carry out his/her mandate, given that all issues arising from conditions of detention in prisons are not under the liaison officer's

[128] Participants requested that their confidentiality is protected in addressing this specific question.
[129] *Ibid.*
[130] One page sheet on « Jail Liaison Function », given to the author by one CBSA respondent (on file with the author).
[131] Ontario CBSA official, Interview May 19, 2010, Toronto (follow-up email July 29, 2010).

control. For example, if the liaison officer is informed that an asylum seeker has a specific issue in prison, the liaison officer can discuss this issue with the superintendent of the prison, who will listen, but he/she cannot give guidelines for the prison to follow, or dictate what the prison should or should not do.[132] Similarly, if an asylum seeker is assaulted in prison, the liaison officer is usually notified and an investigation is launched. The superintendent of the prison usually shares the occurrence with the liaison officer as well as what steps are taken to rectify the situation, but it falls within the jurisdiction of the prison to deal with this incident.[133] Thus, as one CBSA participant noted, the Jail Liaison Officer is the interface between CBSA and the provincial prisons on operational issues, but he/she does not influence the management of the facilities.[134] One respondent noted that the role of the liaison officer could be more effective, given that corrections are open to some procedures.[135] Interestingly, the role of the liaison officer is unanimously perceived as "unclear" and "ambiguous" by non-governmental respondents in Ontario, their strong impression being that the liaison officer represents the interests of CBSA, not those of the detainee, and thus has a limited role in really helping immigration detainees. Therefore, it is necessary to clarify the role and function of the jail liaison officer to other key stakeholders.

Another step to promote greater cooperation between CBSA and provincial correctional services has been the formalization of arrangements between CBSA and the provinces. For example, CBSA/BC Corrections agreement is a letter signed yearly by the Director of BC corrections and the Regional Director of CBSA inland enforcement. This agreement states the following: B.C. corrections will take care of detainees and CBSA will pay for this service ($180/day/detainee); if necessary, CBSA will pay for medical expenses; B.C. Corrections can transfer the CBSA detainee to medical care at will; B.C. corrections can also refuse a CBSA detainee (as of July 2010, this had never happened); CBSA is responsible for transferring CBSA detainees to immigration or refugee hearings and detention reviews. In addition, the 2010-2011 Agreement added

[132] In a recent email communication, the Ontario CBSA official noted that provincial jails usually bring detainees with serious deteriorating medical conditions to his/her attention, and that provincial jails and the liaison officer work together to find the best possible solutions and continue communicating until the situation can be resolved: Ontario CBSA official, email communication, November 28, 2011.
[133] *Ibid*.
[134] Reg Williams, Director of the Greater Toronto Enforcement Centre (CBSA), Interview June 20, 2010 and follow-up email August 2, 2010.
[135] UNHCR Representative, Interview May 21, 2010, Toronto (follow-up email August 6, 2010 & January 27, 2011).

two new provisions: 1. “We follow the principles laid out in the U.N. Standard Minimum Rules for the Treatment of Prisoners and, where ever possible, prevent the mingling of CBSA detainees with the regular prison population”; 2. “B.C. Corrections and the CBSA fully support the Red Cross Monitoring of CBSA detainees”.[136] Local CBSA respondents mentioned that this agreement “works”.[137] This may be true, in the sense that the responsibilities of each level of government have been clarified through this agreement, but, as this study has shown, principles laid out in the agreement related to the care and protection of immigration detainees are not enforced in practice: co-mingling is frequent in B.C., asylum seekers are subject to unnecessary and disproportionate restrictions on their liberty, and the dispersion of asylum seekers in high-security jails is disproportionate management of the asylum seeker population, given the very low security risk that asylum seekers present. As previously mentioned, a Memorandum of Understanding between CBSA and Quebec had just been signed (November 2011) at the time this report was finalized.[138] Currently, there is no such agreement between Ontario and CBSA; however, CBSA has entered into negotiations with Ontario to establish a formal agreement.

