**Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them**

**Submission of the Government of Canada**

*Question 1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.*

The Canada Border Services Agency (CBSA) is responsible for the administration and enforcement of the Immigration and Refugee Protection Act (IRPA), including the arrest and detention of permanent residents or foreign nationals in Canada.

Canada’s immigration detention program is based on the principle that detention shall be used only as a measure of last resort, in limited circumstances and only after appropriate alternatives to detention (ATDs) are first considered.

When exercising their authority to arrest and detain, under the IRPA and the Immigration and Refugee Protection Regulations (IRPR), CBSA officers are guided by jurisprudence, internal policies, guidelines and the Charter of Rights and Freedom.

Canada’s international obligations and domestic legislative and policy frameworks include:

* + The United Nations Convention on the Rights of the Child (CRC), to which Canada is a party. It states that the Best Interests of the Child (BIOC) shall be a primary consideration in all state actions concerning children;
	+ Section 55 of the IRPA is the arrest and detention provisions for adults and minors;
	+ Section 60 of the IRPA affirms the principle that the detention of a minor must be a measure of last resort taking into account other applicable grounds and criteria, including the BIOC;
	+ Section 248 of the IRPR prescribes other factorsfor consideration before a decision is made on detention or release;
	+ Section 249 of IRPR outlines special considerations on the detention of minors;
	+ ENF 20 Detentions Manual, National Detention Standards and Operational Bulletin (OPS-2017-03 (Reporting of all Situations Involving the Detention or Housing of a Minor to the Border Operation Centre)); and,
	+ The Canadian Charter of Rights and Freedoms (s. 7, 9, 10 and 15).

**A55 (1) and (2)** - A designated officer may arrest and detain, with (1) or without (2) a warrant where:

* The officer has reasonable grounds to believe the person is inadmissible to Canada and
	+ is a danger to the public; or
	+ the person is unlikely to appear for an immigration process (examination, admissibility hearing, minister's delegate review, or removal);
* The officer is not satisfied of the identity of the foreign national in the course of any procedure under the IRPA.

**A55 (3)** - A designated CBSA officer may detain a person on entry into Canada (limited to Port of Entry (POE) cases only) where:

* The officer considers it necessary to do so in order for the examination to be completed; or
* The officer has reasonable grounds to suspect that the permanent resident or foreign national is inadmissible on grounds of security or for violating human or international rights, serious criminality, criminality or organized criminality.

**A55(3.1)** provides for mandatory arrest and detention of a designated foreign national who is 16 years of age or older on the day of the arrival that is subject of the designation made by the Minister of Public Safety and Emergency Preparedness pursuant to subsection 20.1(1) of the IRPA.

**Section A60 of the IRPA** enshrines the principle that the detention of a minor is a measure of last resort while concurrently legislating the BIOC must always be considered:

* For the purposes of this Division, it is 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.

**Sections 248, 248.1, and 249 of the IRPR** furtheroutline special considerations for minors before a decision can be made on detention or release - if it is determined that there are grounds for detention:

**R248:** If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:

* (a) the reason for detention;
* (b) the length of time in detention;
* (c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;
* (d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency, or the person concerned;
* (e) the existence of alternatives to detention; and
* **(f) the best interests of a directly affected child who is under 18 years of age.**

**R248.1:**

1. **For the purpose of paragraph 248(f)** and for the application, in respect of children who are under 18 years of age, of the principle affirmed in section 60 of the Act, that a minor child shall be detained only as a measure of last resort, the following factors must be considered when determining the best interests of the child:
	* (a) the child’s physical, emotional and psychological well-being;
	* (b) the child’s healthcare and educational needs;
	* (c) the importance of maintaining relationships and the stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability;
	* (d) the care, protection and safety needs of the child; and
	* (e) the child’s views and preferences, provided the child is capable of forming their own views or expressing their preferences, taking into consideration the child’s age and maturity.
2. **For the purpose of paragraph 248(f)**, the level of dependency of the child on the person for whom there are grounds to detain shall also be considered when determining the best interests of the child.

