



THE CANADIAN  
BAR ASSOCIATION  

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L'ASSOCIATION DU  
BARREAU CANADIEN

## **New National Immigration Detention Framework**

**CANADIAN BAR ASSOCIATION  
IMMIGRATION LAW SECTION AND SEXUAL  
ORIENTATION AND GENDER IDENTITY COMMUNITY FORUM**

**June 2017**

## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law Section and Sexual Orientation and Gender Identity Community Forum, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Immigration Law Section and Sexual Orientation and Gender Identity Community Forum.

## **TABLE OF CONTENTS**

### **New National Immigration Detention Framework**

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>CBSA OVERSIGHT .....</b>	<b>1</b>
<b>III.</b>	<b>MINORS AND DETENTION .....</b>	<b>2</b>
<b>IV.</b>	<b>VIDEOCONFERENCING .....</b>	<b>6</b>
<b>V.</b>	<b>GENDER IDENTITY AND EXPRESSION .....</b>	<b>7</b>
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>8</b>
<b>VII.</b>	<b>SUMMARY OF RECOMMENDATIONS .....</b>	<b>9</b>



# **New National Immigration Detention Framework**

## **I. INTRODUCTION**

The Canadian Bar Association Immigration Law Section and the Sexual Orientation and Gender Identity Community Forum (CBA Sections) appreciate the opportunity to comment on the Canadian Border Services Agency's New National Immigration Detention Framework.

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice.

The Immigration Law Section members practice in all areas of immigration law, delivering professional advice and representation in the Canadian immigration system to clients in Canada and abroad. SOGIC is a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity.

The CBA Sections congratulate the Government of Canada on its efforts to implement a new National Immigration Detention Framework. We agree with many of the recommendations in the January 2017 Summary Report of the Framework and Stakeholder Roundtable Discussions.

We will not address each recommendation in the Summary Report, but will focus on four issues of particular concern to our members: CBSA oversight; minors and detention; videoconferencing; and gender identity and discretion.

## **II. CBSA OVERSIGHT**

The CBA Sections continue to urge the federal government to implement an independent and effective complaints and monitoring mechanism for the CBSA.<sup>1</sup> The need for oversight is particularly important in the detention context.

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<sup>1</sup> See Canadian Bar Association, *Our Security our Rights: National Security Green Paper, 2016* (December 20, 2016), available [online](http://ow.ly/WJvH30cqK6W) (<http://ow.ly/WJvH30cqK6W>).

## RECOMMENDATION

1. **The CBA Sections recommend that the federal government implement an effective, independent complaints and monitoring mechanism for the CBSA.**

### III. MINORS AND DETENTION

The CBA Sections have expressed broad concerns about the immigration detention of minors. A *Statement against the Immigration Detention of Children* was endorsed by the CBA, along with nearly 400 other signatories in October 2016.<sup>2</sup> The *Statement* followed the report of the University of Toronto International Human Rights Program, *No Life for a Child*, which highlighted that “life in immigration detention is woefully unsuited for children.”<sup>3</sup>

From 2010 to 2014, approximately 242 children were detained each year in Canada. This includes unaccompanied minors and children detained with their parents. It does not include children with Canadian citizenship who are not formally detained but live in detention facilities with a parent as *de facto* detainees.<sup>4</sup>

In its 2012 report on Canada’s compliance with the United Nations *Convention on the Rights of the Child* (CRC), the Committee on the Rights of the Child expressed deep concern that, “the frequent detention of asylum-seeking children is being done without consideration for the best interests of the child.”<sup>5</sup>

In its 2016 Annual Report, the Canadian Human Rights Commission also expressed concern about immigration detention, focusing on the experiences of migrant children. The Commission called for independent monitoring and oversight of CBSA in relation to migrants

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<sup>2</sup> See Canadian Bar Association, *A Statement against the Immigration Detention of Children* (October 2016), available [online](http://ow.ly/BgWf30cbS94) (http://ow.ly/BgWf30cbS94). See also Canadian Bar Association, National Magazine, *Let the children go: The detention of immigrants is hard on the kids* (October, 2016), available [online](http://ow.ly/Kl9h30cozsl) (http://ow.ly/Kl9h30cozsl).

<sup>3</sup> See University of Toronto, *No life for a child: A roadmap to end immigration detention of children and family separation* (2016) at p. 5, available [online](http://ow.ly/sNji30cozBF) (http://ow.ly/sNji30cozBF).

