Detention Review Toolkit for Practitioners

OVERVIEW

The goal of an Immigration Detention Counsel is to ***secure a client's maximum entitlement to liberty.***

Immigration detention in Canada is authorized by sections 55 to 58 of the *Immigration and Refugee Protection Act*. It is a state tool currently in use for the purpose of immigration control and enforcement. Canada's ability to use this extraordinary mechanism of coercive control is constrained by individual protections under the *Canadian Charter of Rights and Freedoms*, as well as domestic administrative law principles and international law.

At every detention review, the Minister of Public Safety (through Canada Border Services Agency hearings officers) has the burden to demonstrate that

a. Nexus: the detention is connected to a valid immigration enforcement purpose (i.e. removal);
b. Grounds: one or more "ground" for detention exists; and
c. Charter compliance / s. 248 factors: detention is justified having regard to factors set out in statute, the Charter, and common law.

In general, the detention process moves through s. 55 of the *Immigration and Refugee Protection Act* ("*IRPA*") (arrest), section 56 (officer assessment), and 57 & 58 (Immigration Division hearings).

Counsel should be aware of the following points of procedure and practice:

- Arrest (section 55): The client should be provided access to a lawyer before questioning and have the right to speak with their embassy/consulate. Canada Border Services Agency ("CBSA") drafts a Notice of Arrest and completes a National Risk Assessment for Detention ("NRAD") The NRAD is a form which scores the client on "risk" and determines if they will be place in an immigration holding centre or provincial facility.

- Officer Assessment (section 56): CBSA has the jurisdiction to release a person *before* their first hearing via administrative release. If there is a strong alternative to detention, counsel should present it to CBSA as soon as possible after arrest.

- ID hearings (section 57 and 58): The first detention review must be within 48 hours "or without delay afterward". Once a 48-hour review begins, CBSA loses jurisdiction to grant administrative release; only the Immigration Division ("ID") can order release at this point. If the Division orders detention, the next hearing takes place within 7 days. If the Division orders detention at the 7-day hearing, subsequent hearings take place every thirty days.

The ID **shall** order release unless grounds set out in s.58(1) of *IRPA* are met. There are four potential grounds for detention (*paraphrased*):

- Unlikely to appear for examination, removal or other immigration process;
- Danger to the public;
- Suspicion of inadmissibility on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality; and
- Identity.

Even if the CBSA establishes a ground of detention, the ID can still order release given the weight of *Charter* requirements, including the *Immigration and Refugee Protection Regulation* ("*IRPR*") 248 factors, discussed below.

The burden is always on the Minister to establish, on a balance of probabilities, that detention is legal (i.e. grounds for detention *and* the existence of a nexus to an immigration purpose) and appropriate (based on the R248 factors). (*Brown v. Canada (Citizenship and Immigration),* 2020 FCA 130 paras 120-123)

At the 7 day and 30-day hearings, Members must **decide afresh** whether a ground for detention is established, and can disagree with the decisions of their colleagues, though they need to provide reasons for arriving at different conclusions. (See *Brown v Canada (MCI)* 2020 FCA 130 at paras 134-135, and *Chairperson Guideline 2: Detention* at s. 7.2)

Key questions to support advocacy throughout the process include:

- Has the Minister met the burden of proof (Including: Are the Minister's arguments supported by actual evidence)?
- Is there a rational/lawful purpose underlying this detention (Including: Is detention linked to a valid immigration purpose)?
- Even with a valid reason, is detention compliant with the law (both IRPA and the *Charter*?), including whether there is an alternative that would eliminate the need for detention?
- Is the hearing fair?

Counsel should be familiar with the following core materials:

- Legislation and Policy:
  - *Immigration and Refugee Protection Act*, Division 6
  - *Immigration and Refugee Protection Regulations*, Part 14
  - Immigration Division Rules, SOR/2002-229 ("ID Rules")
  - *Chairperson Guideline 2: Detention*
- Major Appellate Cases:
  - *Sahin v. Canada (MCI)* (T.D.) 1994 CanLII 3521 (FC), [1995] 1 FC 214: How do you conduct a proportionality analysis?
  - *Brown v Canada (MCI)* 2020 FCA 130: How does procedural fairness work at a detention review?
- Background:
  - Report of the 2017/2018 External Audit (Detention Review)

1. Grounds for Detention: Unlikely to Appear (s. 58(1)(b) of IRPA)

Unlikely to appear ("UTA") findings disproportionately affect marginalized populations who may struggle with mental health, poverty, addiction and/or may be unhoused. These elements are often blurred into the UTA analysis.

A. Mandatory Regulatory Factors

Relevant, non-exhaustive factors for the analysis are set out in IRPR s. 245 (*paraphrased*):

- Being a fugitive from justice in a foreign jurisdiction;
- Voluntary compliance with a previous departure order, any required appearance at an immigration or criminal proceeding;
- Previous compliance with any conditions imposed re: entry, release, or a stay of removal;
- Previous avoidance of examination or escape from custody;
- Involvement with a human trafficking operation; and
- The existence of strong ties to Canada.

As always, the Minister bears the onus of demonstrating that, on a balance of probabilities, the individual is unlikely to appear for removal, or one of the other proceedings listed at IRPA s. 58(1)(b). (See *Brown*, at para 118)

In addition to the factors at IRPR s. 245, CBSA frequently relies on the following to argue that a person is UTA;

- Criminal record or pending criminal charges
- Past failure to report to CBSA or update address
- Working or studying without authorization
- Making a refugee claim in Canada or another country (fear of return to home country)
- Overstaying a work permit or study permit
- Living without immigration status in Canada or in another country
- History of addiction
- History of mental health issues
- Homelessness, transience, or frequent past changes of address
- Non-cooperation at time of arrest
- Use of aliases
- Misconduct in detention, including a record of institutional infractions
- Strong ties in Canada
- Lack of ties in their country of citizenship
- Failure to cooperate in the process of obtaining a travel document

B. UTA for What Proceeding

- IRPA allows for UTA as a ground for detention for different types of proceedings (i.e. examination, an admissibility hearing, etc.) as well as removal.
- Explain why a client would be *motivated* to attend a future hearing, for example:
    - A client may be motivated to attend IRPA 36(1)(a) admissibility hearing if they have IAD appeal rights and filing their appeal notice is their best route to retaining PR status.
    - A refugee claimant may equally be motivated to attend their eligibility examination or their refugee hearing/PRRA interview, since this is their best route to permanent status in Canada.
        - *Wang v. Canada (MPSEP*), 2015 FC 79 at para 23
        - *Wang v Canada (MPSEP),* 2015 FC 720, at paras 47-29
        - *Canada (MCI) v. B157*, 2010 FC 1314 at paras 44-47
- If client wants to leave Canada, or has cooperated with removal proceedings/travel document applications, this can mitigate appearance concerns.

C. Mental health

- A mental health condition does not make a person inherently unreliable.
- However, the Immigration Division often finds people "unlikely to appear" because of symptoms of mental health. The Federal Court has found that it is reasonable to find someone a flight risk in this circumstance. However, a finding that someone is a flight risk "in the requisite sense" because of a mental health disorder is to "weigh very differently" than "deliberate or wilful non-compliance." (*Lee v. Canada (Public Safety and Emergency Preparedness)*, 2022 FC 383)
- Counsel can try to distinguish between past non-compliance while their client was experiencing undiagnosed/untreated mental illness, if the client is now receiving treatment or support, or has since demonstrated an understanding into their mental health condition. You may have to request medical documentation from the detention facility and/or other medical providers to corroborate this.
- If evidence of mental health treatment in detention is not available, you can argue that your client should not be penalized, given recognized lack of rehabilitative programming in provincial correctional centers.
    - *Ali v Canada (Attorney General)*, 2017 ONSC 2660, at paras 35-37
    - *Toure v. Minister of Public Safety*, 2017 ONSC 5878 at para 75-88
- Disclosure may indicate non-cooperation by a client at time of arrest. Consider the client's perception or condition at the time of arrest, and raise any mitigating circumstances in testimony and submissions.
- Consider leading testimony from the client regarding:
    - Their understanding of their mental health condition/what they believe they need to manage their condition; and
    - Their willingness and interest in accessing treatment/support.
- *Guideline 2* requires ID Members to consider compliance in light of mental health:
    - Section 2.3.5 When considering previous compliance and non-compliance, members need to consider the particular circumstances in

each case, including mental illness, addiction or other vulnerabilities, the severity of the non-compliance, frequency, the type of compliance and the impact of non-compliance, as well as any evidence as to how the person concerned is addressing these issues.