**R249:**

* (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
* (b) the anticipated length of detention;
* (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
* (d) the type of detention facility envisaged and the conditions of detention;
* (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained or housed minor children; and
* (f) the availability of services in the detention facility, including education, counselling and recreation.

**National Immigration Detention Framework**

The 2016 [National Immigration Detention Framework](https://www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html) (NIDF) launched the transformation agenda to create a better, fairer immigration detention system to improve infrastructure, provide better mental and medical health services at CBSA Immigration Holding Centres, expand partnerships and Alternatives to Detention (ATDs), and reduce the number of minors in detention.

The [NIDF](https://www.cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html) outlines how minors are accommodated in the immigration detention system.

**Ministerial Direction to the CBSA on Minors in Canada’s Immigration Detention System**

In November 2017, the Minister of Public Safety and Emergency Preparedness issued a Ministerial Direction was issued to the Canada Border Services Agency (CBSA) with the key objective of keeping families together and minors out of detention to the greatest extent possible.

Link: <https://www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-cbsa-en.aspx>

**CBSA National Directive for the Detention or Housing of Minors**

To effect its implementation, the CBSA issued simultaneously its [National Directive for the Detention or Housing of Minors](https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html) to guide its officers in making detention case decisions that achieve better and consistent outcomes for minors. As per the Directive, minors are not be detained except in exceptional circumstances. Officers must consider the best interests of the child and alternatives to detention. The directive supports CBSA's continued efforts to stop the detention or housing of minor children and preserve the family unit.

The best interest of the child is always a primary consideration when making a detention decision for all minors, regardless of their status. The CBSA actively and continuously seeks alternatives to detention, such as placement with family members, when the release of a parent/legal guardian is not appropriate.

Children are detained or housed only as a measure of last resort, taking into account the best interests of the child. The decisions on whether a minor may be housed with their detained parent is largely based on the parent’s request, and the minor’s level of dependency and physical, mental and emotional needs.

The CBSA continues to take measures to ensure decision-making is transparent in all cases through management oversight and systematic public reporting.

**The Best Interests of the Child (BIOC)**

Mental health evidence is clear that both detention and family separation have detrimental consequences for children's well-being. The BIOC are best achieved where children are united with their families in community-based, non-custodial settings where possible.

1. On all detention decisions that affect minors, CBSA officers must consider the BIOC as a primary consideration and documented on the clients file.
2. To facilitate decision-making, the BIOC is to be determined separately and prior to the decision to detain the parent or legal guardian and is reviewed on an ongoing basis (including observations and day to day interactions) based on the legal situation of the minor and their parent/legal guardian, and their well-being.
3. Officers must use, but are not limited to, the list of factors to determine the BIOC:
	1. the child's physical, mental and emotional needs
	2. the child's educational needs
	3. the preservation of the family environment and maintaining relationships
	4. the care, protection and safety of the child
	5. the level of dependency between the child and the parent or guardian;
	6. the child's views, if they can be reasonably ascertained; and
	7. any other relevant factor.
4. The BIOC is to be determined on a case-by-case basis taking all relevant information related to the minor's situation into account; the interests and rights of the parent/legal guardian are taken into consideration subsequent to the BIOC determination.
5. CBSA officers must give minors capable of forming their own views the opportunity to express those views freely in all matters regarding their detention, housing or family separation. Their views should be given due weight in accordance to their age and level of maturity. Although the officer is not bound by their views, they must be considered and duly noted in the determination of what is in the BIOC.