<sup>4</sup> *Ibid*, at p. 9

<sup>5</sup> See United Nations, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention - Concluding observations: Canada* (October, 2012), at para. 73, available [online](http://ow.ly/ybSs30cozGk) (http://ow.ly/ybSs30cozGk).

and other foreign nationals in detention. The Commission also urged that immigration detainees have access the protections of the *Canadian Human Rights Act*.<sup>6</sup>

Children who live in detention are subject to many hardships, including surveillance, frequent searches and restricted mobility in detention facilities. They have few opportunities to socialize with other children, minimal recreational opportunities and inadequate education due to inconsistent frequency and quality. They may also have limited opportunities to interact with their fathers or other male family members due to segregation in immigration holding centres. The lack of balanced meals is also a concern, as is the limited access to specialized medical and mental health services.<sup>7</sup>

Children who live in detention for even brief periods experience significant psychological harm that persists even after they are released. Not surprisingly, they experience increased symptoms of depression, anxiety, post-traumatic stress and suicidal ideation, as well as developmental delays and behavioural issues.<sup>8</sup> Detained parents also experience negative mental health consequences, which in turn affects their ability to care for their children. Even when children are not detained, they may be separated from their detained parents and placed in the care of a child protection agency, resulting in similar negative consequences.

The current practice of detaining minors or separating families for immigration purposes contravenes Canada's domestic and international human rights obligations. These include obligations under the CRC, that the best interests of the child be a governing consideration in all actions concerning children.<sup>9</sup> The CRC obligations also include recognizing a child's right not to be separated from their parents except if it is in their best interests, to education, to the highest standard of health, to an adequate standard of living, and to rest, leisure and play.<sup>10</sup>

The detention of minors and their families must be avoided if at all possible. Unaccompanied minors and families with children should be offered alternatives to detention. These might include registration requirements, deposit of documents, reasonable bond or bail conditions,

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<sup>6</sup> See Canadian Human Rights Commission, *2016 Annual Report to Parliament*, at p. 42, available [online](http://ow.ly/rZP630cozKN) (http://ow.ly/rZP630cozKN).

<sup>7</sup> *Supra* note 2 at p. 5

<sup>8</sup> *Ibid*

<sup>9</sup> See United Nations, *Convention on the Rights of the Child*, 28 May 1990, 1577 UNTS 3, Cen TS 1992 No 3, Article 3, available [online](http://ow.ly/HGpH30cozV6) (http://ow.ly/HGpH30cozV6).

<sup>10</sup> *Ibid*, Articles 24, 27, 28 and 31

use of a surety or guarantor, periodic reporting requirements, electronic monitoring, alternative care (for unaccompanied minors), or case management with supervised release.

The CBA Sections welcome the government's focus on minors and detention and the preservation of the family unit in reforming the immigration detention regime through the new Framework. We also agree with much of the stakeholder feedback on minors and detention highlighted in the Summary Report, including these key concepts:

- The detention of children for immigration purposes is never in their best interests.
- The best interests of the child must be a primary consideration in any decision on detention that affects a child, including decisions on detention of parents or legal guardians.
- Immigration law and regulations should be amended to create a presumption in favour of release for children and families with children.
- Immigration law on designated foreign nationals, including provisions on mandatory detention for children over 16, should be repealed.<sup>11</sup>
- Amend legislation to require a designated representative to be assigned to a separated minor, beginning with first contact with immigration authorities and throughout the immigration process, not only when they appear before the IRB.
- Detention should never be used to protect minors.
- Unaccompanied minors should not be segregated.
- A consistent national approach is needed to address the assessment of schooling needs for children in detention. Children should be able to go to school and arrangements made to have them transported there. Stimulating activities should also be made available.
- Child protection agencies should be consulted in all cases where parents are unable to care for their children or are absent.

The CBA Sections recommend further clarifying that the best interests of the child is a primary consideration in any decision on detention that affects a child, *regardless of the child's status*. In other words, the best interests of Canadian-born children who may be subject to *de facto* detention to avoid separation from their parents, or who may be placed in alternate care, agreeable to both parties, while the parents are detained, must also be considered.

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<sup>11</sup> See *Immigration and Refugee Protection Act*, R.S.C. 2001, c.27, available [online](http://ow.ly/1z8A30cbT6u) (<http://ow.ly/1z8A30cbT6u>).

We also recommend that in addition to assigning a designated representative to an unaccompanied or separated minor, consideration be given to providing legal representation for these minors.<sup>12</sup>

Detained children should not be separated from family members while in immigration holding facilities. Where the detention of families cannot be avoided, family units should be available to ensure that children are not segregated from parent or other family members.

