Immigration Detention

Stephen Foster
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RÉSUMÉ
Cet article donne un aperçu général des pouvoirs d’arrestation et de détention régis par la Loi sur l’immigration. Il traite également de trois questions actuelles concernant la détention des immigrants au Canada. Tout d’abord, est-ce qu’une personne a droit à l’assistance d’un avocat lorsqu’elle est interrogée au port d’entrée? Deuxièmement, est-ce qu’il est obligatoire de présenter des preuves lors de la révision des motifs de détention? Troisièmement, quel est le traitement standard applicable à une personne détenue par les services de l’immigration? L’auteur termine l’article en abordant la question du recours à la détention comme moyen de dissuasion, indiquant les voies prises dans ce domaine par les services canadiens d’immigration et les inquiétudes qu’un tel principe provoque au sein de ces services.

1. INTRODUCTION
It is generally accepted in international law that a state has the right to detain a person seeking to come into its territory.¹ This may be necessary in order to verify the person’s identity, to ensure the person’s presence at immigration proceedings, or to protect the public against a person who is dangerous.

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¹ For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950; Council of Europe Treaty Series No.5) recognizes in Article 5 the “... lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” See also United Nations High Commissioner for Refugees, Detention of Refugees and Asylum Seekers, No. 44 (XXXVII), 37th Session of the Executive Committee (1986).
In Canada, detention plays an important role in immigration law and policy. This is underlined in the government's most recent immigration plan:

There will be greater use of detention for individuals who are likely to fail to present themselves for legal procedures.2

Additional resources are being allocated to give effect to this part of the plan. In the Toronto area alone, resources devoted to investigations and intelligence, detention and removals, increased by 37% in 1991.3 By March, 1992 this had resulted in a 36% increase in the total number of days spent in immigration detention in that area.4 As well, recent proposals to amend the Immigration Act5 would broaden the already wide powers of arrest and detention given to immigration officials.6

This paper examines three current issues respecting immigration detention in Canada:

- Does a person have a right to counsel during questioning at the port of entry?
- Is there a requirement that evidence be presented at detention review hearings?
- What standards of treatment are applicable to persons held in immigration detention?

The paper begins with an overview of arrest and detention under Canadian immigration law. It then deals with each of the above issues. It concludes with a discussion of the direction of Canada's immigration detention policy and concerns about the use of detention as a deterrent.


4. Statistics from the Central Removals Unit, Canada Immigration Centre, Mississauga, Ontario reveal that total detention days (port of entry and inland) had risen from 4,050 in April, 1991 to 5,506 in March, 1992.


2. OVERVIEW OF ARREST AND DETENTION
The power to arrest and detain persons exists at three stages of the immigration process: upon arrival, inland, and at inquiry.

2.1 DETENTION UPON ARRIVAL
Detention upon arrival can be broken down into detention for examination, detention for review by a senior immigration officer, detention for inquiry, and detention for identification or security purposes.

2.1.1 Detention for examination
Section 12(1) of the Immigration Act provides that every person seeking to come into Canada must appear before an immigration officer for examination at a port of entry. Ports of entry include U.S. border crossings, international airports and various seaports. The purpose of the examination is to determine whether the person will be allowed to come into Canada.

The person being examined must answer truthfully all questions put by the immigration officer and produce all documentation required by the officer. It is an offence, punishable by a fine of up to five thousand dollars and/or imprisonment of up to two years, to refuse to answer a question put on examination.

In practice, the examination is broken down into a primary examination (or inspection) and a secondary examination. The primary examination is conducted by a customs officer (acting as an immigration officer) stationed in a reception booth. For example, at the United States/Canada border, the driver of a car first speaks with this officer. At international airports, passengers are directed to the line-up for inspection by this customs officer.

The Immigration Act provides that the customs officer may adjourn the examination and refer the person being examined to another immigration officer for completion. If the customs officer conducting the primary inspection feels that additional questioning is required, the person will be sent to another room for a secondary examination by an immigration officer. This immigration officer might also adjourn the examination, where, for example, an interpreter is required.