- *See additional comments on mental health and how it impacts a R248 analysis below.*

D. Addiction

- The client may have disclosed an addiction history to CBSA, or CBSA may have inferred an addiction history from convictions or charges relating to possession, or due to client's behaviour during arrest.
- When addiction is raised as a factor adversely impacting a client's reliability, you can:
    - Argue that a person is not inherently unreliable due to a history of addiction;
    - Emphasize that addiction is a medical condition and not a choice.
- Potential points to canvass with your client/raise in submissions:
    - Information or documentation regarding treatment/supports the client accessed;
    - Whether the addiction is dated, and is being managed;
    - Client's understanding of their addiction issues;
    - Whether/why the client is motivated to seek treatment, including whether they have requested or received treatment in detention; and/or
    - Details of plan for client to access treatment and support upon release, including how this treatment will be paid for (as many clients will not have health coverage upon release)

E. Unstable housing/unhoused clients

- Having been unhoused or had unstable housing does not mean clients are necessarily UTA.
- If CBSA argues that the client failed to report their address, review disclosure to determine if the client was actually under any obligation to inform CBSA of their address at that time.
- Raise any attempts to update their address to CBSA, IRCC or IRB.
- It may be appropriate to raise ties that the client has to a specific community or location (i.e. child custody arrangements) to counter arguments that they are highly mobile.
- If a client is unstably housed, but has a personal strategy for how/where they will receive mail, how they will remember appointments and how they can be contacted, this is worth raising.

F. Criminal Convictions and Charges

- Criminal convictions or pending charges are often raised by CBSA to argue that someone is UTA (using the argument that they do not respect criminal laws of Canada). The relevance of charges is discussed below under danger to the public.

- Review the specific convictions or pending charges and determine if they are relevant to reliability (i.e., a failure to appear for a court date).
- Consider raising relevant mitigating factors in evidence and submissions:
    - Convictions are dated;
    - Criminal record is caused by personal circumstances at the time that have since been addressed; and/or
    - There is evidence relating to rehabilitation such as anger management, substance abuse counselling, intimate partner violence courses, etc.

G. Breaching Past Release Orders

- Past breaches of any Release Order are generally viewed negatively by the ID.
- Past non-compliance is a factor to be considered, but "…should not automatically lead to a conclusion that the person concerned is unlikely to appear" and should be considered in the context of the case. (See *Guideline 2*, s. 2.3.4)
- Highlight elements of compliance (i.e. reported consistently, cooperated with travel document application, etc.), and ask the Member to balance this compliance against the non-compliance established in evidence.

H. Best practices on UTA Allegations

- Even if the evidence establishes UTA, try to demonstrate a low flight-risk if possible on the evidence.
- If you have not been able to talk to client before 48 hour hearing, you might want to limit submissions and testimony until the next sitting when you have more information.
- Review CBSA disclosure with the client, explain the CBSA's reasons for alleging flight risk, and determine whether the client can explain or provide evidence mitigating the CBSA's allegations. Ensure that your client understands which facts and factors are relevant to a UTA finding, since these are not always intuitive, and that the purpose of a detention review hearing is not to decide if they are allowed to remain in Canada.
- Try to distinguish legitimate UTA concerns from factors relating to a client's mental health, disabilities, and housing insecurity.

2. Grounds for Detention: Danger to the Public (s. 58(1)(a) of IRPA)

Another ground of detention is whether the individual is a "danger to the public" ("DTP"). Even if UTA is made out, the Minister will often also additionally argue DTP. (The Federal Court held that: "[T]here is a stronger case for continuing a long detention when an individual is considered a danger to the public". (*Sahin v. Canada (MCI)* (T.D.) 1994 CanLII 3521))

DTP is a high standard. It must be applied in a manner that is consistent with (i) serious and stigmatizing language adopted by Parliament and (ii) the loss of liberty that comes with it.

- The mere fact of criminal convictions/charges is insufficient to establish DTP:

  - Parliament chose language of DTP instead of simply "criminally inadmissible" so something more is needed (*Salilar v. Canada (MCI)*, 1995 CanLII 3610 (FC), [1995] 3 FC 150).
  - Someone should not be detained because they have committed crimes; they may only be detained if the crimes support a conclusion that, on a balance of probabilities, they pose a **current and forward-looking danger.**
- CBSA will often argue that criminal charges are enough to establish DTP. It is important to note that neither the allegations nor evidence (like police reports) have been proven in court. See discussion below with respect to withdrawn or stayed charges.

A. Mandatory Regulatory Factors

- IRPR s. 246 lists mandatory factors to take into consideration in assessing DTP.
- All of the 246 factors involve previous **convictions**, except (*paraphrased)*:
  - (a) fact that persons constitutes DTP in Canada or danger to security of Canada under IRPA 113(d)(i) or (ii) or 115(2)(a) or (b)
  - (b) association with a criminal organization
  - (c) engagement in people smuggling or trafficking in persons
- The existence of one of the factors in R246 is not sufficient to "automatically conclude" that someone is a danger to the public (*Thanabalasingham v Canada (MCI),* 2004 FCA 4).
- **BUT** the presence of a 246 factor is nonetheless "sufficient" to establish danger if the Member so decides (*Bruzzese v. Canada (MPSEP),* 2014 FC 230 at para 47). At least one case suggests the presence of a 246 factor may necessitate a danger finding (*Canada (MCI) v. B232*, 2011 FC 257 at para 52).
- **BUT** note that the *Guideline 2* suggests that being described in one of the 246 factors is insufficient to be found DTP
  - *Guideline 2*, s. 2.2.8: "The Minister's opinion that the person constitutes a danger to the public is a factor to take into account at a detention review but is not in itself sufficient for finding that the person is a danger to the public."
- CBSA's ENF 20 Manual - *Detention* also lists additional factors (at 6.4) that may be relevant beyond the mandatory 246 factors. It may be helpful to reference ENF 20 if your client's past criminal conduct is not described (i.e. did not involve any violence, weapons or threats)
- Neither *Guideline 2* nor CBSA's manual overrule the problematic caselaw listed above. Depending on the case, they may still be worth raising, but be mindful that the Minister will likely raise the cases listed above in reply.

B. Past Criminal Records

A criminal record alone does not render someone a DTP – if the Minister relies on past criminal convictions as the basis for DTP, be sure to critically analyze the convictions:

- When were the occurrences that led to the convictions?
- How much time has passed?

- Can you show many years since the occurrence(s) without further criminal justice interaction?
- Can you argue the absence of escalation in behaviour?
- What mitigating factors about the offences can you highlight?
- Will arguments about systemic racism in the criminal justice be relevant

PRACTICE TIPS:

- If CBSA argues danger solely based on CPIC record, you can argue that this lacks sufficient detail about the circumstances of the offence and ID cannot undertake a contextualized assessment of DTP. Normally, allegations are accompanied by police report or reasons for conviction or sentence.
- Attempt to obtain pre-sentence reports, reasons for sentence, and parole decisions. They may be helpful and highlight mitigating circumstances. It is better to introduce mitigating circumstances via documentary evidence, so you do not expose your client to aggressive cross-examination by the Minister.
- Review criminal history for aggravating circumstances and the associated risks; this can help craft an alternative that is responsive to those specific circumstances. Tie aspects of a release plan to specific aspects of risk.

