



Immigration detention and children: Rights still ignored, two years later

Introduction

In November 2017, the Canadian government introduced instructions intended to severely limit the detention of children.

“To stop detaining or housing minors and family separation, except in extremely limited circumstances.”

First objective of the Canada Border Services Agency (CBSA) National Directive for the Detention or Housing of Minors.

Two years after the instructions were introduced, there continue to be children in immigration detention in Canada or separated from a parent because of immigration detention. This occurs on a regular basis, and not only in “extremely limited circumstances”.

Toddlers in detention for over a month

Early in the summer of 2019, two young children, Alex and Dominique, walked across the border near Lacolle, Quebec, with their mother, Danielle, in order to ask for refugee status.¹ Lacking documents to confirm their identities, they were sent to the detention centre outside Montreal. Legally-speaking only the mother was detained.

With no activities offered for young children in the detention centre, Alex and Dominique were bored and agitated. Over the next few weeks, other families joined them in the detention centre, providing for more stimulation and opportunities for play for the children, always under the watch of security guards and with the only place to go outside surrounded by barbed wire.

Meanwhile, their mother made multiple phone calls overseas to try and obtain documents to confirm her identity, not easy with two active and noisy toddlers.



¹ Not their real names.

At one detention review Alex and Dominique were restless and disruptive, making it difficult for everyone to concentrate on the hearing. At other reviews, an NGO volunteer was present and able to distract the children, allowing Danielle to focus on the proceedings.

Finally, after more than a month in detention, Danielle was released with conditions. The family went first to a shelter and are now living in Montreal, preparing for their refugee hearing.



Immigration Detention Centre, Laval, Quebec (CBSA photo)

2017 directives

In November 2017, the Canadian Council for Refugees (CCR) welcomed the “[Ministerial Direction to the Canada Border Services Agency: Minors in Canada’s Immigration Detention System](#)”, issued by the Minister of Public Safety Ralph Goodale, and the Canada Border Services Agency’s “[National Directive for the Detention or Housing of Minors](#)” as a step in the right direction.

The directives importantly acknowledged that the best interests of the child must be a primary consideration when decisions about detention are being made, where a child is affected. This reflects a legal requirement under the Convention on the Rights of the Child.

The directives also clearly and repeatedly emphasize that non-detention is the rule and recognize the need to preserve family unity.

Nevertheless, the CCR was concerned that the directives contain wording that could lead to inconsistent application, notably in stating that detention is to be avoided “to the greatest extent possible”, and in tying avoidance of detention to the availability of Alternatives to Detention (ATD).

Unfortunately, experience in the first two years has shown that the CCR was right to be concerned: the directives are being implemented inconsistently.

Statistics

Government statistics show that 118 children were detained or housed in a detention centre in 2018-19. While this is a decrease from previous years, it is clear that the directives are far from eliminating the presence of children in detention.

Also of serious concern is that the average length of detention for children has increased to 18.6 days (the highest average in five years).

Housed/Detained minors (National)		
Fiscal Year	Average length of time in a facility (days)	Total # minors in a facility
2014-2015	16	232
2015-2016	14.1	201
2016-2017	13.1	162
2017-2018	14.9	151
2018-2019	18.6	118
CBSA, <i>Annual Detention Statistics – 2012-2019</i>		

Regional variation

The overwhelming majority (91%) of children housed or detained in the past year were in Montreal.

Housed and detained minors by region, 2018-2019			
	Quebec	Ontario	Pacific
Housed minors	97	0	6
Detained minors	7	3	0
Total	104	3	6
CBSA, <i>Annual Detention Statistics – 2012-2019</i>			

This heavy regional disparity highlights the unnecessary of the detention: if other regions can put an end to the detention of children, why not in Montreal?

Children “housed” but not detained

Children are described as “housed” when they are not legally detained, but accompany a detained parent. This includes Canadian citizen children (9 last year). From the perspective of the child, being housed is no different – and no less harmful – than being detained.

When children are housed and not detained, they ironically have fewer legal safeguards. In theory, they could leave the detention centre if their detained parent consents to have them under the care of another adult. In most cases, this is not practically nor humanely possible.

The Immigration and Refugee Board (IRB) reviews the situation of anyone detained, but a child who is housed is not detained and therefore does not legally “appear” before the IRB. Housed children thus do not have the same legal protections as detained children. They are legally speaking invisible to the IRB, and do not appear in IRB statistics.² From the IRB website it would appear that no children were subject to a detention review in 2019, when in reality children are regularly sitting in detention reviews in front of the decision-maker.³

Family separation when a parent is detained

The CCR is also concerned about the increasingly common practice of family separation as a result of immigration detention, a problem that is not captured in the CBSA statistics. This occurs when one or both parents are detained, while the children are not detained. For refugee families to be separated in this way on arrival in Canada, sometimes not even knowing how to contact each other, is extraordinarily traumatic.