7. Supra, note 5.
8. Ibid. s.13(4).
9. Ibid. s.94(1)(g).
10. Ibid. s.12(3).
The immigration officer has the power to detain the person upon adjournment of the examination. The *Immigration Act* provides:

12(3) Where an immigration officer commences an examination referred to in subsection (1), the officer may, in such circumstances as the officer deems proper,

(a) adjourn the examination and refer the person being examined to another immigration officer for completion of the examination; and

(b) detain or make an order to detain the person.\(^{11}\)

While the law does not specify grounds and allows the officer to detain "in such circumstances as the officer deems proper", the Immigration Policy Manual\(^ {12}\) provides that detention for examination should only be used where grounds exist:

2.14 Completion of an Examination - Need for Temporary Detention ...

c) Officers are, of course, aware that they cannot detain under the provisions of the Immigration Act unless they are of the opinion that the person to be detained is a danger to the public or would not likely appear for further immigration proceedings. Therefore, a person cannot simply be "held" as an administrative convenience. ... \(^{13}\)

In spite of these guidelines, it could be argued that the unlimited power to detain under section 12(3) of the *Act* violates the right not to be arbitrarily detained in section 9 of the *Charter*.\(^ {14}\) On the other hand, there would be an argument that any such violation would be overcome by the "reasonable limits ... demonstrably justified in a free and democratic society" provision in section 1 of the *Charter*.\(^ {15}\)

### 2.1.2 Detention for review by a senior immigration officer

Once the s.12(1) examination has been completed, the immigration officer must write a report to a senior immigration officer explaining why the person

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14. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K., 1982, c. 11 [hereinafter the *Charter*]. The *Charter* provides in section 9 that "Everyone has the right not to be arbitrarily detained or imprisoned".

15. Note that the *Immigration Act* provides in section 103(6) that where the examination does not take place within forty-eight hours the person must be brought before an adjudicator to review the reasons for detention.
has not been allowed to come into Canada. The immigration officer may detain the person for this "SIO review":

20(1) Where an immigration officer is of the opinion that it would or may be contrary to this Act or the regulations to grant admission to a person examined by the officer or otherwise let that person come into Canada, the officer may detain or make an order to detain that person and shall
(a) subject to subsection (2), report that person in writing to a senior immigration officer; or
(b) allow that person to leave Canada forthwith.16

In order to justify detention, the immigration officer need only be "of the opinion that it would or may be contrary to this Act" to let the person come into Canada. For example, where a person is seeking to come into Canada for a period of two weeks and the immigration officer does not believe the person is a genuine visitor, this in itself would be grounds to detain.17 Immigration guidelines instruct the officer to give the following notice to the person:

"I am detaining you because in my opinion you are not a genuine visitor and I therefore have to report you to a Senior Immigration Officer."18

2.1.3 Detention for inquiry
Where a senior immigration officer reviews the report of the immigration officer and does not allow the person to come into Canada, the senior immigration officer must cause an inquiry before an adjudicator to be held.19 The senior immigration officer may detain the person in specified circumstances or release on terms and conditions. Section 23 of the Act provides:

(3) Where a senior immigration officer does not let a person come into Canada pursuant to section 22 and does not grant admission to or otherwise authorize the person to come into Canada pursuant to subsection (1) or (2), the officer may, subject to subsections (4) and (6),
(a) detain or make an order to detain the person, or
(b) release the person from detention subject to such terms and conditions as the officer deems appropriate in the circumstances, including the payment of a reasonable security deposit or the posting of a performance bond.

16. Supra, note 5, s.20(1).
17. Even though it would be difficult to argue that such a detention is "arbitrary" under the Charter, it is questionable whether detention in the absence of other grounds is justifiable.
18. Supra, note 12 at IE 2.73(3)(a)(ii).
19. Supra, note 5, s.23(4).
(6) No person shall be detained or ordered detained by a senior immigration officer pursuant to paragraph (3)(a) and any person who has been detained pursuant to subsection 20(1) shall be released from detention by a senior immigration officer pursuant to paragraph (3)(b) unless the senior immigration officer is satisfied that the person poses a danger to the public or would not appear for an examination or inquiry.\(^\text{20}\)

If, in the senior immigration officer’s opinion, these circumstances exist, the person will normally be sent to a detention centre to await the holding of the inquiry.