C. Bail or Parole Decisions

- Sometimes the conditions of bail or parole are a sufficient alternative to detention to offset the DTP such that release is appropriate.
- However, while bail or parole conditins are relevant to the DTP assessment, the ID must be careful about how and how much they rely upon them since the ID must still make an independent assessment of whether particular conditions address danger in the immigration context. The Federal Court has found that they cannot rely too heavily on parole or bail decisions/conditions.
- For these arguments CBSA often cites *Canada (MCI) v. Salinas-Mendoza,* 1994 CanLII 3522 (FC), as well as *Canada (MPSEP) v. Bulhosen Rios,* 2019 FC 891
    - While the FC on the stay order in *Canada (MPSEP) v. Bulhosen Rios,* 2019 FC 891 agreed that the ID had given excessive deference to the parole findings on danger, in the full JR on the case the FC found the Member's treatment of the parole decision to be reasonable: *Canada (MPSEP) v. Rios,* 2020 FC 709.
- According to the caselaw, Members must:
    - Identify and acknowledge that the objectives of bail or parole, and the tests for granting them, differ from DTP under *IRPA*.
    - Identify if and how the evidence (or allegations) before them differs from that which was before the bail judge or the parole board.
    - Come to their own independent conclusion whether the bail/parole conditions address danger concerns under *IRPA*.
- You can request that compliance with bail or parole conditions be made an express condition of any immigration release order.
- This is also reflected in *Guideline 2*, ss. 2.2.6-2.2.7

PRACTICE TIP: Help the panel see the justification for any bail or parole conditions on the evidence in the detention review itself. Even if the release order imposes the exact same conditions, directly link those conditions to the danger finding under *IRPA.*

D. Evidentiary Burden

The evidentiary burden on the Minister to demonstrate DTP generally increases with the length of detention. At the same time, the longer an individual remains in detention, the less imminent a danger they are likely to pose (*Charkaoui v. Canada (MCI),* 2007 SCC 9, paras 112-113).

- These comments were made in the security certificate context, but have been directly adopted into the detention context by the FCA in *Brown*, at para 123
- See also: *Guideline 2*, s. 3.1.5 ("The burden on the Minister to justify continued detention increases over time as the length of detention continues.")

E. Withdrawn or stayed charges

CBSA sometimes relies on withdrawn or stayed charges. This is extremely problematic since the client was never afforded an opportunity to respond to those allegations in court. In immigration law, existence of withdrawn or stayed charges, in and of itself, is not proof of criminality (*Sittampalam v. Canada (MCI)*, 2006 FCA 326 at para 50; *Canada (CIC) c. Solmaz*, 2020 CAF 126 at para 85)

- **BUT**: evidence surrounding withdrawn or dismissed charges "can be taken into consideration at an immigration hearing" (*Sittampalam v. Canada (MCI)*, 2006 FCA 326 at para 50; *Canada (CIC) c. Solmaz*, 2020 CAF 126 at para 85)
    - The ID must come to their own independent assessment of whether the evidence is credible and trustworthy; it cannot simply rely on the fact that a charge was laid.
    - Note that both *Sittampalam* and *Solmaz* arise in the inadmissibility context where the standard of proof is much lower (reasonable grounds to believe).

F. Nexus to Immigration Purpose

The Minister has previously argued that "danger to the public" is a stand-alone immigration purpose and that immigration detention can continue even when removal (or other immigration proceedings) are not possible (i.e., due to an inability to get a travel document). Recent case law suggests this is no longer a valid position.

In *Brown*, the FCA held that, "[I]n order for continued detention to be legal under IRPA, **there must be a nexus between detention and an immigration purpose**. If that is missing, detention under IRPA is no longer possible" (para 90). An immigration purpose could be removal or another immigration proceeding (i.e., admissibility hearing). For removal, relevant evidence of communications with a receiving country ought to be disclosed in advance of the hearing. The FCA wrote in *Brown*:

> [95] … The decision maker must be satisfied, on the evidence, that removal is a possibility. The possibility must be realistic, not fanciful, and not based on speculation, assumption or conjecture. It must be grounded in the evidence, not

> supposition, and the evidence must be detailed and case-specific enough to be credible…
>
> [123] … What may often change with the passage of time is the quantity and quality of evidence required to justify detention. The longer the period of detention, the more time and opportunity the government has had to make the necessary arrangements with the receiving country and to execute removal. With the passage of time, the assertion that removal remains possible requires a more probing inquiry. Reflecting this reality, in *Charkaoui*, the Supreme Court stated that the burden on the Minister becomes heavier over time (at para 113); I take the Supreme Court to have been speaking of an evidentiary or tactical burden here, not a persuasive burden.

In *Canada (Public Safety and Emergency Preparedness) v. Suleiman,* 2022 FC 286, the Court found it reasonable that the Member ordered that detention could no longer continue because they determined that Mr. Suleiman's removal was no longer possible.

CARL's position is that DTP does not justify detaining someone when there is no viable immigration process in the future (including removal) being served by it.

G. Best Practices on Contesting DTP

Is it worth it to contest the allegation?

- Sometimes it is not, with a particularly adverse criminal history;
- Be mindful that your position and arguments may encourage CBSA to seek out further damaging documents from the client's criminal proceedings, or opening the client up to detailed and problematic questions from the ID or Minister;
- Be mindful that detailed submissions may cause the Member to include detailed factual findings to justify a DTP conclusion in the decision;
- Depending on the circumstances, consider whether it is strategically better to concede danger, or to simply take no position, highlight a few mitigating factors and move to the s. 248 factors

Be mindful/strategic in relying on addiction or mental health conditions:

- While they can be mitigating factors surrounding criminality, the ID may conclude that addiction treatment or mental health services must be included in any release plan. Bear in mind that this programming is difficult to secure and can frustrate release.
- Programming may also be too restrictive for your client, and may set them up to fail.

Remorse, responsibility, rehabilitation:

The ID will assess whether an individual has expressed remorse for past offending, accepted responsibility, and demonstrated (at least a commitment to) rehabilitation;The ID will generally accept the conclusions made by criminal courts regarding a client's involvement in an offence;

- Encourage clients to testify about the insights they have developed as a result of their involvement in an offence, including reflections on: the impact of their offenses, costs on them, lessons they have learned, steps they have taken to change going forward, supports they will rely on, etc.

3. Grounds for Detention: Identity (s. 58(1)(d))

Unlike UTA and DTP, the ID does not make a determination whether the individual's identity has or has not been established; rather, the ID must defer to CBSA's determination. Instead, the ID's role is to determine whether CBSA is making "reasonable efforts" to establish identity, and whether your client has "reasonably cooperated" with CBSA.

This ground for detention reads:

> the Minister is of the opinion that the identity of the foreign national… has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity…

Detention under this ground is premised on uncertainty of identity, and it is often invoked in cases where the detained person:

- does not have any identity documents;
- has used fraudulent documents;
- has used different names/aliases;
- is not forthcoming about identity; and/or
- identity documents have been destroyed or are not available.

Identity may centre around uncertain personal identity (name, date of birth) or national identity (country of birth/citizenship) or both. The inability to establish identity may be caused by the detainee's alleged non-cooperation or may be caused by a third party (such as the receiving government) being unwilling or unable to accept or confirm identity.

A. Mandatory Regulatory Factors

IRPR 247 sets out the factors for the Member to consider:

(a) the foreign national's cooperation in providing evidence of their identity or assisting the Department or the Canada Border Services Agency in obtaining evidence of their identity, in providing the date and place of their birth as well as the names of their mother and father, in providing detailed information on the itinerary they followed in travelling to Canada or in completing an application for a travel document;

(b) in the case of a foreign national who makes a claim for refugee protection, the possibility of obtaining identity documents or information without divulging

personal information to government officials of their country of nationality or, if there is no country of nationality, their country of former habitual residence;

(c) the foreign national's destruction of their identity or travel documents, or the use of fraudulent documents by the foreign national in order to mislead the Department or the Canada Border Services Agency, and the circumstances under which the foreign national acted;

(d) the provision of contradictory information by the foreign national with respect to their identity during the processing of an application by the Department or the Canada Border Services Agency; and

(e) the existence of documents that contradict information provided by the foreign national with respect to their identity.

B. Special Considerations on Identity Cases

Note the distinct framework for establishing this ground for detention under s.58(1)(d)

- The Minister's opinion is owed deference when identity is alleged as a ground for detention;
- The ID does not have the jurisdiction to direct the Minister on what steps they should take, rather the role of the ID is to determine whether the Minister has made "reasonable efforts" to establish identity and whether identity may be established.
- There is a shared onus with the Minister and a positive obligation on the detained person to establish their identity and/or cooperate with any and all efforts to establish identity.

Further, note the language of "but may be, established" in s. 58(1)(d). With all s. 58 grounds, the burden to establish a ground for detention rests with the Minister. However, under s.58(1)(d) the obligation to establish identity rests first and always with the detainee, such that it is a shared onus: the Minister must make reasonable efforts, but *the detainee's own actions will condition and influence the assessment of reasonable* efforts.