Formal agreements are a worthwhile step to delimit the responsibilities each level of government owes to asylum seekers held in provincial prisons. However, it is also essential that the two levels of government work together in identifying protection gaps in the detention of asylum seekers in provincial prisons and in developing common strategies to ensure that these protection gaps are addressed. For example, the federal government could work with the provinces to develop appropriate standards of care for asylum seekers held in provincial prisons and to exchange key information on asylum seekers, with the objective of maintaining a coordinated strategy for the management of this non-criminal population. Thus, even if provincial prisons retain the ultimate power to decide where to place CBSA detainees and where to transfer them, the provinces could work in collaboration with CBSA to find the least intrusive option for asylum seekers hold in prison (for example, placement in minimum/medium security prisons; access to appropriate health care programs and services etc.).

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[136] Rob Johnston, former Executive director of CBSA (Pacific Region), Interview June 10, 2010, Vancouver (follow-up email June 15, 2010).

[137] Colby Brose (CBSA detention manager, British Columbia), Ross Fairweather (CBSA director of Inland Enforcement, British Colombia), Nicole Goodman (previous CBSA detention manager, British Columbia), Interview June 8, 2010, Vancouver.

[138] UNHCR legal officer, follow-up email November 13, 2011.

Several CBSA respondents have also noted that CBSA should host all its detainees in CBSA-run facilities, noting that it is not the job of corrections to follow or implement the immigration legislation. This study does not take a position as to which strategy should be adopted, and as a result does not subscribe to a specific view. Recommendations formulated in this section are solely aimed at resolving some of the protection challenges unique to asylum seekers held in provincial jails and emphasizing that a greater level of communication and transparency between the two levels of government is crucial.

RECOMMENDATION 19 **The federal government and the provinces should work together in identifying protection gaps in the detention of asylum seekers in provincial prisons and in developing common strategies to ensure that these protection gaps are addressed.**

RECOMMENDATION 20 **The federal government should provide CBSA jail liaison officers in each province where asylum seekers are held in provincial prisons. The jail liaison officer's duties would include face-to-face contacts with detained asylum to discuss their status in the refugee process and to ensure that their needs while in detention are met effectively. Asylum seekers e transferred to another facility should maintain contact with their assigned jail liaison officer or be promptly reassigned to another jai liaison officer.**

CONCLUSION

The first pages of this study outlined the domestic and international legal framework applicable to immigration detention. The study emphasized that immigration detention should be the exception rather than the rule, that detention, to be justified, must be in accordance with law and must not be arbitrary, and that the conditions of detention must be humane and thus, not result in restrictions which are disproportionate to the goal sought. This legal framework was used in the remaining pages of the study to compare legal principles related to immigration detention with Canadian practices of detention for asylum seekers and refugees.

One objective of the study was to obtain statistics from CBSA on the cost of immigration detention and on asylum seekers and refugees in detention (number of "refugees" detained per year, gender and age composition of detained refugee claimants, time in detention, reasons for detention and place of detention). Although the CBSA was very cooperative in the process, the study showed that there are today important limitations in national detention statistics provided by the Agency. It is essential to correct this situation to reach firmer conclusions regarding the variations in the number, gender and age of detained asylum seekers, as well as the variations regarding the length of time in detention. Given that immigration detention represents a serious financial cost to taxpayers, it is also essential to provide the general public with readily available, up-to-date data on the cost of immigration detention.

The study acknowledges CBSA's commitment to treat asylum seekers fairly and CBSA's efforts to comply with international standards on detention. Nonetheless, the study expressed some concerns over specific grounds for detention, and the legislative changes proposed by the Canadian government in this area. The study also showed that asylum seekers benefit in theory from appropriate procedural safeguards– including access to legal counsel and notice thereof-, but that in practice, they may face unnecessary barriers in accessing these rights. The study also showed that the separation of the criminal and non-criminal populations in detention centers is a well established principle in international law, but that it is common practice for asylum

seekers, especially outside Toronto and Montreal, to be detained in penal institutions. This, in itself, is a serious problem. Another problem is that the detention of asylum seekers in prisons falls under the jurisdiction of the federal and provincial governments, and there are important communication and protection gaps between these two levels of government regarding the day-to-day care and custody of the asylum seeker population held in penal institutions.