### 2.1.4 Detention for identification or security purposes

The Immigration Act also provides for special power to detain in cases where the person’s identity is in question or there is reason to suspect the person may be a security risk. Subsection 103.1 of the Act provides:

(1) Where, with respect to a person seeking to come into Canada,
(a) the person is unable to satisfy an immigration officer with respect to that person’s identity, or
(b) in the opinion of the Deputy Minister or a person designated by the Deputy Minister, there is reason to suspect that the person may be a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), or (j), an immigration officer shall detain the person and forthwith report the detention to a senior immigration officer who may continue or order the continuation of the detention for a period not exceeding seven days from the time the person was first detained under this Act.\(^\text{21}\)

Concerns about identity or security would also fall within “circumstances as the officer deems proper” under section 12(3). However, section 103.1(1) states that the officer “shall” detain whereas section 12(3) states the officer “may”. As well, section 103.1 allows for the extended seven day period of detention prior to a detention review.

### 2.2 DETENTION UPON INLAND ARREST

Section 103 of the Act provides that a person inside Canada may be arrested and detained under a warrant:

(1) The Deputy Minister or a senior immigration officer may on reasonable grounds issue a warrant for the arrest and detention of any person with respect to whom an examination or inquiry is to be held or a removal order has been made where, in the opinion of the Deputy Minister or that officer,

\(^{20}\) Ibid. ss. 23(3) and 23(6).

\(^{21}\) Ibid. s. 103.1.
the person poses a danger to the public or would not otherwise appear for the examination or inquiry or for removal from Canada.22

There is also provision for arrest and detention without warrant:

(2) Every peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issuance of a warrant, make an order or a direction for arrest and detention, arrest and detain or arrest and make an order to detain (a) for an inquiry, any person who on reasonable grounds is suspected of being a person referred to in paragraph 27(2)(b), (e), (f), (g), (h), (i), or (j), or (b) for removal from Canada, any person against whom a removal order has been made that is to be executed, where, in the opinion of the officer, the person poses a danger to the public or would not otherwise appear for the inquiry or for removal from Canada.23

This means that a visitor who has worked illegally, overstayed their time as a visitor, or come into Canada improperly can be arrested without warrant. A permanent resident cannot be arrested without warrant unless a removal order has been issued.

Although in most cases a person who has contravened the *Immigration Act* can be arrested without the issuance of a warrant, it is common practice to issue a warrant in order to send it to various police forces. These warrants are entered into the C.P.I.C. police computer network.

The Immigration Commission guidelines point out that it is not enough to say that the officer believed that the person was described in one of the subsections:

"The officer must have reasonable grounds to believe that the person is described in a specific paragraph (or paragraphs). The lack of particularity as to the precise violation could lead the courts to conclude that there were no actual grounds for such arrest and that there had occurred an abuse of the authority contained in A103(2)."24

In the *Khan*25 case the Federal Court made some noteworthy comments about the exercise of the right to arrest under section 103:

In the circumstances of this case, viewed as they are with lucid hindsight, the Court holds that the immigration officers, Deschamps and Pace, were overly

22. *Ibid.* s. 103(1).
zealous and officious in effecting the applicant’s arrest, pursuant to s. 103. Having so readily become satisfied that the applicant would indeed appear for an inquiry—no doubt as a result of the telephone call to her sister from the office, which could as effectively have been performed from the Thompson/Gould residence—the ground for arrest evaporated readily like a wisp of fog before a refreshing zephyr. Indeed, if they believed that the residence was not an appropriate place in which to conduct an interview with the applicant, nothing whatever prevented them from requesting or inviting her to accompany them voluntarily to their office, without even exerting their power of arrest, but leaving it in reserve if their slim ground for it appeared to be more substantial than expected. One wishes that they had exercised better, more moderate judgment rather than bringing the state’s heavy artillery to bear at the outset.

Of course, such a circumstance does not indicate that the ground was illusory or never existed. Alerted to the possibility of two addresses, the officers could, with a little bit of reason, form the opinion that the applicant would not appear for an inquiry because they would not know where to contact her. The reasonable basis for such opinion is very slim indeed and soon proved to be nonexistent. But hindsight, no matter how keen, does not eradicate the circumstance in which the immigration officers formed their opinion. Even if this Judge, in their place, would have performed differently—of which there can be no doubt—their performance of their duty cannot be gainsaid on that account. Suffice if to say that this Court awards officers Deschamps and Pace no accolade for good judgment or humane concern in the performance of their duty as they saw it, on what were barely reasonable and probable grounds for arresting an agitated, scared woman who was 8 months through an evident pregnancy.