There are two different situations where the Minister's opinion will warrant continued detention:

1. if the foreign national has not reasonably cooperated by providing relevant information to establish identity; **OR**
2. the Minister is making reasonable efforts to establish identity

See: *Canada (Citizenship and Immigration) v. B046*, 2011 FC 877 at para 37

Further information on "reasonable efforts" to establish identity:

- There are cases where there appears to be a prima facie argument for insufficient effort: i.e.: the MC puts forward an opinion that identity isn't established, but only interviews the PC on day 28 of a 30 day detention review

cycle. This is arguably unreasonable when balanced against the liberty interests of the detainee.
- The client should be provided with the means to pursue avenues to establish their identity, i.e., phone cards, access to their phones.
- As with the "suspicion of inadmissibility" ground of detention (discussed below), the longer the detention continues, the Minister must be held to a higher standard of reasonableness.
- What the Minister has done, is doing and intends to do must be rationally connected to the purpose of the provision (the steps have the potential to uncover relevant evidence).
- The Minister must act in good faith and must provide sufficient evidence of its efforts, as well as concrete plans and time estimates.
- The detained person also has an obligation not to obstruct and to cooperate.

See: *Canada (MCI) v X*, 2010 FC 1095

4. Grounds for Detention: Suspicion of inadmissibility (s. 58(1)(c))

Similar to the ground of identity, suspicion of inadmissibility is a determination made by CBSA, to which determination the ID must defer.

This ground of detention reads:

> the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.

There are three components to this ground:
- "reasonable suspicion";
- "necessary steps to inquire" being taken; and
- grounds of inadmissibility.

There is a low threshold for continued detention on this ground: "reasonable suspicion" that there may be "reasonable grounds to believe" that a person is inadmissible on one of the listed grounds, and deference is given to the Minister's choice of investigative steps. Where the investigation uncovers evidence to support an inadmissibility, the grounds for detention will shift (or end).

The regulations are silent about this ground of detention and there is little guiding jurisprudence.

This ground of detention is not regularly used.

A. What is a "reasonable suspicion"?

- While the "reasonable suspicion" standard is low, this does not mean the Minister can justify continued detention based on simple intuition or pure speculation.

- "A reasonable suspicion is one which is supported by objectively ascertainable facts that are capable of judicial assessment." (*R. v. Kang-Brown*, 2008 SCC 18, para 75)
- The Minister must do more than simply assert a suspicion and argue that it is reasonable; it must disclose evidence to establish the reasonableness of the suspicion of potential inadmissibility.
- While the evidence may be circumstantial, open to more than one interpretation, and may even be contradicted by other evidence, the question for the ID is "whether the evidence, when considered globally, could support the possibility of inadmissibility." (*Canada v. X,* 2010 FC 112, para 16)

B. What are "necessary steps"?

The ID must not "usurp the Minister's role" by second guessing or dictating the steps taken to investigate the suspected inadmissibility.

- "The Board's supervisory jurisdiction on this issue is limited to examining whether the proposed steps have the potential to uncover relevant evidence bearing on the Minister's suspicion and to ensuring that the Minister is conducting an ongoing investigation in good faith." (*Canada v. X,* 2010 FC 112, para 20; see also *Canada (Citizenship and Immigration) v. B232*, 2011 FC 257, paras 35-41)

Despite deference, the Minister must still adduce evidence to prove the investigation is ongoing and may produce results relevant to the Minister's specific suspicion.

If this is the only ground being relied on, the Minister will also be required to establish in the context of the s. 248 analysis whether continued detention is necessary for the investigation to continue (248(a)); how long the investigation is likely to take (248(c)) and whether the Minister has been diligent in the investigation (248(d)). These factors may support release even if this ground is established.

C. What are the inadmissibilities involved?

S. 58(1)(c) applies to the major inadmissibilities (ss 34 – 37 of the IRPA): security, violating human or international rights, serious criminality, criminality or organized criminality.

- Some of these inadmissibilities require very specific conditions to be met, e.g.
  - being the subject of an order or regulation made under section 4 of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* (s. 35(1)(e)), or
  - having been convicted in Canada of an offense carrying a maximum sentence of 10 years (s. 36(1)(a)).
- Other inadmissibilities are far vaguer, such as inadmissibility for membership in an organization that has engaged in subversion of a democratic process (eg 34(1)(f) in relation to (b.1)) where neither "membership," nor "subversion," nor "democratic process" has been defined in IRPA.
- Further, the interpretive clause s. 33 of the IRPA provides that the facts underlying these inadmissibility provisions include those "for which there are

reasonable grounds to believe that they have occurred, are occurring or may occur."

- Despite the breadth of these grounds of inadmissibility, be mindful that to maintain detention the Minister must:
    - adduce evidence of specific facts that provide a reasonable basis to suspect that the person concerned is inadmissible on one or more specific grounds
    - and, as noted, that the Minister is taking concrete necessary steps to inquire into that/those specific inadmissibility/ies.

D. What this detention ground is not

This detention ground is distinct from the danger to the public grounds as well as from the UTA provisions relating to persons facing an admissibility hearing. It is likely to be alleged in cases where someone has only recently been detained and there is not yet enough evidence to support the issuance of a s. 44 report for inadmissibility and/or to allege that the person presents a present and future danger to the public.

E. Increasing burden on the Minister

The longer a person is detained on suspicion of inadmissibility, the more time the Minister will have had to investigate the well-foundedness of the suspicion, and thus the heavier the evidentiary burden will become to justify continued detention.

At each detention review, the Minister will need to prove that the suspicion is **still reasonable** in light of the information obtained in the investigation; that there are **further** steps in the investigation that are necessary before the Minister can reach a conclusion as to whether there are reasonable grounds to believe the person is inadmissible; that the Minister has **remained diligent** in pursuing those steps; and that **continued detention is necessary** in order for the Minister to take those steps.

F. Shifting grounds for detention

As always, the Minister may raise a different ground for continued detention than that which justified the original arrest and/or the previous detention reviews (*Canada (Public Safety and Emergency Preparedness) v. Ismail,* 2014 FC 390). For example, once the inadmissibility has been established, they could change to a DTP allegation.

G. Best Practices on Inadmissibility Cases

Depending on the specifics of the allegation and your opportunity to prepare your client, given the low threshold for "reasonable suspicion" and the breadth of inadmissibility, consider whether your client may wish to exercise their right to silence and not testify.

Whether a detainee is compellable by a Member is disputed question of law. Some Members maintain that a detainee is compellable, others find that they are not. (See Section 6.2 Oral Evidence and Witness for more details).

PRACTICE TIP: Unless you are very confident that the PC through oral testimony will be able to fully displace the allegations against them, there is a real risk of adverse

findings that will harm your client not just in the detention review but potentially also in the context of admissibility proceedings.

5. The 248 Factors (R248)

Even if the Minister has established one or more grounds of detention, the Member is still required to assess whether an individual should be detained or released, having regard the "248 factors." S. 248 comprises a list of factors that were initially codified into law to ensure *Charter* compliance.

Immigration and Refugee Protection Regulation 248 reads:

> 248 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.

These are "non-exhaustive" factors. A common addition to this list is "conditions of detention," including health and safety risks caused by a pandemic (ex the COVID-19 risks posed in congregate setting), harsh conditions of detention in provincial correctional centres (including frequent lockdowns, limited access to showers, telephones to call family, friends or counsel).

A. Reasons for Detention

In general, UTA is seen as "less serious" a ground for detention than DTP. Addressing this factor is an opportunity to emphasize whether the person concerned is lower on the UTA or DTP spectrum. The Federal Court has also found that UTA due to mental health issues "would weigh very differently in the overall balancing than a flight risk based on deliberate or wilful non-compliance" (*Lee v. Canada (Public Safety and Emergency Preparedness),* 2022 FC 383, para 64).

B. Length of Detention and Future Length of Detention

The Minister's evidentiary burden grows heavier over time (*Charkaoui v. Canada (MCI),* 2007 SCC 9). There is an increased quantity and quality of evidence required to justify detention (*Brown*).

C. Alternatives to Detention

Immigration detention is to be used as a last resort. If the Immigration Division determines there are grounds for detention, it must also consider whether an alternative to detention exists.