It is hoped that the observations in this report will assist CBSA to ensure that asylum seekers are detained only when necessary and in conditions which do not affect their ability to seek protection. One key finding emerging throughout the study is the observation that CBSA, as the detaining authority, is ultimately responsible for the care and safety of all its immigration detainees, including asylum seekers held in provincial prisons.

ANNEX 1

List of Non-IHC Facilities used and/or tracked by the Canada Border Service Agency for Detention FY 2007-2008 to FY 2008-2009

Province	Provincial Detention/Medical/Pretrial	Federal	Municipal
Alberta	• CALGARY CORRECTIONAL CENTER • CALGARY DETENTION CENTRE • CALGARY REMAND CENTRE • CALGARY WEST REMAND CENTRE • CALGARY YOUNG OFFENDER CENTRE • EDMONTON REMAND CENTRE • LETHBRIDGE CORRECTIONAL CENTER • LEDUC INN • MEDICINE HAT REMAND CENTRE • RED DEER REMAND CENTER		
British Columbia	• ABBOTSFORD POLICE • ALOUETTE CORRECT. CTR. FOR WOMEN, MAPLE RIDGE • FRASER REGIONAL CORRECTIONAL CENTRE • KAMLOOPS REGIONAL CORRECTIONAL CENTRE • MOUNTAIN INSTITUTION, AGASSIZ • NORTH FRASER PRETRIAL SERVICES CENTRE – BC • REGIONAL HEALTH CENTRE, ABBOTSFORD • SUMAS CENTRE, ABBOTSFORD • SURREY PRETRIAL SERVICES CENTRE • VANCOUVER ISLAND REG. CORRECT. CTRE, VICTORIA • WILLIAM HEAD INSTITUTE, B.C. • WILLINGDON YOUTH DETENTION CENTRE, BURNABY	• *FERNDALE INSTITUTION, MISSION* • *FRASER VALLEY INSTITUTION* • *PACIFIC REGION ENFORCEMENT CENTRE – BC* • RCMP 100 MILE HOUSE • RCMP BURNABY • RCMP CHILLIWACK • RCMP COQUITLAM • RCMP CRESTON • RCMP DAWSON CREEK • RCMP HOPE • RCMP KELOWNA • RCMP LANGLEY • RCMP LYTTON • RCMP NANAIMO • RCMP OLD CROW	• DELTA POLICE – BC • MATSQUI POLICE – BC • NELSON CITY POLICE, NELSON, B.C. • NEW WESTMINSTER POLICE – BC • VANCOUVER CITY JAIL • VICTORIA CITY POLICE – BC

Province	Provincial Detention/Medical/Pretrial	Federal	Municipal
		– BC • RCMP OLIVER • RCMP OSOYOOS • RCMP PENTICTON • RCMP POWELL RIVER - BC • RCMP PRINCE GEORGE • RCMP PRINCE RUPERT • RCMP PRINCETON • RCMP REVELSTOKE • RCMP RICHMOND • RCMP SURREY • RCMP TERRACE • RCMP VERNON • RCMP WEST SHORE	
Manitoba	• DAUPHIN CORRECTIONAL CENTRE • HEADINGLEY CORRECTIONAL CENTRE • MILNER RIDGE CORRECTIONAL CENTRE • PORTAGE LA PRAIRIE CORRECT. CTRE FOR WOMEN • WINNIPEG REMAND CENTRE	• *ROCKWOOD INSTITUTION* • *STONY MOUNTAIN INSTITUTION, WINNIPEG*	
New Brunswick	• ATLANTIC INSTITUTION, RENOUS, N.B. • MADAWASKA REGIONAL CORRECTIONAL CENTRE • MONCTON DETENTION CENTRE • SAINT JOHN REGIONAL CORRECTIONAL CENTRE		
Newfoundland	• HER MAJESTY'S PENITENTIARY, ST JOHN'S • NFLD & LABRADOR CORRECTIONAL CENTRE FOR WOMEN • NFLD & LABRADOR CORRECTIONAL CTR, NFLD		
Nova Scotia	• CAPE BRETON CORRECTIONAL CENTRE, SYDNEY • CENTRAL NOVA SCOTIA CORRECTIONAL FACILITY		
Nunavut		• RCMP - NUNAVUT	
NWT	• NORTH SLAVE CORRECTIONAL CENTRE		