In addition to schooling needs, adequate recreational activities should be made available to children, including options for participation in off-site programming. Appropriate medical and mental health services should also be available to minors, including counselling services.

When children are placed in alternate care arrangements (such as with other family members or in foster care), regular contact with detained parents and family members should be facilitated in accordance with Article 9 of the CRC. This should include extended visiting periods, eliminating physical barriers (like plexiglass) between parents and children, child-friendly indoor and outdoor facilities for visits, and the ability to bring food and other amenities to detained family members.

## **RECOMMENDATIONS**

- 2. The CBA Sections recommend clarifying that the best interests of the child is a primary consideration in any decision on detention that affects a child, regardless of the child's status.**
- 3. The CBA Sections recommend that in addition to assigning a designated representative to an unaccompanied or separated minor, consideration be given to the providing legal representation.**
- 4. The CBA Sections recommend that detained children should not be separated from family members while in immigration holding facilities. Where the detention of families cannot be avoided, family units should be made available.**
- 5. The CBA Sections recommend that in addition to schooling needs, adequate recreational activities should be made available to children, including options for participation in off-site programming.**

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<sup>12</sup> See Canadian Bar Association, Designated Representatives in Immigration and Refugee Matters: Using Them to the Fullest Potential (December, 2015), available [online](http://ow.ly/KaED30coAvP) (<http://ow.ly/KaED30coAvP>).

- 6. The CBA Sections recommend that appropriate medical and mental health services should be available to minors.**
- 7. The CBA Sections recommend that when children are placed in alternate care arrangements, regular contact with detained parents and family members should be facilitated.**

#### **IV. VIDEOCONFERENCING**

The use of videoconferencing for refugee hearings has been the subject of criticism, and is a controversial issue. A 2004 report by S. Ronald Ellis reviewed the Immigration and Refugee Board of Canada's (IRB) use of videoconferencing in refugee hearings, and assessed the impact the technology on the fairness of the hearings and whether the practice maintains an appropriate balance between fairness and efficiency.<sup>13</sup>

The report outlined serious disadvantages and weaknesses in using videoconferencing for refugee hearings, raised by IRB members, lawyers and translators. The most significant problem was the deep depersonalization of the hearing environment – the parties have no direct personal contact with those responsible for deciding their fate. Other issues included security of data transferred online or via satellite, the challenge of offering adequate translation remotely, the difficulty in viewing facial expressions and properly assessing credibility, and the additional stress to vulnerable detainees caused by the use of technology.

A matter as fundamental as detention should, at a minimum, allow for the option of an in-person hearing. The CBA Sections recommend that videoconferencing be used for refugee and detention hearings only with the consent of all parties. The Refugee Protection Division's (RPD) Policy Statement on the transfer of files for videoconference hearings (Policy No. 2004-01), allows a claimant to bring an application from their hearing by videoconference to be reassigned to an in-person hearing on the grounds of special circumstances that make an in-person hearing more appropriate. This policy should also apply to detainees at detention hearings, and IRB members should have discretion to call for an in-person hearing. Unrepresented detainees should also have the option to request an in-person hearing.

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<sup>13</sup> See Immigration and Refugee Board of Canada, *Videoconferencing in Refugee Hearings*, available [online](http://ow.ly/9QdE30coAKt) (<http://ow.ly/9QdE30coAKt>).

## RECOMMENDATIONS

- 8. The CBA Sections recommend that videoconferencing be used for refugee and detention hearings only with the consent of all parties.**
- 9. The CBA Sections recommend that RPD Policy Statement No. 2004-01 on videoconference hearings also apply to detention hearings – allowing detainees to bring an application from a videoconference hearing to request an in-person hearing. This option should also be available to unrepresented detainees.**
- 10. The CBA Sections recommend that IRB members have discretion to request an in-person hearing.**

## V. GENDER IDENTITY AND EXPRESSION

Lesbian, gay, bisexual, transgendered and two-spirited individuals may fear for their safety, and face difficulties when placed in immigration detention because of the way they may be perceived by others.

This vulnerable group experiences high rates of discrimination and harassment, as well as violence in detention settings. Trans and intersex individuals in particular, may be at increased risk due to placement in solitary confinement or in a single-sex population that does not correspond to the gender with which they identify.