- Release without conditions (release on own recognizance) should be the first consideration, with conditions only imposed as necessary to manage risk.
- Alternatives to detention can include:
    - A detainee posting their own cash bond;
    - A bondsperson posting a deposit (cash bond) or guarantee (performance bond) or both;
    - Community Case Management and Supervision (i.e., Toronto Bail Program) (see below sections for details).
- The ID can impose any conditions that it considers necessary. Conditions should be necessary, reasonable, and linked to the ground of detention. The cumulative effects of all the conditions should also be considered, with particular attention for whether vulnerable individuals will be able to comply with a particular condition and whether that condition is necessary to achieve its proposed outcomes.
- The Member must actively consider and reassess alternatives to detention at each review – this includes reassessing previously proposed alternatives to detention, as circumstances may have changed.
- The Member should always articulate any concerns with a proposal, and give an opportunity for both parties to respond (including calling witnesses where appropriate) before rendering a decision.

Members have a heightened obligation to consider alternatives to detention when detention becomes lengthy and when the detainee is a vulnerable person:

- *Guideline 2* also states that Members have a heightened obligation to consider ATDs in cases involving vulnerable persons, such as persons with mental illness, minors, the elderly, individuals with diverse sexual orientation and gender identity and expression (SOGIE) and survivors of torture, genocide, crimes against humanity, gender-related violence, and violence based on SOGIE.
- In *Lee v. Canada (Public Safety and Emergency Preparedness),* 2022 FC 383, the Court held that: “there is a heightened obligation on the part of the ID to consider alternatives to detention for vulnerable persons such as persons with mental illness… a member should “actively question” the steps that the Minister has taken to make an alternative to detention available when the person concerned is a vulnerable person.” (see also: *Canada (Citizenship and Immigration) v. Tjhang*, 2022 FC 1664)

i. Bondspeople

Requirements of a bondsperson:

- Posting a bond is more than simply putting up money for release. The bondsperson must be able to effectively supervise the individual and convince the ID that they can ensure compliance.
- A bondsperson must post their own money – it is a criminal offence for the detainee to repay their bondsperson.
- A bond can be either a “deposit” or a “guarantee”:

    - A deposit is a payment of a sum of money by a person to the Receiver General for Canada. It is often referred to as a "cash bond", although is usually not paid in cash (see section 8.8 of ENF Manual 8, "Deposits and Guarantees" for acceptable forms of payment).
    - A "guarantee" is a written enforceable undertaking by a third party (the guarantor) that the person concerned will abide by the conditions imposed and to forfeit or pay a sum of money to the Crown if the person concerned breaches any conditions. The guarantor and the person concerned must both agree to the conditions. These are also called "performance bonds".
- A bondsperson must not have signed or co-signed another guarantee that is in default and must have capacity to contract in the province where the deposit is paid or guarantee is posted. (*IRPR*, s. 47(1))
- In addition, a person who posts a guarantee must:
    - be a Canadian citizen or a permanent resident, physically present and residing in Canada;
    - be able to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed; and
    - present to an officer evidence of their ability to fulfil the obligation arising from the guarantee. (*IRPR*, s. 47(2))
- Temporary residents are eligible to post a deposit, but not a guarantee. They should be able to establish they will be in Canada for the duration of the supervisory period.
- If an officer has reasonable grounds to believe the money for a deposit or guarantee was not or would not be legally obtained, the officer will not allow the bond to be posted.
- There are no specific requirements regarding the amount, but the proposed amount must be considered meaningful to the bondsperson based on their income and assets. The bond should also be proportionate to the identified risk.
- The bond amount imposed is not always, and often not, the same as imposed on the criminal bail conditions (if applicable).
- If a guarantee is being proposed, the bondsperson has to show they have sufficient funds. Even if the ID finds the bond to be suitable, CBSA may still conduct a solvency assessment at the time the bond paperwork is process. Information on this can be found at s. 8.14 of ENF Manual 8.

The more the bondsperson knows about the situation history of the person concerned, the better. The following information is relevant in a determination of a bondsperson's suitability, and a bondsperson should be prepared to address all of it:

- How they know the person concerned, for how long, and the nature and strength of their relationship;
- The last time the bondsperson and person concerned were in contact, both in person and over the phone;
- Whether the person concerned can live with the bondsperson:
    - If the person rents, ensure the bondsperson is allowed to have a long-term guest.

    - If not, why not, and how they will nonetheless be able to supervise the person concerned);
- How the person concerned will be financially supported on release, especially if they do not have a work permit;
- Whether the bondsperson understands what will happen to the bond money if there is a breach;
- Proportionality of the proposed bond to the bondsperson's financial capacity, and the financial and emotional impact of forfeiture on the bondsperson;
- Bondsperson's employment information, including employer, number of years with that employer, annual income (as indicated on last Notice of Assessment);
- Whether the bondsperson owns any property and, if so, the value of the property, whether there is a co-owner, value of any mortgage;
- Any previous history of being a bondsperson, either immigration or criminal;
- Any criminal record and, if so, the nature of the criminality and when it occurred;
- Any knowledge of criminal release, probation or parole conditions, especially if these conditions will be incorporated in the ID's release plan;
- Bondsperson's knowledge of the detained person's immigration and criminal history, including any inadmissibilities or inadmissibility allegations, as well as the next steps in their immigration process;
- Whether and to what extent the bondsperson had knowledge of any past non-compliance from the person concerned;
- How the bondsperson will exert influence over the person concerned and ensure the comply with potential removal; and
- What the bondperson would do in the event that they are concerned that the client will breach or has breached.

Where your client is managing an addiction, it is important to canvass the following with the bondsperson: their knowledge of the person's addiction issues, how they will ensure that the client complies with any treatment conditions, whether the BP themselves has any history of addiction, whether alcohol is kept in the house.

PRACTICE TIP: Fully and thoroughly interview the bondsperson and the person prior to presenting the alternative to detention. Canvas both the options of deposit and guarantee. The ID appreciates it when counsel submits the Bondsperson Information Form to the parties in advance, so that information is on record prior to the hearing. The Member will likely want to hear from the bondsperson, who will also be subject to cross-examination by CBSA. The Member and CBSA will likely want to question the detainee to assess credibility and will consider consistency in the answers.

ii. Mental Health and Addiction Conditions: Sobriety and Treatment

For individuals with mental health and addiction issues, the ID will sometimes request that an ATD includes treatment for alcohol or drug abuse, mental illness or anger management. The ID will sometimes seek to impose a sobriety condition.

It can be very difficult to arrange acceptance into such programming from detention (especially residential treatment, and for persons without health insurance), which in

turn can make it difficult to propose an ATD that the ID considers viable. Such conditions can also be difficult to follow even post-release, thus risking a breach of release conditions and re-arrest.

Consider arguing against any condition that the client maintain sobriety. It is contrary to the principle of harm reduction, and may set the client up for failure (and re-arrest). ((See *R. v. Zora*, 2020 SCC 14 for the principle (albeit in criminal law) that bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention).

iii. CBSA Alternatives to Detention: Community Case Management Supervision and Electronic Monitoring

CBSA is required to assess a client for ATD suitability, including Community Case Management Supervision. This is usually done by a CBSA Community Liaison Officer ("CLO"), who will review a client's file then recommend a particular type of ATD, if any. These reports are often filed as evidence with the ID.

Electronic Monitoring is a pilot project in the Greater Toronto Area. It consists of an ankle monitor and is intended for high-risk clients. EM monitors an individual's location at all times. The data is collected and analyzed by Correctional Services Canada ("CSC").

CCMS programs currently include: John Howard Society (Vancouver, Victoria, Halifax, Sarnia, Regina, Kingston, Windsor, London, Calgary, Niagara, Montreal, Winnipeg, Edmonton, Ottawa, Saint-John NB, St-John's NL); Toronto Bail Program (Toronto); and the Salvation Army (Vancouver and Toronto).
Entry into the John Howard Society and the Salvation Army programs require a referral from CBSA, a signed Supervision Agreement with the detainee and may include residence.