A CCR member in Quebec has reported a new trend in 2019 by the CBSA of separating families at the border. Generally, the CBSA detains one parent while the other parent is sent to a temporary shelter with their children. Approximately 50 families have been observed to suffer this kind of separation in 2019.



² Until recently “housed” children were also invisible in CBSA statistics, but the CBSA has now rectified that omission.

³ <https://irb-cisr.gc.ca/en/statistics/detentions-reviews/Pages/dentenSub.aspx>. The statistics show that 11 minors were subject to a detention review by the IRB in 2018, all in the Eastern Region, which covers Quebec.

In a new country and separated from a detained parent

Naomie⁴ arrived in Canada with her parents in 2019. Fearing persecution in their country of origin, they asked for refugee status when they crossed the border into Canada. They spent three days waiting to be processed at the Lacolle Port of Entry, after which Naomie’s father was detained on the grounds that his identity had not been satisfactorily established.

Naomie and her mother, who was pregnant, were sent to a temporary shelter. At first they had no means of communicating directly with Naomie’s father, who had been sent to the detention centre in Laval.

Naomie’s father tried to obtain documents to clarify his identity, using international calling cards provided by a local NGO. Nevertheless, he was not released at his first or second detention review before the Immigration and Refugee Board.

Meanwhile, Naomie’s mother found the long bus ride from the shelter to the detention centre to visit her husband difficult. She gave birth before her anticipated due date. While her mother was delivering the baby, Naomie was left in the care of another newly arrived family at the shelter.

Naomie’s father asks: “if we came together as a family to Canada to seek protection, why must they separate us like this?” He waited for his release while his wife was left alone to care for Liliane, their newborn baby, and Naomie.

Children in detention on identity grounds

Most children in detention in Montreal are there because border officials are not “satisfied” that their parent’s identity has been established – a decision that is not reviewable by any independent tribunal. Montreal has long detained many more people on identity grounds than other regions, highlighting the arbitrary nature of decision-making. Many refugees are unable to travel with identity documents and need time after arrival to have ID sent to them.

In 2018-2019, identity was the ground for detention of the parents in **66% of the cases** where children were housed.

“Only in extremely limited circumstances may a minor be detained or housed if no suitable [Alternatives to Detention] can be found: [...]

when identity is a serious concern but only insofar as there are well-founded reasons to believe the minor or his or her [parent/legal guardian] may represent a risk to public safety and national security”

Canada Border Services Agency (CBSA) National Directive for the Detention or Housing of Minors.

⁴ Nor her real name (nor is the name of her new sister real).

In early 2018, the CCR was concerned that the CBSA's plans for Alternatives to Detention (ATD) excluded people detained on identity grounds. The CCR raised concerns about this exclusion in written comments in January 2018.

We note that excluding people detained on the basis of identity is also inconsistent with the November 2017 Ministerial Direction to the CBSA on “Minors in Canada’s Immigration Detention System”, and the accompanying CBSA National Directive. Children are regularly detained on identity grounds (particularly in Montreal and in Vancouver). The Directive proposes to keep children out of detention in part through pursuing ATDs. If the CBSA’s ATD model excludes detention based on identity, it seems that children will be detained, contrary to the goal of the Ministerial Direction.

In February 2018, the CBSA responded to the CCR comments by clarifying the framework to state that ATDs may be appropriate for individuals detained on the grounds of identity.

Despite this clarification, messaging from the CBSA on this matter has continued to be inconsistent, and ATDs have rarely, if ever, been used for parents detained on identity grounds.

Impacts of detention on children

Research has shown that even short-term detention has a long-lasting negative impact on the health of children.⁵ Similarly, separating children from their parents may cause long-term damage.⁶ Visiting parents in a prison-like facility can be extremely distressing for children, especially when they must part again at the end of each visit.

⁵ “Asylum-seeking children’s experiences of detention in Canada: A qualitative study”, Kronick, Rachel; Rousseau, Cécile; Cleveland, Janet, *American Journal of Orthopsychiatry*, May 2015.

⁶ Society for Research in Child Development, “The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities”, June 2018, <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear>

The anguish of children whose parents disappear into detention

Nicole and Ray⁷ are 8-year-old twins. Three years ago their parents were forced to flee their country, leaving them in the care of their grandparents. They were kidnapped by their parents' persecutors – luckily they escaped and joined their parents in Canada, but this experience traumatized them.

It was therefore particularly hard on Nicole and Ray when their parents were both detained by the Canada Border Services Agency, in Ontario.

The children were at school when their parents were arrested so they experienced it as the sudden disappearance of their parents. They were looked after by a friend of their parents. In school, the children were often crying and not able to learn – the principal called their mother in the detention centre out of concern for the children.

