IMMIGRATION LEGAL COMMITTEE

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Legal Opinion on Legality of Long-Term Immigration Detention

INTRODUCTION

In recent weeks, 191 immigration detainees held in the Central East Correctional Centre in Lindsay, Ontario, have taken action to protest the conditions of their detention. A number of the protesting detainees have been held in long-term detention, some for as many as seven years or even longer. This document addresses the legality of long-term immigration detention in Canada.

While detainees are entitled to monthly detention review hearings, **there is no maximum period of time that an individual can be held while authorities seek their removal. Effectively, this means that as long as detained migrants are provided monthly detention review hearings, they can legally be held indefinitely**. In practise, this means that some individuals can be held for several years at a time, with Canada's longest immigration detentions lasting over a decade.

It is our opinion that this practise violates Canadian constitutional law, runs contrary to standards set by other countries, and violates international law.

THE CANADIAN LEGAL FRAMEWORK FOR IMMIGRATION DETENTION

The legal foundation for Canada's immigration policies are found within the *Immigration and Refugee Protection Act* ("IRPA")[1] and *Immigration and Refugee Protection Regulations* ("IRPR")[2]. The IRPA and IRPR outline the guiding principles with respect to detaining and releasing migrants. Non-citizens can be arrested and detained by immigration officers, sometimes without a warrant, either upon their entry to Canada or after their arrival.[3]

Generally speaking, once detained, individuals are provided with detention reviews within 48 hours and then one week after being detained, and every 30 days thereafter.[4] However, a migrant who is deemed a "designated foreign national"[5] can be kept waiting up to 14 days for an initial detention review, and then are denied a second review for at least the next 6 months.[6]

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1 *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].
2 *Immigration and Refugee Protection Regulations,* SOR/2002-227[IRPR].
3 IRPA, *supra* note 1 at s. 55.
4 *Ibid* at s. 57
5 See: *ibid* at s. 20.1
6 *Ibid* at s. 57.1

Unfortunately, the detention review process often proves ineffective. In particular, many detainees are labelled as "not credible" from the outset, and as each hearing is not a *de novo* (i.e. "new") hearing, past decisions continue to follow individuals throughout the process. Moreover, many detainees are unrepresented at their 48-hour detention review hearings. It is thus unsurprising that the detention review hearings overall result in the release of detainees only 13.9% of the time.[7]

It is also important to note that in Canada, **immigration law is administrative and civil in nature, as opposed to criminal/penal. Accordingly,** Canadian immigration legislation does not permit authorities to place migrants in detention for punitive reasons. Rather, detention is only authorized in specific circumstances, namely if the individual is: 1) a danger to the public; 2) unlikely to appear for examination, a hearing, or removal; 3) under investigation for certain grounds of inadmissibility; or 4) in a situation where the individual's identity has not been established.[8]

However, **despite the fact that under Canadian immigration law, immigration detention is not considered to be a punitive measure, many migrants are held in detention for periods that far exceed prison sentences for serious crimes**. In light of this fact, it is our opinion that long-term immigration detention is a measure that harshly deprives the liberty of detainees, who may be detained for an indefinite period of time under Canadian law.

CANADIAN CONSTITUTIONAL LAW

The current Canadian policy with respect to migrant detention is unconstitutional, and violates multiple sections of the *Canadian Charter of Rights and Freedoms* ("Charter"). Specifically, these policies violate sections 7, 12 and 15 of the Charter and cannot be saved under section 1 of the Charter.

Charter Violations

Section 7 of the Charter states that all individuals, including non-citizens, have the right to "life, liberty and security of the person". The Supreme Court of Canada has held that this section protects three separate rights: the right to life; the right to act without being physically restricted by the government; and the right to be free from psychological harm caused by the government.[9]

Canada's immigration detention policies restrict the rights protected under Section 7 through:

a) The detention of migrants in provincial and federal jails, regardless of the fact that most of these migrants have no criminal records; and

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7 Based on information obtained in 2012 through an Access to Information Request by the Immigration Legal Committee.

8 *Immigration and Refugee Protection Act,* SC 2001, c 27, s 58(1).

9 *The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis v. Robin Blencoe*, 2000 SCC 44.

b) The indefinite nature of these detentions, which can continue for years.