The Toronto Bail Program is a professional supervision program only available in Toronto:

- An individual or their counsel may apply to TBP. CBSA may also refer a client to TBP. However, for clients with "serious criminality", only CBSA can make a referral; TBP will not consider self-referrals or referrals from counsel.
- If the ID orders release to TBP supervision, the ID will include a condition that the client remain in good standing with TBP. If the client then breaches this condition, TBP will withdraw supervision and CBSA will most likely issue a warrant for arrest of the client.
- TBP can be an ATD either on its own or in addition to a bondsperson. If there is no bondsperson, ideally the client is at least able to arrange their own accommodation. If the client has no bondsperson and no available accommodation, TBP will try to arrange a shelter bed. In this situation, the ID will

usually impose a condition that the release order only takes effect upon TBP arranging a bed for the client.
- Once released, a client will be assigned a TBP caseworker. The client must remain in contact with their caseworker, report as required and follow any other directions imposed by their caseworker. Depending on the client's level of vulnerability, their caseworker may help them report to CBSA, arrange and follow treatment, etc. TBP has caseworkers specifically dedicated to clients with addictions issues and clients with mental health issues respectively.

iv. Conditions of Release

- Release with minimum conditions (without a deposit or guarantee) should be the first consideration and "members should apply conditions of release as necessary to manage heightened risk." *Guideline 2* provides helpful language on principles of conditions, as well as a list of potential conditions to impose).
- According to *Guideline 2*, when conditions are imposed, they should include at least 1) providing an address and residing at that address and 2) advising CBSA of a change of address prior to moving. Ideally, the person concerned will have a suitable and stable residence to go to upon release and that they can propose as part of their ATD. For vulnerable clients (or clients who might have difficult complying), you will likely want to argue for less onerous conditions (i.e., informing of a change of address within 7 days).
- The ID also usually imposes a reporting condition, often monthly. CBSA may request that the ID order more frequent reporting, particularly if removal is imminent. You can argue that the reporting conditions are unreasonable, particularly if it is an in-person reporting and the client has employment, childcare responsibilities etc.
- A condition that the person concerned appeared as required by CBSA, including for removal, is standard.
- The ID often imposes other standard conditions, including providing a travel document to CBSA and/or cooperate with CBSA in making removal arrangements, and not committing any act that results in a conviction.
- Other more restrictive conditions may include a curfew, no-contact order, abiding by parole/probation/bail conditions and house arrest. As the ID notes in Guideline 2 at 3.2.2., some of these conditions (i.e. house arrest and electronic monitoring) are considered exceptional measures.

D. Conditions of Detention

i. Mental Health

The evidence is clear that immigration detention – even for short periods and even in immigration holding centres – can have a damaging impact on mental health. In *Lee v. Canada (Citizenship and Immigration)*, 2022 FC 344, Justice Ahmed wrote: "The severity of the damaging impacts of immigration detention on those with mental health issues cannot be understated or ignored."

Consider leading evidence of your client's mental health and how it is deteriorating due to ongoing detention. This may include:

- Client testimony
- Medical records (pre-dating detention and/or from the facility)
- Information from friends, family or a mental health worker who are in contact with the client
- Testimony from the Designated Representative on whether their condition is deteriorating
- A psychological assessment of your client (in Toronto, these can be arranged to be done remotely).

Looking at the transcripts of the hearings can provide you with an indication of how the client's mental health might be changing over time.

Even if you cannot get individualized evidence, consider filing academic and research articles about the impact of detention on mental health, including:

- "We Have No Rights" Arbitrary imprisonment and cruel treatment "of migrants with mental health issues in Canada", International Human Rights Program, 2015
- "The impact of immigration detention on mental health: a systematic review", von Werthern et al. BMC Psychiatry (2018) 18:38
- "Immigration Detention and the Problem of Time: Lessons from Solitary Confinement", Efrat Arbel & Ian Davis (2018) 4(4) International Journal of Migration and Border Studies 326-344
- "Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada", Janet Cleveland, Cécile Rousseau, Can J Psychiatry. 2013 Jul; 58(7): 409-16
- "I Didn't Feel like a Human in There: Immigration Detention in Canada and its Impact on Mental Health", Human Rights Watch and Amnesty International, 2021

ii. Conditions of Detention (i.e., Lockdowns, pandemic protocols)

Conditions of detention, such as lockdowns and pandemic protocols, can make detention more onerous and weigh in favour of release. Question your client about whether they have had access to outdoor space, telephones, showers, and general conditions of detention. Ask how much time they get out of the cell, how many people are in the cell, and the cleanliness of the facility.

Evidence to lead could include client testimony or, in some cases, news articles about particularly bad conditions in some correctional centres.

6. Administrative Law Principles (procedural fairness)

Procedural fairness requirements may be set out in legislation, regulations, policy guidelines (insofar as they set legitimate expectations if they are non-binding), and the

common law (see: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

Some general rights that might be afforded in an administrative decision include:

- A right to know about the hearing;
- A right to know the case that will be put forward;
- A right to have a chance to meet that case;
- A right to make oral representations;
- A right to cross examine witnesses;
- A right to be represented by counsel;
- Disclosure of documents;
- Adequate time to prepare;
- Adequate time to make oral submissions.

There are common fairness issues that arise at detention reviews include:

- Interpretation issues at the hearing;
- Vulnerable detainees who may require, but are not appointed, a designated representative;
- Hearings which are held outside of required statutory timeframes to the detriment of the detainee;
- Detainees unable to speak with counsel to effectively prepare prior to the hearing;
- Detainees compelled to testify at their hearing; and
- Inadequate, incomplete or untimely disclosure of evidence by the Minister.

A. Documentary Disclosure

Basic rules of disclosure:

- If a party wants to use a document at a hearing, the party must provide a copy to the other party and the ID on the timelines set out in ID Rule 26:
    - **As soon as possible** for a 48 hour or 7-day review / admissibility hearing, or;
    - **At least five days before the hearing** in all other cases. (ID Rules, s. 26)
- The ID is not bound by legal or technical rules of evidence; it can deal with all proceedings before it as informally and quickly as circumstances and considerations of fairness and natural justice permit. (*IRPA*, s. 173(c)). The Immigration Division can rely on direct and indirect evidence, and on hearsay evidence, so long as it is credible and trustworthy. It is a matter of weight.
- Both parties have the right to present relevant evidence at a detention review, **including witnesses** – this includes the right to question witnesses. (See: *Guideline 2*, s. 7.3)

Brown is clear on the disclosure obligation on the Minister:

- “All relevant information must be disclosed, including information that is only to the advantage of the detainee.” (para 142)

- "Procedural fairness requires that the detainee have advance disclosure of all evidence relevant to the section 248 criteria, regardless of whether the Minister relies on it to support continued detention." (para 144)
- "A detention decision may be vitiated if it is established that there has not been timely disclosure of material documents which results in a breach of procedural fairness." (para 149)

Counsel needs to decide whether to file their own documentary disclosure:

- Remember the detainee is not required to do anything by law – because the Minister carries the burden, a detainee's decision to introduce evidence in response is entirely tactical (*Brown*, para 122).
- Disclosure can be critical to rebut the Minister's evidence, to rebut or mitigate allegations with respect to grounds for detention (i.e., evidence of rehabilitation in a DTP case), to rebut next (i.e., possibility of removal), to bolster an alternative to detention.

Counsel may need to object to problematic disclosure:

- Hearings officers often try to recite information into the record as evidence. A hearings officer is not a witness. Procedural fairness requires detainee have **advance disclosure** of all evidence – this is breached if Minister relies on facts that are not disclosed in advance evidence.
- Evidence from the Enforcement/Removals Officer should be in the form of a statutory declaration disclosed before the hearing, or oral testimony.
- Responding to the Minister's late evidence:
    - The ID is generally very accepting of late disclosure at early reviews.
    - If CBSA discloses significant documents from the file on the eve of the hearing, you can object on the basis that this evidence was known to the Minister earlier and should have been disclosed in compliance with ID Rules, s. 26.

How and when to object:

- Be ready to raise an objection to problematic disclosure.
- Consider the timing of your objection. Sometimes, you will need to object at the start of the hearing (i.e., if Minister's counsel is seeking to enter false or misleading evidence). Other times, you will need to interrupt Minister's Counsel (i.e., when they stray into testifying). Finally, there will be times when your objection can be made in submissions (i.e., that nexus has not been established because there is no direct testimony from a removals officer). Be clear about the proposed remedy request (evidence is not entered, postponement needed for client to respond fairly, etc).
- Consider objecting if the Minister seeks a recess or postponement to remedy inadequate evidence. There are specific legislated timelines in which the Minister must establish their case. The ID should not ignore those timelines and permit the Minister more time to meet their burden other than in exceptional situations.