**Family unity**

1. Every effort must be made to preserve the family unit for overall well-being and continuity of care.
2. Families must be released with or without conditions to the greatest extent possible. Where unconditional release is not possible, an Alternative to Detention (ATD) should be used.
* When a parent/legal guardian are detained, and public safety (i.e. **R245 Flight Risk and R246 Danger to the Public**) and/or national security are **not an issue**, officers must make every effort to find an appropriate ATD.
* Where public safety (i.e. **R245 Flight Risk and R246 Danger to the Public**) and/or national security are raised, every effort shall be made to find an ATD that sufficiently mitigates the concerns.
1. Though it is crucial to maintain the family unit, there may be exceptional circumstances where it is not possible. Where an ATD is not appropriate for the family or either parent following a thorough review of community based options and release conditions, CBSA officers with the parent/legal guardian and relatives or a Community-based organization shall find a solution for the temporary care of the minor if this is in the BIOC. Contact information of the organization and/or person charged with temporary care of the minor must be indicated in the minor's file (or the p/lg file if the minor is a Canadian citizen). Subject to their level of comprehension, the minor should be given Legal Aid and Provincial Child Advocate contact information.
2. If a minor is separated from their family, access to the p/lg must be facilitated and the CBSA officer must inform them of the steps being taken, unless the provision of the information is contrary to the BIOC and compromises the safety and well-being of the minor.

**Alternatives to Detention**

A key pillar of the NIDF is the identification of alternatives to detention. According to the Immigration and Refugee Protection Act, people are only detained when grounds for detention exist, and after all alternatives to detention have been considered. Several factors must be considered when deciding to detain, including the availability and potential use of alternatives to detention; allowing a person to be released under specific terms and conditions, such as deposits and guarantees; and, reporting requirements.

On June 22, 2018 the CBSA started roll-out of an expanded Alternatives to Detention (ATD) program to provide risk-based, nationally consistent programming to individuals deemed suitable for release from detention. Officers have access to an expanded set of tools and programs that enable them to more effectively manage individual needs while ensuring public safety and program integrity. In addition to release on reporting conditions (cash deposit or the establishment of a bondsperson), the ATD Program includes:

* a national [Community Case Management and Supervision (CCMS) program](https://www.cbsa-asfc.gc.ca/security-securite/detent/ccms-gccs-eng.html) that integrates in-community support services with individuals' needs to mitigate any risk factors;
* A national [Voice Reporting program](https://www.cbsa-asfc.gc.ca/security-securite/detent/vr-rv-eng.html) that enables individuals to comply with reporting conditions imposed by the CBSA or the Immigration and Refugee Board (IRB), by using voice biometrics to report to the CBSA at a prescribed interval; and,
* An Electronic Monitoring Pilot Project in the Greater Toronto Area and Quebec regions that uses GPS and Radio Frequency technology to monitor an individual’s whereabouts. The EM Pilot is scheduled to end on March 31, 2021. Prior to this expiration date, the Agency will consider the expanded use of this technology to all regions. The decision to do so (or not) will be announced later in 2020.

This work contributes to Canada's commitment to the United Nations High Commissioner for Refugees (UNHCR) Global Detention Strategy to ensure that ATDs are considered in all cases prior to detention.

**Medical and Mental Health Services**

Under the NIDF, the CBSA remains committed to improving detainee well-being by ensuring safe, secure and humane detention conditions with improved access to essential medical and mental health services.

Specific initiatives include limiting detention of persons living with mental health issues, expanding the availability and use of alternatives to detentions, and improving access to essential medical and mental health services, including psychiatric and psychological care.

The CBSA has implemented national policies and standards to help promote consistency in program delivery across Canada, and has made increased mental health training available to staff at all immigration holding centres. Ongoing consultations with external partners continue to help guide these efforts.

**Reduction in the number of minors, vulnerable persons and long-term detainees in detention**

In support of the pillar of alternatives to detention, the CBSA is committed to improving and minimizing the use of immigration detention for minors, vulnerable persons and long-term detainees as much as possible.

A vulnerable person in detention is defined as a person for whom detention may cause a particular hardship. For detention purposes, the following are considered "vulnerable": pregnant women and nursing mothers; minors (under 18 years of age); persons suffering from a severe medical condition or disability; persons suffering from restricted mobility; persons with suspected or known mental illness and victims of human trafficking.