The power of arrest, even in a free and democratic society, is a formidable instrument of coercion, not to emphasize intimidation. That power is to be wielded cautiously and, of course, strictly legally. The Court here has concluded that the immigration officers wielded their formidable state power too callously but not strictly illegally. Legality, however, is not an ephemeral requirement, it must be observed throughout the entire process. The two senior immigration examining officers’ conduct of the case after arrest must be viewed through the optic of such legality.26 [Emphasis added]

The Khan case also illustrates the application of section 28 of the Immigration Act27

- It provides that where a person is detained for a violation of section 27, there is no requirement that the Deputy Minister issue a direction that an inquiry be held under section 27(3). However, if the person is detained and

26. Ibid. at 116, 117.
27. Supra, note 5.
then released prior to the commencement of the inquiry, the direction is required.

2.3 DETENTION AT INQUIRY
Section 103(3) of the Act provides that an adjudicator conducting an inquiry may detain a person for the continuation of the inquiry or to ensure the removal of the person following the conclusion of the inquiry:

(3) Where an inquiry is to be held or is to be continued with respect to a person or a removal order or conditional removal order has been made against a person, an adjudicator may make an order for
(a) the release from detention of the person, subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond;
(b) the detention of the person where, in the opinion of the adjudicator, the person poses a danger to the public or would not otherwise appear for the inquiry or continuation thereof or for the removal from Canada; or
(c) the imposition of such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.28

2.4 THE DETENTION REVIEW PROCESS
Following an initial detention, there are a variety of ways that a person may be released from detention. The detention review process can be broken down into release by a senior immigration officer, detention review hearings, and judicial review.

2.4.1 Release by a senior immigration officer
Following the initial arrest or detention, the Immigration Act provides that a senior immigration officer may, within forty-eight hours from the time the person is placed in detention, order the person to be released subject to terms and conditions.29

In practice, this section allows family or friends of the person detained to come forward and offer to provide security, in the form of cash or a performance bond, guaranteeing the appearance of the person at subsequent proceedings. This would usually apply for detention upon arrival and inland arrest but not where the person has been ordered detained at inquiry by an adjudicator (who would have already considered the possibility of release on a performance bond).

28. Ibid.
29. Ibid. s. 103(5).
2.4.2 Detention review hearings
Where a person is detained and not subsequently released within forty-eight hours by a senior immigration officer, the person must be brought forthwith before an adjudicator for a detention review hearing. Section 103(6), (7) of the Act provides as follows:

(6) Where any person is detained pursuant to this Act for an examination, inquiry or removal and the examination, inquiry or removal does not take place within forty-eight hours from the time when that person is first placed in detention, that person shall be brought before an adjudicator forthwith and the reasons for the continued detention shall be reviewed and thereafter that person shall be brought before an adjudicator at least once every seven day period, at which times the reasons for continued detention shall be reviewed.

(7) Where an adjudicator who conducts a review pursuant to subsection (6) is not satisfied that the person in detention poses a danger to the public or would not otherwise appear for an examination, inquiry or removal, the adjudicator shall order that the person be released from detention subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.30

There are special provisions for the review of detention under the identity and security provisions of section 103.1(1):

(2) Where, with respect to a person detained under subsection (1), the Minister certifies in writing
(a) that
(i) the person’s identity has not been established, or
(ii) the Minister has reason to suspect that the person may be a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), or (j), and
(b) that an additional period of detention is required to investigate the matter referred to in subparagraph (a)(i) or (ii),
the person shall be brought before an adjudicator forthwith and at least once during every seven-day period thereafter, at which times the adjudicator shall review the reasons for the person’s continued detention.

(5) Where an adjudicator who conducts a review under subsection (2) or (3) is satisfied that reasonable efforts are being made by the Minister to investigate the matter referred to in subparagraph (2)(a)(i) or (ii), the adjudicator shall continue the person’s detention.31

30. Ibid. s.103(6),(7). Note that Bill C-86 supra, note 6 proposes to change the nature of the test by amending section 103 (7) to read “Where an adjudicator who conducts a review pursuant to subsection (6) is satisfied that the person in detention is not likely to pose a danger to the public and is likely to appear ...” [Emphasis added].

31. Ibid. s.103.1(1).
Thus, the detention of a person on identity or security grounds may be extended by the signing of a certificate. Subsequent detention reviews are limited to ensuring that reasonable efforts to investigate are being undertaken.

In the Smith32 case, an immigration officer ordered Mr. and Mrs. Smith detained for 7 days under section 103.1(1)(a) of the Act on the grounds that they had not satisfied the officer as to their identity and were suspected of being a security risk. A certificate was then issued under section 103.1(2) stating that the identity of the applicants had not yet been established.