If you believe that the Minister has **additional relevant evidence** that has not been disclosed, there are a number of way to request/demand it:

- Written request to CBSA: Ideally, identify relevant material in advance. If this is the case, write to CBSA and copy the ID, demanding disclosure of the requested material and explaining why it is relevant to the detention review.
- Oral request to the ID: Sometimes, material becomes relevant in the course of a hearing and you will want disclosure. You may make an oral request for the material during your submissions, per ID Rules, s. 38, and ask that the Member order disclosure.
- Written Request to the ID: You can also make a written request to the ID that they order disclosure per ID Rules, s. 38.

If CBSA refuses disclosure due to issues of privilege, this is a *Canada Evidence Act* matter and must be litigated in Federal Court. You should seek assistance from senior counsel, as these matters are complex.

B. Oral Evidence and Witnesses

Counsel has the right to present and question witnesses at a detention review.

i. Detainee

Whether a detainee should testify is not an easy question. In some cases, their testimony will be necessary:

- If a bondsperson is presented
- To address grounds of detention
- To lead evidence on conditions of detention
- To lead evidence on the best interests of children.

When determining whether a detainee should testify, consider:

- Whether you have had adequate time to prepare them
- Whether they can make the situation worse by testifying
- That the Member and CBSA will have a right to cross-examine them if they testify.

Whether a detainee is compellable by a Member is disputed question of law. Some Members maintain that a detainee is compellable; others find that they are not. The compellability of a detainee is currently being litigated in Federal Court (*Hemond v. MCI*, IMM-8969-22, leave granted).

If a Member insists that the detainee is compellable, consider objecting and maintaining that your client has a right to **silence** pursuant to section 7 of the *Charter*. While not yet squarely decided in the detention review context, the Federal Court has held that individuals are not compellable at security certificate detention reviews (see *Jaballah* (Re), 2010 FC 224 at paras 77-78, *Almrei* (Re), 2009 FC 3 at para 70).

If the Member overrules your objection, you can advise the Member that your legal advice to your client will have changed based on their ruling, and request a recess to provide further legal advice before they testify. You will then want to advise your client that the Member has ruled that they are compellable, and advise your client of their obligation to answer questions in light of that ruling.

ii. Bondsperson

The Member may find a bondsperson acceptable without hearing their direct testimony if there is a joint recommendation for release, or if Minister is not objecting.

Otherwise, the bondsperson will likely have to testify:

- A bondsperson must be given an opportunity to testify before they can be found not suitable.
- Minister's counsel will often request the detainee testify before the bondsperson – inconsistent testimony may impact suitability of bondsperson and credibility of detainee.
- A bondsperson will usually be questioned first by Minister's counsel – they will be expected to be aware of information in the disclosure, and answer questions about the factors. Then, counsel will have opportunity to question. The Member may interject with their own questions throughout.
- If a bondsperson is not available on the day of the scheduled detention review, you may request an early detention review or adjournment to accommodate their schedule.

iii. Summoning Witnesses

Typically, if you informally advise the CBSA in advance that you wish to examine an officer, they will make that person available.

If they refuse, counsel can apply to the ID for a summons to compel an individual to testify. This application can be done orally at a proceeding or in writing (ID Rules, s. 33).

iv. Cross-Examination of CBSA Witnesses

You may want to ask CBSA witnesses questions to show their evidence is not reliable or credible, and/or to get evidence that can help the detainee.

Assess whether cross-examining CBSA will harm your client. Under normal circumstances, the worst a cross-examination will do is re-affirm material already in evidence.

C. Timing of Detention Reviews

You may request an early detention review at any time to the ID in writing. This is critical if there has been a change in circumstance. The ground for detention may no longer be

made out (i.e., identity is now established) or a new alternative to detention may be available. It is good practice to contact CBSA in advance to obtain consent (or no objection) to the early detnetion review.

6. Charter Compliance

Efficient, straightforward arguments are appropriate for most detention reviews. Before making a Charter argument, it is important to build a solid evidentiary record for the alleged breach.

A. Legal Framework

The Minister always has the onus to provide justification (with evidence) of the grounds and lawfulness of detention, including compliance with the *Charter.*

The person asserting a *Charter* breach (detainee) has the onus to prove the breach. Most Charter issues arising out of immigration detention will fall under Sections 7, 9, 12 and/or 15 of the Charter.

Key concepts include:

- Proportionality
- Arbitrariness
- Cruel and unusual treatment
- Non-discrimination

The ID Member has a duty to consider the constitutionality of every detention and must proactively adjudicate the case, including ascertaining the facts needed to come to a conclusion. Per *Brown*:

> [106] There is a duty on ID members to exercise their discretion in a manner consistent with the Charter…
>
> [107] As a tribunal of competent jurisdiction capable of providing Charter remedies ….[t]he ability, indeed obligation, to consider sections 7, 9 and 12 is inherent in the exercise of the discretion concerning whether or not detention is warranted.

B. Section 7

Section 7 of the *Charter* guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

Every detention engages Section 7 automatically by virtue of a deprivation of liberty. Security of the person rights are also implicated in detention. Principles of fundamental

justice include procedural fairness, and concepts such as proportionality and arbitrariness.

The Regulation 248 factors have been incorporated into detention decision-making to ensure s. 7 Charter compliance, per *Sahin v. Canada (MCI)* (T.D.) 1994 CanLII 3521; they are non-exhaustive. More recent jurisprudence confirms that Charter compliance requires consideration of additional factors to ensure proportionality, and that detention is hinged to its purpose.

i. Indefinite Detention and Non-Cooperation

What is indefinite detention?

- The indefiniteness of a detention is inextricably linked to the current and future anticipated length of detention.
- Lengthy detention to date coupled with clear evidence of unlikeliness of removal in the foreseeable future may make detention "indefinite".
- From *Sahin v. Canada (MCI)* (T.D.) 1994 CanLII 3521:
    - "…. when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed "indefinite.""

Indefinite detention and non-cooperation:

- If the PC is unwilling to consent to removal, or does not provide information that will facilitate removal, CBSA and the ID may consider that they are not cooperating.
- This may include:
    - refusing to sign a travel document or COVID liability waiver;
    - refusing to attend detention reviews;
    - refusing to meet with CBSA;
    - providing inaccurate or incomplete information to CBSA resulting in delays in removal.
- Prevailing case law from the FCA and FC currently states that non-cooperation justifies ongoing or even indefinite detention (Lunyamila v. Canada (Public Safety and Emergency Preparedness), 2018 FCA 22, *Brown*). The FCA in Brown held:
    - [99] Detention cannot be ordered on the basis of non-cooperation alone—to do so would be contrary to sections 7 and 9. But where the impasse in effecting removal is disputed identity and the detainee has refused to cooperate in confirming their identity, delays in removal cannot count against the Minister. Release in these circumstances would encourage detainees to be less than forthcoming. Where a detainee is uncooperative, detention cannot be classified as indefinite because it is within the detainee's control to change their destiny**.** That said, there will be cases where the receiving country alone disputes identity. Care must be taken not to attribute this to the detainee, who should not bear the burden of the country's recalcitrance to confirm identity.

- BUT non-cooperation is just one factor of many. The Member is obligated to balance all factors; non-cooperation is not determinative.
    - In *Canada (MPSEP) v. Chipovalov,* 2017 FC 623, the ID found that the PC's length of detention was due primarily to his refusal to cooperate with the CBSA and then went on to weigh this factor against the others set out in Section 248. In that particular case, the ID found that continued detention would not further the goal of obtaining a travel document for the Respondent, and further that Respondent's non-cooperation alone was insufficient to support continued detention. The Court found that the ID properly weighed the evidence, applied the case law and reasonably exercised its discretion to order release.
- In assessing "indefinite" detention and non-cooperation, consider:
    - Distinguishing between ability and willingness to cooperate
    - Determining the impact of any mental health issues on cooperation
    - Whether unwillingness to return is based on fear in country of origin

Indefinite detention and inability to remove someone:

- When there is no possibility of removal, counsel should argue that there is no nexus to an immigration purpose and release is required. See the comments above under danger to the public on detention where removal is no longer a possibility, as well as comments below on arbitrariness.

ii. Proportionality

International Law speaks about proportionality in detention:

- Proportionality is a key component of the legality of any detention: detention of migrants must be a measure of last resort, detention is permissible only for the shortest possible period of time, and detention must be necessary and proportional in all the circumstances (Resource: UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, Guideline 10: Conditions of Detention; UNGWAD Opinion No. 15/2014 (Canada) quoting Opinion No. 56/2011 (Lebanon) and 4/2011 Switzerland))

Section 7 of the Charter requires that detention always remain proportionate to its purpose:

- Immigration detention is for an administrative purpose. The administrative purpose is key to determining whether detention is proportionate and justified in the circumstances.
- Immigration detention must never be punitive in nature.
- Assess the 248 factors and other relevant factors to determine proportionality of an individual's overall detention:
    - Is the detention unduly lengthy?
    - Is there an uncertain future length?
    - Are there delays and what are the reasons for them / who is the cause of them?
    - Are there less harsh alternatives available (i.e. - is detention minimally restrictive)?