Through the implementation of ATDs, the CBSA is better positioned to manage individuals with identified vulnerabilities in a nationally consistent manner, while balancing the requirement to ensure public safety. This is due to the expanded tools available to officers in all regions that previously did not exist.

Further work on supporting minors and individuals with mental or medical health needs are ongoing.

*Question 2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.*

The CBSA has entered into contracted partnerships with 3 community service providers, who under their contracts are required to find options for children and families where appropriate. Allowing these individuals to be in the community with various supports (after going through a standardized CBSA and service provider risk assessment) enhances children’s and their family’s rights and freedoms by setting them up for success while released from detention. The CCMS program provides individuals with effective community support until their immigration status is conferred or until they are removed from Canada.

*Question 3. Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education (e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).*

**Key Detention Principles and the Rights of Detained Individuals**

All individuals are detained according to international best practices as well as the Canadian Charter of Rights and Freedoms. Key principles involve respecting the health, well-being and safety of all people held for immigration purposes.

Detained individuals have several rights, including the right to:

* Be informed about the reason(s) for their detention and have access to a CBSA officer;
* Be informed about the right to be represented by and to meet with a lawyer in person or by phone as required;
* Be put in contact with a representative of their country's embassy or consulate and non-government organizations;
* Be assisted by an interpreter if the individual does not understand or speak the language in which immigration proceedings are being conducted (English or French);
* Receive medical attention; and,
* Practice religion.

**Detention of Minors**

When a minor is housed or detained, the CBSA ensures that they have the proper access to programs and services, including access to health care services, outdoor and indoor recreation, and proper nutrition that caters to special dietary needs. Minors that are in CBSA Immigration Holding Centres (IHCs) for periods in excess of seven (7) days are provided with educational programming.

Families have separate living and sleeping quarters, washroom and laundry facilities, and Immigration Holding Centres (IHC) readily provides cribs, diapers and other products as needed.

**Detention of Vulnerable Groups**

Where safety or security is not an issue, detention is to be avoided or considered only as a last resort for pregnant women or nursing mothers, persons who are suffering from a severe medical condition or disability, persons suffering from restricted mobility, persons with a suspected or known mental illness, and victims of human trafficking.

When detention is required, it should be for the shortest time possible.

Individuals with mental health issues may be detained in a provincial detention facility that provides access to specialized care.

*Question 4. Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.*

Although ATDs existed in a limited capacity, the launch of the National ATD program provided officers with an expanded set of tools and programs. As a result, a culture shift was in order for many of the regional operations; working closely with our regional operations has been and continues to be critical in ensuring successfully implementation and use of the ATD program.

The CBSA’s contracted partners for the delivery of the ATD program have extensive knowledge and experience related to the delivery of community-based programming; the CBSA’s specific operations and detention population however presented some new considerations in the delivery of their programming. For two of CBSA’s contracted service providers, their previous experience focused on Corrections cases that did not involve children, but knew they could establish linkages in the community if given the time to do so. When the CBSA approached them for these types of services, it was agreed that there would be an onboarding phase to solidify child and family services, which so far, has progressed as more individuals have bought into the Program.

The CBSA and the ATD service providers continue to work together to further support their partnership to ensure effective program delivery, including access to programming that support child and family needs, and making access to these services more efficient thus reducing any time spent in CBSA Immigration Holding Centres.

The CBSA’s Community Liaison Officer (CLO) position was also created to support the development of the ATD Program in the seven (7) CBSA regions, and specifically to help administer CCMS programming.

*Question 5. What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?*

Non-government stakeholders could assist the CBSA at the front end of child and family detention situations by developing outreach programs that educate various populations as to how the Canadian immigration system works and why we remove certain individuals. Better and more accessible education for children and family units around accessing travel documents would shorten the time in which the CBSA has to interact with these individuals, thus reducing their stress and uncertainty of their varying situations.

Lastly, non-government stakeholders could create more housing options for children and family units, as there seems to be a shortage of options for these populations groups.