Province	Provincial Detention/Medical/Pretrial	Federal	Municipal
Ontario	• AJAX PICKERING HEALTH CARE CENTRE • ALGOMA TREATMENT AND REMAND CENTRE • BRANTFORD JAIL • BRANTFORD JAIL • CENTRAL EAST CORRECTIONAL CENTER LINDSAY • CENTRAL NORTH CORRECT.CT.PENETANGUISHENE – ON • CORNWALL COUNTY JAIL – ON • ELGIN MIDDLESEX DETENTION CENTRE, LONDON – ON • ETOBICOKE GENERAL HOSPITAL – ON • FORT FRANCES DISTRICT JAIL - ON • GUELPH CORRECTIONAL CENTRE - ON • HAMILTON WENTWORTH DETENTION CENTRE – ON • KINGSTON DETENTION CENTER • MAPLEHURST CORRECTIONAL COMPLEX • MIMICO CORRECTIONAL CENTRE, TORONTO – ON • NIAGARA REGIONAL DETENTION CTR, THOROLD – ON • OTTAWA CARLETON REGIONAL DETENTION CTR – ON • OWEN SOUND JAIL – ON • PITTSBURG INSTITUTION, KINGSTON - ON • QUINTE REGIONAL DETENTION CTR, NAPANEE – ON • SARNIA JAIL – ON • SAULT STE MARIE DISTRICT JAIL PROV. INST – ON • ST. LAWRENCE VALLEY CORR. & TRT.CTR-ADUL – ON • SUDBURY JAIL – ON • SYL APPS YOUTH CTRE/OAKVILLE OBS & DET HOM-ON • THUNDER BAY CORRECTIONAL CENTRE – ON • THUNDER BAY JAIL – ON • TORONTO DON JAIL – ON • TORONTO EAST DETENTION CENTRE, SCARBOROUGH-ON • TORONTO WEST DETENTION	• *COLLINS BAY INSTITUTION, KINGSTON – ON* • *FRONTENAC INSTITUTION, KINGSTON – ON* • *ISABEL MCNEIL HOUSE, KINGSTON – ON* • *JOYCEVILLE INSTITUTION, KINGSTON - ON* • *KINGSTON PENITENTIARY* • *GRAND VALLEY INSTITUTE FOR WOMEN KITCHENER-ON*	• KINGSTON POLICE CELLS • NIAGARA REGIONAL POLICE - 22 DIVISION • WINDSOR POLICE CELLS

Province	Provincial Detention/Medical/Pretrial	Federal	Municipal
	CENTRE, ETOBICOKE – ON • VANIER CENTRE FOR WOMEN, MILTON • WALKERTON JAIL – ON • WATERLOO REGIONAL DETENTION CTR, CAMBRIDGE-ON • WINDSOR JAIL – ON		
PEI	• PROVINCIAL CORRECTIONAL CENTRE, SLEEPY HOLLOW		
Quebec	• C.D.D. LAVAL (ANNEXE BORDEAUX) • CENTRE DE DETENTION, CHICOUTIMI • CENTRE DE DETENTION HULL • CENTRE DE DETENTION SHERBROOKE • CTR. DE DET. RIVIERES-DES-PRAIRIES, MONTREAL • DRUMMONDVILLE INSTITUTION, P.Q. • INSTITUT PHILLIPE PINEL, MONTREAL • PRISON BORDEAUX, MONTREAL • PRISON DE ST-JEROME CENTRE		• CENTRE DE DETENTION OPERATIONNEL (CO) • CENTRE DE DETENTION MUNICIPAL, BEAUCE, QUE
Saskatchewan	• REGINA CORRECTIONAL CENTRE • SASKATOON CORRECTIONAL CENTRE	• RCMP REGINA • RCMP SASKATOON • RCMP YORKTON • *SASKATCHEWAN PENITENTIARY, PRINCE ALBERT*	
Yukon	• WHITEHORSE CORRECTIONAL CENTRE - YT		

Source: CBSA (email communication; March 25, 2010 (on file with the author)).

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