- What are the conditions of detention and are they unduly harsh (i.e. - detention in provincial jail, COVID related concerns)?
- Are there any best interests of the children engaged? (i.e. - separation from a child, a child in care)

Some examples of when detention might no longer be proportionate to its administrative purpose:

- Cases of indefinite detention (no end in sight);
- Cases with harsher conditions of confinement (provincial jails, lockdowns);
- Cases where detention has been lengthy and flight risk is the only ground for continued detention;
- Cases where someone has mental health or physical health issues which are exacerbated in a detention setting.

iii. Arbitrariness

Detention must **always** remain tethered to a valid immigration purposes such as removal from Canada. If there is no longer a nexus to a valid immigration purpose, then detention is arbitrary and unlawful. (see section under Danger to the Public on nexus for case law).

Given the requirement of a nexus to removal, it is important to request disclosure and concrete timelines about when exactly removal will be possible. If there is sufficient evidence that removal is not possible, then detention has become unhinged from its statutory purpose and the ID **cannot** order continued detention.

Examples of when removal might not be possible (and detention arbitrary):

- If the receiving country appears unwilling to issue a travel document;
- If citizenship of the detainee cannot be established or the they are stateless;
- if the CBSA investigation and steps required for removal are unclear or appear to be stalled;
- if CBSA consistently cannot provide a timeline for removal;
- If there are significant and ongoing impediments to removal;
- If the person concerned cannot meet the requirements of the receiving country;
- If the person is unable to consent to removal.

C. Section 9

Section 9 of the *Charter* protects against arbitrary detention.

This section of the Charter will be most applicable when determining whether or not there is an ongoing nexus between a detention and an immigration related purpose.

Not all detentions will engage Section 9 unless they have become unhinged from their purpose.

D. Section 12

Section 12 of the Charter protects against cruel and unusual treatment and punishment.

Section 12 is not always engaged in detention cases but in some cases it may be applicable. This section becomes most relevant in cases where conditions of detention are extremely harsh or punitive (like solitary confinement – see *CCLA v Canada (AG)*, 2019 ONCA 243).

Most often, section 12 arguments will be based on either length of detention, conditions of detention or a combination of both (lengthy, harsh detention).

The ID must **always** consider conditions of detention as they relate to the **overall proportionality** of an individual's detention. This is **distinct** and separate from alleging a **breach of section 12** on the basis of conditions. The threshold for finding that a detention has become cruel and unusual and breach of section 12 is quite high. It is important to have credible, case-specific evidence to back up the allegations (institutional records, affidavit evidence, medical evidence).

Some examples of when detention might constitute a section 12 breach include:

- Solitary confinement for more than 15 days;
- Denial/inability to access medical care because of conditions;
- Severe exacerbation of mental or physical health issues due to conditions (lockdowns, segregation);
- Violence experienced by detainees in general population;
- Deprivation of shower rights for lengthy periods of time;
- Frequent, lengthy lockdowns.

The test for establishing a breach of section 12 is a "high bar". The treatment (ongoing detention in those conditions) must not ne merely disproportionate or excessive but is so excessive as to "outrage standards of decency" and be "abhorrent or intolerable to society. (see*: Lee v. Canada (Public Safety and Emergency Preparedness),* 2022 FC 383, paras 78-84).

E. Section 15

Section 15 protects against discrimination and differential treatment.

This will not be implicated at each detention review but may become relevant if you are alleging differential treatment of your client on the basis of mental health issues.

F. Vulnerability and the *Charter*

Vulnerability is a central consideration for the ID's determination of:

- whether the overall detention is proportionate (s. 7, 12)
- whether the detention remains connected to a valid immigration purpose (s. 9)
- Whether the person's vulnerability is the sole factor underlying the alleged ground of detention (s.15)

EXAMPLES:

- If the person detained has trauma stemming from a previous incarceration such that their mental state is declining in detention, it may be possible to argue that the current detention is not proportionate or is cruel and unusual, given the impact on the detainee.
- If a UTA allegation stems solely from a mental health issue which impacts the person's ability to cooperate with CBSA, it may be argued that the detention is discriminatory (s. 15) and disconnected from an immigration specific purpose. [*This argument has yet to be successful*.]

At each detention review, counsel should consider whether a detainee's *Charter* rights might be impacted by both their vulnerability and the detention proceedings and to clearly present these issues to the ID.

7. Vulnerable Detainees

A. Designated Representative

i. Role of a Designated Representative

- If the client is under 18 years old or does not understand or cannot meaningfully participate in detention review proceedings, a designated representative must be appointed. (IRPA, section 167(2))
- A designated representative is distinct from counsel and may be required as a matter of natural justice and procedural fairness.
- The role of a designated representative is to facilitate the individual's ability to participate in the proceedings in a manner that sees their interests adequately protected.
- The designated representative is appointed **solely** for proceedings before the Board, and has not jurisdiction to act in other immigration processes at IRCC or with CBSA (i.e., accepting PRRA service on behalf of someone without capacity).
- The Board publishes a "Designated Representatives guide" providing information on the role and responsibilities of a designated representative, as well as a "Code of conduct for designated representatives".

ii. Appointment of a Designated Representative

- The Board must consider whether the individual's interests could be better served by both counsel and a designated representative.
- If you believe your client needs a designated representative, you should inform the Board as soon as possible, support the request with evidence (medical if possible). The Member will often question the person concerned to determined if a designated representative is required.

iii. Working with a Designated Representative

- Counsel and the designated representative should work together as a team.

- Designated representatives can provide evidence that counsel cannot (such as mental health decline of the person in detention).
- There is no clear guidance on what can be done if you are having concerns with the designated representative (i.e., with the quality of assistance). Because the Board appoints the designated representative, only the Board can terminate or change that designation. It can be difficult, if not impossible, to change the designated representative once they are appointed.

B. Children

The detention of minors is meant to be a measure of last resort (*IRPA*, s. 60).

As noted above, the best interests of any child directly affected must be taken into account at every detention review (IRPR, 248(f)). "Directly affected" does not require the child to be detained or "housed" with a parent.

Guideline 2 refers to the detention of a parent or guardian, but this could be broader than that depending on circumstances.

Lead evidence on the impact detention is having on the child. The Regulations and *Guideline 2* provide these non-exhaustive factors as a guide:

- Child's physical, emotional and psychological well-being
- Child's healthcare and educational needs
- Importance of maintaining relationships and stability of the family environment, and the possible effect on the child of disrupting those relationships or that stability
- The care, protection, and safety needs of the child
- 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.

Consider also filing academic or published reports on the psychological impact of detention on children, and on the separation of children from parents who are detained, such as the IHRP report, "No Life for a Child":

- "Children who live in detention for even brief periods experience significant psychological harm that often persists long after they are released."
- "Where children are spared detention, they are often separated from their detained parents and, as a result, experience similarly grave mental health consequences."

8. Judicial Review of a Detention Decision

Judicial reviews of detention decision are complicated by the fact that they can be mooted out by a new decision in as little as seven to thirty days.

If you secure release of your client, the Department of Justice might bring an interim stay seeking to stop their release.

The Federal Court has now issued practice guidelines for interim stays in their scenarios (see: Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings, June 24, 2022).

The Federal Court may also shorten time limits, allowing the judicial review of the decision to be heard on a very expedited basis.