The CBA Sections have advocated for amendments to laws and policies to protect gender identity and expression rights for many years.<sup>14</sup> In 2010, the CBA's governing Council urged the federal, provincial and territorial governments to amend laws to ensure equality for all regardless of gender identity or gender expression.<sup>15</sup>

In 2016, the CBA passed a resolution on *Protecting Gender Identity and Gender Expression Rights in Corrections and Detention*, which identified the elements of a comprehensive, nondiscriminatory detention framework.<sup>16</sup> We wrote to the Honourable Ralph Goodale,

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<sup>14</sup> See Canadian Bar Association, Bill C-16 — *Canadian Human Rights Act and Criminal Code Amendments (gender identity or expression)* (May 11, 2017), available [online](http://ow.ly/3kf830coBdI) (http://ow.ly/3kf830coBdI).

<sup>15</sup> See Canadian Bar Association, *CBA Resolution 10-01-A: Equality for All Regardless of Gender Identity and Gender Expression* (August 2010), available [online](http://ow.ly/ItLy309KVzU), (http://ow.ly/ItLy309KVzU).

<sup>16</sup> See Canadian Bar Association, *CBA Resolution 16-07-M Protecting Gender Identity and Gender Expression Rights in Corrections and Detention* (February 20-21, 2016), available [online](http://ow.ly/5mkA30coBkY) (http://ow.ly/5mkA30coBkY).

Minister of Public Safety and Emergency Preparedness in March 2017, asking the government to address the human rights of transgender people in correctional and detention facilities.<sup>17</sup>

There is limited consideration of gender identity or expression in CBSA's Summary Report. The only mention is in the context of medical and mental health services – that CBSA officers should receive training on gender and gender identity dynamics as well as the particular vulnerabilities of certain migrants, including lesbian, gay, bi-sexual, trans-sexual and queer.

We recommend explicitly addressing the protection of gender identity and gender expression rights in the Framework, to better reflect the government's commitment to create “a fairer immigration detention system for the humane and dignified treatment of individuals while upholding public safety.”<sup>18</sup> These protections should address concerns about institutional placement, use of segregation, searches, toiletry, access to personal items, and access to health care for this population. They might include, for example, revising policies and practices to reflect the needs and concerns of this group, training to raise awareness on gender identity and expression rights for detention officers, staff and detainees, as well as establishing robust oversight and accountability mechanisms.

## **RECOMMENDATION**

### **11. The CBA Sections recommend explicitly addressing the protection of gender identity and gender expression rights in the Framework.**

## **VI. CONCLUSION**

The CBA Sections congratulate the Government of Canada on its efforts to implement a new National Immigration Detention Framework. We agree with many of the recommendations in the Summary Report, and appreciate the opportunity to share our views on issues of particular concern to our members. We trust that our comments on CBSA oversight, minors, videoconferencing, and gender identity and discretion will be of assistance. We would welcome the opportunity to discuss our recommendations further with the CBSA.

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<sup>17</sup> See Canadian Bar Association, *Gender Identity and Expression Rights in Corrections* (March 17, 2017), available [online](http://ow.ly/3sGu30coBwC) (http://ow.ly/3sGu30coBwC).

<sup>18</sup> See Canadian Bar Association, *Bill C-279, Better Protection for Transgender People*, (May 6, 2013), available [online](http://ow.ly/2PTg30coBD6) (http://ow.ly/2PTg30coBD6), See also Canadian Border Services Agency, CBSA's New National Immigration Detention Framework (January 2017), available [online](http://ow.ly/goFi30coBJU) (http://ow.ly/goFi30coBJU).

## **VII. SUMMARY OF RECOMMENDATIONS**

The CBA Sections recommend that:

- 1. the federal government implement an effective, independent complaints and monitoring mechanism for the CBSA.**
- 2. the federal government clarify that the best interests of the child is a primary consideration in any decision on detention that affects a child, regardless of the child's status.**
- 3. in addition to assigning a designated representative to an unaccompanied or separated minor, consideration be given to providing legal representation.**
- 4. detained children should not be separated from family members while in immigration holding facilities. Where the detention of families cannot be avoided, family units should be made available.**
- 5. in addition to schooling needs, adequate recreational activities should be made available to children, including options for participation in off-site programming.**
- 6. appropriate medical and mental health services should be available to minors.**
- 7. when children are placed in alternate care arrangements, regular contact with detained parents and family members should be facilitated.**
- 8. videoconferencing be used for refugee and detention hearings only with the consent of all parties.**
- 9. RPD Policy Statement No. 2004-01 on videoconferenced hearings also apply to detention hearings, allowing detainees to bring an application from a videoconference hearing to request an in-person hearing. This option should also be available to unrepresented detainees.**
- 10. IRB members have discretion to request an in-person hearing.**
- 11. CBSA explicitly address the protection of gender identity and gender expression rights in the Framework.**