At the detention review hearing, the case presenting officer offered his assurance to the adjudicator that an active investigation was being carried out by the Canadian Security and Intelligence Service and that he had a report from them in his possession, but he declined to produce the report or any other evidence of the investigative effort. The adjudicator determined that the Minister had not satisfied him that reasonable efforts were being made to investigate, as the immigration officer had provided him with no factual basis for him to determine if the efforts were reasonable.

The Minister and the Solicitor General then filed a security certificate under section 40.1(1) of the Act which provides for the automatic detention of a person until a security determination is made in their case. The Federal Court struck down this certificate as unreasonable.

2.5 JUDICIAL REVIEW OF DETENTION

It is possible to attack the decision to detain by way of an application for judicial review under section 18 of the Federal Court Act33

- However, it is necessary to apply for leave under section 82.1 of the Act34
- This makes the process long and complicated and not suitable for persons whose liberty is at stake.

There is also the possibility of proceeding by way of habeas corpus in the superior courts of the province. Such proceedings are usually summary in nature and geared towards the quick release of persons in detention.

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34. Supra, note 5.
In Ontario the Court of Appeal has refused to allow the *habeas corpus* remedy to be used to attack deportation orders that have already been or could be reviewed by the Federal Court. In the *Vega* case, the High Court of Justice suggested this could be extended to proceedings respecting detention orders.

In Quebec, on the other hand, the Court of Appeal has confirmed the jurisdiction to grant *habeas corpus* with *certiorari* in aid to set aside deportation orders. The Courts have also used *habeas corpus* to set aside detention orders made illegally. For instance, in the *Cushnie* case, the Court found that a decision to detain a person on the basis that his prior convictions automatically meant that he was a danger to the public constituted cruel and unusual treatment contrary to section 12 of the *Charter*.

### 2.6 PLACES OF DETENTION

The *Immigration Act* provides that persons are to be detained at an “immigration station” or other place satisfactory to the Deputy Minister. An immigration station is defined as any place designated by the Minister for the examination, treatment or detention of persons for any purpose under the Act. The Act allows the Minister to make this designation by order.

The Minister, in Instrument I-20, has designated various places as immigration stations, including:

1. All penitentiaries, common goals (sic), public or reformatory prisons, lock-ups, guarded rooms, or other places in which persons who are charged with or convicted of offences under the Criminal Code are usually kept in custody;

2. All hospitals, sanatoriums, nursing homes or other institutions operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for observation, care or treatment of convalescent or chronically ill persons;

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40. *Ibid.* s. 2(1).
41. *Ibid.* s.115(b).
3. The places designated in the following list:

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**Ontario Region**
- Plaza Hotel, 103 Cityview Drive – Rexdale, Ontario
- Celebrity Inn, 6355 Airport Road – Mississauga, Ontario
- Beacon Arms Hotel, 88 Albert Street – Ottawa, Ontario
- Holiday Inn, 480 Riverside Drive West – Windsor, Ontario
- Skyline Brock Hotel, 5685 Falls Avenue – Niagara Falls, Ontario
- Village Inn, 2nd Floor, 5688 Falls Avenue – Niagara Falls, Ontario (summer months only)

4. All immigration quarters at ports of entry and at Canada Immigration Centres.42

The Immigration Commission’s policy is that as a general rule immigration detainees are to be held in the “medium-security hotel facilities” designated in no. 3 of Instrument I-20.43 Exceptions include detainees with criminal records, detainees who have exhibited violent behaviour, detainees who have tried to escape from the hotel, and situations where the hotels are filled to capacity.44

This means that most people detained for immigration purposes are held in these medium-security “hotel” facilities. However, the reference to “hotel” can be somewhat misleading. The Celebrity Inn Detention Centre in Mississauga, Ontario is the example used in this paper. This is the primary detention centre for the Toronto area. It is located in the back portion of the Celebrity Inn Hotel. There have been substantial modifications to the outside and inside of the hotel premises used for the detention centre.

Outside, two barbed-wire fences have been erected around the detention area. There are surveillance cameras all around the perimeter. Access is limited to a single door controlled by a security guard on the inside. An intercom system may be used to identify visitors. Inside, security personnel control entry to the facility. All visitors must pass through a metal detection booth and a personal search. Visitors are required to produce documentary identification and sign in. Within the facility itself, the doors have been removed on the rooms. All suitcases and personal belongings are seized and held by the security personnel.