This curtailment of physical mobility through indefinite detentions is aggravated by the fact that detainees have little ability to make international phone calls, often leaving them indefinitely disconnected from their families, who remain abroad. This may exacerbate the serious psychological harm that is caused from being detained with no concrete indication of when they may be released in Canada or deported.

Section 12 of the Charter protects individuals from being "subjected to any cruel and unusual treatment or punishment". While Canadian courts have held that lengthy detentions alone do not violate this Charter right, as these detention are regularly reviewed, they have also acknowledged that detentions with no end in sight may violate both Sections 7 and 12.[10] The existence of monthly detention reviews may not save a detention from being cruel and unusual if they become only a matter of procedural formality. Arguably, these monthly reviews are rendered meaningless if there is no indication that an individual's circumstances will be changing from month to month. This is especially true when their removals are hampered by circumstances outside the migrant's control, such as the co-operation, or lack thereof, of foreign governments in facilitating the removal, or Canada's own oftentimes lengthy immigration processing times.

Canada's immigration detention policies also violate Section 15 of the Charter, which protects individuals from discrimination. The Supreme Court of Canada has repeatedly held that the Charter extends to non-citizens, and that laws distinguishing between citizens and non-citizens may be unconstitutional.[11] Since there is no framework whereby Canadian citizens can be held indefinitely it is our legal opinion that Canada's ability to indefinitely detain non-citizens who are awaiting the decisions of immigration processes that can take years to resolve, violates Section 15 of the Charter.

Section 1 of the Charter

Along with setting out a set of rights and protections, the Charter also provides the government with the opportunity to override those same rights and protections through Section 1, ("reasonable limits clause"), or through Section 33 ("notwithstanding clause"). The Supreme Court of Canada held in *R. v. Oakes*[12], that in order to justify curtailing an individual's rights, the government must establish, among other things, that the negative effects of the law are proportional and connected to its objectives and that they minimally impair one's rights. It is our legal position that the Canadian government has failed to establish these principles and cannot rely on Section 1 to justify their immigration detention policies.

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10 *Canada (MCI) v. Li*, [2009] FCA 85
11 See: *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 and *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 SCR 769.
12 *R v Oakes*, [1986] 1 SCR 103

Specifically, **the absence of a presumptive maximum period of detention demonstrates that Canada's immigration detention rules are not minimally impairing**. Detention constitutes an extreme infringement on an individual's freedom and has severe consequences, such as a forced separation from one's family and the stigmatization that may arise from being locked up. Furthermore, these policies also fail to minimally impair one's rights under Section 15 of the Charter. The Supreme Court of Canada has reaffirmed that it is unconstitutional to discriminate against non-citizens based on their citizenship status. However, Canada's immigration detention laws do just this. Canadian citizens who face allegations of misconduct (e.g. criminal charges) are not subject to indefinite detentions while their cases are resolved, and are provided with clear timeframes for when their case may be decided. Indeed, specific constitutional protections exist to ensure that they face trial in a timely manner [Section 11(b) of the Charter]. This is a marked departure from Canada's immigration detention rules, which allow for effectively indefinite detentions as there are few controlled timelines for removal processes[13]. In fact, in the Ontario region the overall success rate at detention reviews (i.e the chance of being released) stands at a mere 13.9 percent.[14]

According to a statement released by the Canadian government prior to the enactment of the IRPR, the goal of both the IRPA and IRPR is to have clear codified practices, and enhanced transparency and consistency.[15] Canada's unwillingness to set presumptive periods with respect to immigration detentions goes directly against these stated goals by creating a system that is neither codified, transparent or consistent. Rather, policies are purely decided on a case-by-case basis, with a minimal body of caselaw to help guide decisions. It is clear then that Canada's immigration detention policies are not sufficiently linked to the stated objectives of Canada's immigration laws and regulations to warrant the curtailing of migrants' rights through indefinite detentions.

We can find further evidence of the contradiction between Canada's stated immigration objectives and their actual practices by examining the IRPA itself. Section 3 of the IRPA states that the Act should both be consistent with the Charter, and comply with international human rights instruments.[16] Detaining migrants without a presumptive period accomplishes neither of these codified objectives. Arguably, in light of Canada's detention policies failing to minimally impair the rights of non-citizens, and the lack of connection between our detention practices and

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13 This may be due to: foreign governments that are not always co-operative, inconsistent processing times for various immigrations applications and appeals, and negative credibility findings that, once made in early proceedings, are extremely difficult to overcome as board members rely on precedential rulings.