The parents were detained for a total of over four months, on two separate occasions. They were arrested a second time for minor breaches of the strict conditions they were under – for example, they had stopped off to buy winter clothes for the children. The conditions require them to wear ankle bracelets and stay at home, apart from limited exceptions such as taking the children to school.

Now that the parents are at home again, Nicole and Ray are doing better but they remain very anxious. When they leave to go to school, they urge their parents not to disappear. They don't like to close the door when they go to the bathroom. Because of the restrictions on their parents' liberty, they are mostly confined to their home when they are not at school. Their parents are working hard to reassure the children.

Their mother says: "I hope that we are the last case to face this."



⁷ Not their real names.

Best Interests of the Child – inconsistent practices

Article 3 of the Convention on the Rights of the Child requires that “in all actions concerning children [...], the best interests of the child shall be a primary consideration.” The CBSA directive correctly reflects this foundational principle with respect to the best interests of the child (BIOC).

Fundamental considerations:

- The BIOC are a primary consideration and may only be outweighed by other significant considerations such as public safety (i.e. R245 Flight Risk (a) (f) and R246 Danger to the Public), or national security. [...]
- The BIOC assessment is to be conducted prior to any decision to detain or house a minor or separate a minor from his/her detained [parent/legal guardian]; and should also be conducted on a continual basis (Section 8(2))

Canada Border Services Agency (CBSA) National Directive for the Detention or Housing of Minors.

In practice, however, the CBSA often fails to even mention the best interests of the child when presenting their arguments at detention reviews before the IRB, in cases where children are affected.

For its part, the Immigration and Refugee Board gives inconsistent consideration to BIOC. In some decisions where BIOC is considered, the Board concludes that it is in the interest of the child to remain housed with their detained parent. The question that the IRB should be addressing is not where the child should be housed, but rather whether to release the detained parent(s), taking into consideration the best interests of affected children.

Even after an amendment to the regulations enshrining BIOC in the decision-making framework (in June 2019)⁸ as well as an updated [IRB Chairperson’s Guideline on Detention](#), decision-makers frequently maintain detention of parents even at the 30 day detention review.

⁸ Regulations Amending the Immigration and Refugee Protection Regulations: SOR/2019-213, Canada Gazette, Part II, Volume 153, Number 13, June 17, 2019.

Children in detention: the last two decades

2002	The Immigration and Refugee Protection Act came into force. The Act affirmed “as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.” (IRPA s. 60)
2003	The UN Committee on the Rights of the Child recommended that Canada clarify the legislative intent of detention of minors as a measure of “last resort”.
2009	The Chairperson of the IRB wrote to the CCR stating that the wording of the Act and Regulations “indicates to us a legislative intention in IRPA that the ID [Immigration Division] not consider the best interests of a child affected by an adult’s detention.”
2009	The CCR published a report “ Detention and Best Interests of the Child ”, showing how, despite the legislation limiting detention of children to a measure of last resort, “children are regularly detained in Canada, sometimes for many weeks, and not only in exceptional circumstances.” The report highlighted that non-detained children were invisible in the legal regime.
2012	The United Nations Committee on the Rights of the Child recommended that States “expeditiously and completely” cease the immigration detention of children, and clarified that “the detention of a child because of their or their parents’ migration status constitutes a child rights violation.”
2016	The Federal Court approved a settlement agreement ⁹ according to which the best interests of a non-detained child can be considered as a factor in deciding whether to detain a parent.
2016	The CCR published a “ Call for legislative amendment ” to end the immigration detention of children.
2017	The Minister of Public Safety issued a Ministerial Direction “ Minors in Canada’s Immigration Detention System ” – one of its objectives is to “stop the detention or housing minors and family separation, except in extremely limited circumstances”. The Direction was accompanied by the Canada Border Services Agency’s “ National Directive for the Detention or Housing of Minors ”.
2019	The IRB Chairperson issued a revised Guideline 2: Detention , including a section on minors.
2019	The <i>Immigration and Refugee Protection Regulations</i> were amended to clarify that best interest considerations apply to every child directly affected by an immigration detention decision.

⁹ B.B. and Justice for Children and Youth v. Canada (MCI), IMM 5754-15

Need for CBSA oversight

The CCR believes that it is urgent that CBSA be overseen by an independent accountability mechanism that could receive complaints about non-compliance with the directives on detention of minors. The CCR has recommended a [model for such a mechanism](#).

Need for change to legislation

The CCR has long advocated for an end to the detention of children. While we welcomed the 2017 directives, we continue to call for a change to the *Immigration and Refugee Protection Act*. We believe that meaningful and lasting change will depend on the law providing strong protection of children's rights.

The CCR has developed a detailed proposal: [Ending immigration detention of children: Call for legislative amendment](#).