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43. *Supra*, note 12 at IE-10, 10.40.
3. **DOES A PERSON HAVE A RIGHT TO COUNSEL AT THE PORT OF ENTRY?**

Having reviewed the general powers of arrest and detention, we can now turn to the first of the three issues dealt with in this paper: does a person seeking to enter Canada have a right to counsel during examination at the port of entry?

It is the position of the Canada Employment and Immigration Commission that a person being questioned at the port of entry does not have the right to counsel, unless the person has been formally detained. The Immigration/IE Manual provides:

2.10 Counsel at Examination.

1) The *Immigration Act* does not provide for counsel to be present at examinations or interviews. Counsel usually includes lawyers, law students and law clerks, M.P.s and M.P.P.s or their representatives, clergy, social workers and relatives. The Commission does not distinguish between legal and non-legal counsel.

2) During an examination, the person concerned is required to answer truthfully all questions (A12(4)). At this point, no decision has been made as to the person’s admissibility, no accusations or charges have been levied by the Commission, and no report has been made. The sole purpose of the interview is to gain facts about the person’s intent to enter the country.

3) The *Charter of Rights* grants the right to counsel to people who are arrested or detained. Subjects at examinations are not usually detained or arrested, therefore the *Charter* does not oblige the Commission to allow a person to have Counsel during an examination. *It shall be Commission policy not to permit counsel at examinations.*

However, it has been argued that the person being examined is “detained” by the very nature of the examination process and should be entitled to the section 10 *Charter* right to retain and instruct counsel.

In *Dehghani* the Federal Court of Appeal held in a two to one decision that the secondary examination did not constitute “constitutional detention” which would give rise to the *Charter* right to counsel. The case involved a refugee claimant whose claim had been rejected following a credible basis hearing where the examining officer’s notes from the secondary examination

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had been used against the claimant. Mahoney J.A. (Pratte J.A. concurring) wrote:

Everyone, including a Canadian citizen or permanent resident who has a right to come into Canada, is detained when he presents himself for admission at a port of entry. No one is free to enter Canada until an immigration officer is satisfied that he has a right to do so or that it would not be contrary to the Immigration Act ... for him to do so. What distinguishes all such detainees from the sort of detainee considered in R. v. Therens, [1985] 1 S.C.R. 613 ... is that the person has not been put in that position by an agent of the state, assuming control over his movements. Rather, he has put himself in that position by his own action in seeking admission. Such a person is not, in the terminology of R. v. Simmons, [1988] 2 S.C.R. 495 ... "detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel." 47

... I am unable to agree that the examination of the applicant in the present instance was anything but routine. I see no way of demonstrating the basis for my opinion but to set out, in Appendix 'A', the full text of the immigration officer's handwritten record of the questions and answers, translated to and signed by the applicant at the time. It speaks for itself and, in my opinion, simply does not suggest anything in the nature of an inquisitorial strip search that would, I quite agree, escalate a detention of no constitutional consequence. Accepting the applicant's uncontradicted affidavit as evidence as to his state of mind when subjected to the secondary examination, such a circumstance particular to the person concerned cannot, in my view, change the character of what was plainly a routine examination. 48

In his dissent, Heald J.A. wrote as follows:

I agree with the applicant's counsel that the rationale of Therens, supra, applies to the facts of this case. In my view, the immigration officer, "an agent of the State", who conducted the secondary examination of the applicant had assumed control over the applicant's movements, and the applicant was not free to leave the room or go elsewhere. The immigration officer was engaged in a detailed interrogation of the applicant. In the result, this interrogation became an integral part of an inquiry under the Immigration Act which led, finally, to the issuance of an exclusion order against him. Based on the uncontradicted evidence of the applicant as set out in his affidavit, it is also apparent that he acquiesced in the deprivation of his liberty, since he reasonably believed that he had no choice to do otherwise. In these circumstances and applying the rationale of Therens, I conclude that the applicant was "detained", within the meaning of s. 10(b). 49

47. Ibid. at 54.
48. Ibid. at 56.
49. Ibid. at 72.
Heald J. went on to point out that the referral from the primary inspection to the secondary examination meant that Mr. Dehghani was “taken out of the normal course and required to submit to interrogation”. The decision has been appealed to the Supreme Court of Canada.