14 Access to Information and Privacy Request by Carranza LLP 2012

15 When speaking of detentions and releases, the statement suggests Canada's immigration regulations exist "…to assist decision makers in assessing issues related to detention", since "[c]odifying factors and conditions in regulation promotes consistency, clarity and transparency in decision-making". See: *Canada Gazette*, Part 1, December 15, 2001 at pg. 4574-4575 (online: <http://publications.gc.ca/gazette/archives/p1/2001/2001-12-15/pdf/g1-13550.pdf>.

16 IRPA, *supra* note 1, ss. 3(3)(d) and 3(3)(f)

the IRPA and IRPR's stated objectives, these policies would not satisfy the proportionality test required by Section 1 of the Charter.

PRACTICES OF OTHER JURISDICTIONS

Other countries, including the United States and many Member States of the European Union, have recognized that laws permitting the indefinite detention of migrants is unlawful, and that such practices violate basic human rights. The United States and the European Union have both set out a presumptive maximum period of detention for migrants pending removal.

United States of America

In the United States, the law limits detention to six months pending removal. The landmark United States Supreme Court decision of *Zadvydas v Davis* [2001] 99-7791 (Supreme Court of the United States) held that a foreign national may be detained for a period of 90 days in order to effect their removal, and that a further 90 days may apply if necessary, **amounting to a six month maximum**. After six months, if the migrant can provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, then **they must be released.**

In *Zadvydas,* the U.S. Supreme Court found that laws permitting the indefinite detention of migrants would breach the Fifth Amendment of the United States Constitution, which forbids the government from depriving "any person of liberty without due process of law".[17] The Court held that U.S. immigration law is civil law and not criminal law, and that the legislative intent could not be construed to grant the government power to hold an alien in indefinite confinement.[18]

The *Zadvydas* decision has been upheld and expanded upon in more recent decisions. In the case of *Clark v Martinez* [2005] (03-878) 543 U.S. 371, the U.S. Supreme Court expanded on *Zadvydas,* by applying the ruling to all migrants, regardless of whether they were admissible or inadmissible to the United States. The Court affirmed the six-month maximum period for detention, and that it is only authorized for a period consistent with the purpose of effecting removal.[19]

European Union

In 2008, the Parliament of the European Union passed the European Union Directive on Return (Directive 2008/115/EC), which sets out common standards and procedures for Member States in their treatment of 'illegally staying third-country nationals'.

17 *Zadvydas v Davis* [2001] 99-7791 (Supreme Court of the United States) at 9.
18 *Ibid* at 10, 16, 17.
19 *Clark v Martinez* [2005] (03-878) 543 U.S. 371 (Supreme Court of the United States) at 13, 15.

Included in the Directive are explicit rules and principles around deportation. In particular, Article 15 of the Directive **sets out a presumptive maximum period of detention of six months**.[20] In addition to this, the Directive sets out that where it appears that a reasonable prospect for removal no longer exists, detention is no longer justified and the person shall be released immediately.[21]

INTERNATIONAL LAW

Without a maximum presumptive period of detention set out by law, the long-term detention of migrants takes an arbitrary character and is not permitted under international law.

Freedom from arbitrary detention is a basic human right under international law – it is expressly prohibited in a number of international human rights instruments. The *International Covenant on Civil and Political Rights* ("ICCPR"), to which Canada is a party, expressly prohibits arbitrary arrest or detention, and provides that individuals are entitled to a court process to challenge the validity of their detention.[22] The chief interpretive body of the ICCPR, called the Human Rights Committee, has clarified that this protection extends to detention for immigration purposes.[23] The right against arbitrary detention is further supported by the *Universal Declaration of Human Rights,* which stipulates that no person shall be subjected to arbitrary arrest, detention, or exile.[24]

Immigration detention in Canada is arbitrary insofar as it is indefinite, with no maximum period of detention set out in law. In many cases this leads to situations of long-term detention for migrants. In particular, migrants who are detained pending deportation can be held for years while authorities attempt to arrange deportation to countries that may not be willing to issue travel documents. While other countries set out a presumptive periods of detention within which authorities may deport an individual, Canada has set out no presumptive period in law.

As described, the detention review process in Canada is an extrajudicial process involving a series of hearings before the Immigration and Refugee Board, which are not *de novo* hearings. Assessments of a detainee's credibility at one hearing, for example, will continue to follow her/him throughout the proceedings. Moreover, despite the gravity of the rights at stake, the decision makers in detention reviews are not judges, and are often non-licensed members of the legal profession. The above adds to the arbitrary character of detention, as the fairness of the process is highly questionable.

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20 Directive 2008/115/EC, OJ 2008 L 348/98, at Art 15(5).
21 *Ibid,* Art 15(4).
22 *International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171,* Art 9(1) and Art 9(4).
23 Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.9, at para 1.
24 *Universal Declaration of Human Rights,* GA Res 217 (111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948), Art 9.

The United Nations Working Group on Arbitrary Detention has set out several principles in order to determine whether the detention of a migrant is arbitrary, including that: "**a maximum period should be set by law and the custody may in no case be unlimited or of excessive length**".[25] Furthermore, in *Opinion No. 37/2007 (Lebanon)* the Working Group held that indefinite detention can give a detention "an arbitrary character".[26] In fact, the Working Group has already held that an eight-month detention was too long, as this was an unnecessarily excessive period of time to arrange a deportation.[27]

In the case of asylum seekers, international law is clear that the detention of asylum seekers must be a last resort measure and for a minimal period of time. Article 31 of the *Convention Relating to the Status of Refugees* exempts refugees from being punished on account of their illegal entry or presence in a country.[28] In addition, the United Nations High Commissioner for Refugees has released guidelines relating to the detention of asylum seekers, wherein it states that, as a general principle asylum-seekers should not be detained, and that if detention is imposed on exceptional grounds, it should be for **a minimal period**.[29]

In light of the fact that there is no presumptive period of detention set out in Canadian law for detained migrants, the long-term detention of migrants is not permitted under international law as it is arbitrary. This is supported by the *International Covenant on Civil and Political Rights,* the *Universal Declaration of Human Rights,* as well as the deliberations and opinions of the United Nations Working Group on Arbitrary Detention. Moreover, there is an even stronger prohibition under international law against the long-term detention of asylum seekers.

RECOMMENDATIONS

In light of the above analysis, it is our legal opinion that the long-term detention of migrants is not valid under Canadian and international law. While detention review mechanisms exist, these have proven to be ineffective and have failed those who have spent years in immigration detention with no end in sight. This is evidenced by the mere 13.9% of detainees that are released at Detention Reviews in the Ontario Region.

The use of immigration detention is a harsh measure that violates the freedom and dignity of those subjected to it. This is particularly so in cases of long-term detention, and its severe effects are worsened when detainees cannot be told when they may be released or when their detention

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25 Commission on Human Rights, 56th Session, Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2000/4 (28 December 1999), Deliberation No. 5 at Annex II, Principle 7.
26 Human Rights Council, 10th Session, Opinions adopted by the Working Group on Arbitrary Detention, UN Doc A/HRC/10/21/Add.1 (4 February 2009), at 72, para 46.
27 Human Rights Council, 13th Session, Opinions adopted by the Working Group on Arbitrary Detention, UN Doc A/HRC/13/30/Add.1 (4 March 2010), at 9, para 22.
28 *Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954),* Art. 31
29 Office of the United Nations High Commission for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999), Guidelines 2, 3, 4.

must legally end. The government's objective to remove migrants does not justify the long-term detention of migrants who, often through no fault of their own, cannot be returned to their country of nationality.

We demand that:

- The Federal Government of Canada enact changes in order to implement a presumptive maximum term of detention for migrants, in compliance with their obligations pursuant to the *Canadian Charter of Rights and Freedoms* and under international law;
- That the *Immigration and Refugee Protection Regulations* be amended to include a presumptive period of 90 days as per the United States model;
- That the Canada Border Services Agency seek and apply alternatives to detention in order to exercise their mandate; and
- That specific criteria be developed to determine when a detainee is held in a maximum security facility, and that this be done only in the most extreme cases[30].

Signed on behalf of the Immigration Legal Committee on the 20th day of November, 2013,

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30 It is to be noted that in reply to two Access to Information and Privacy Requests, Ontario Region of the CBSA has denied the existence of any policies or guidelines used to make such decisions (Carranza LLP).