It is interesting to note that no mention is made in the decision of the fact that a person is under a statutory duty to submit to questioning. It would seem that this would bolster the argument in favour of finding that a person being examined is detained.

From an immigration policy perspective, the insistence on the right to counsel can be justified. Refugees and immigrants are a particularly vulnerable class. This is especially so at the port of entry.

The potential for abuse of refugees facing detention is well illustrated in the American case of Orantes-Hernandez. In that case the United States Court of Appeals, Ninth Circuit, had to deal with United States immigration officials who were using the threat of prolonged detention to deter people from pursuing refugee claims. The Court described some of the evidence as follows:

Another witness, Martha Osorio Sandoval, testified she told the agents that she did not want to sign for voluntary departure after reading the form. The agents told her that she had to sign and if she did not, she would remain in jail for a long time ... (p.559)

Juan Francisco Perez-Cruz, arrested in 1980, did not request asylum even though informed of it because the agent told him that asylum was only for people who were fleeing their country because they were an enemy of the government or an assassin. The agent also told Perez-Cruz that if he wanted asylum, it would be 3 to 6 months, he would be detained the entire time and that if he did not get asylum he would be deported ... (p.559)

Jorge Antonio Joya, apprehended on April 16, 1981, was given a voluntary departure form and told to “sign it” ... Joya further testified that while he

50. Ibid. at 74.

51. See R. v. Bryson, unreported decision of the Supreme Court of British Columbia, No. CC 910941, Vancouver Registry, November 22nd, 1991, with respect to the need to take special care to advise immigrants of their right to counsel upon detention.

52. Orantes-Hernandez v. Thornburgh 919 F.2d (9th Cir. 1990)

53. Ibid. The Court of Appeals upheld the injunctive relief granted by the District Court which had found “substantial evidence of INS detention officers urging, cajoling, and using friendly persuasion to pressure Salvadorans to recant their requests for a hearing and to return voluntarily to El Salvador.”(p.556).
was detained in El Centro, an officer often told Salvadorans who had applied for asylum that their applications would never be granted and the best thing they could do would be to sign for voluntary departure ... (p.560)

Gloria Esperanza Benitez de Flores was apprehended in March, 1992. The day after her apprehension, INS agents requested more than five times that she sign for voluntary departure. The agents placed her in a jail cell and told her that she would remain there for a long time if she did not sign. When Benitez de Flores asked the agents about asylum, she was told that the INS was not giving anyone asylum, and that it would be useless for her to stay, and it would be better for her to sign for voluntary departure ... (p.560)

Dora Elia Estrada, arrested in 1980, refused to sign a voluntary departure form and asked for asylum. The agent that arrested her told her that political asylum "wasn't given" in the United States, and that if she did not sign for voluntary departure she was going to be in detention for a long time in a jail where there were only "men" ... (p.560)

Jaime Rodriguez Alas told an INS agent that he was being persecuted in his country and that he could not go back. The agent told him he could apply for asylum but it would take a long time and Alas would have to remain detained for possibly a year or more ... (p.563)

Miguel Enrique Avila-Ochoa, arrested in 1985, testified that INS officers commented that aliens who asked for asylum would "remain in El Centro maybe for six months or a year and it would come to no good anyway" ...(p.563)

There have been allegations of similar occurrences in Canada. Ensuring the right to counsel at the port of entry could help reduce the risk of this kind of abuse.

4. IS THERE A REQUIREMENT THAT EVIDENCE BE PRESENTED AT DETENTION HEARINGS?

The second issue under consideration is whether evidence is required when an adjudicator makes a decision at a detention hearing under section 103(3) of the Act or a detention review hearing under section 103(6) of the Act.

It is general policy that these hearings are to be conducted on the basis of submissions only. The Immigration Manual describes the current practice:

54. Toronto Refugee Affairs Council (TRAC), Subcommittee on Detention, April 30, 1992 letter to Employment and Immigration Canada, Ontario Regional Office.

55. This also applies to detention hearings at inquiries under section 103(3) of the Immigration Act.
b) A Detention Review is not an inquiry. The CPO [Case Presenting Officer] is not normally excepted (sic) to adduce evidence, to question the person concerned directly, nor to present documentary evidence. In the majority of cases, only a submission by each of the parties is required.

c) CPO’s should ensure that their submissions deal strictly with issues relevant to detention or release, (i.e., the reasons behind their opinion that the person would not appear when required or would pose a danger to the public). The substantive issues of a pending inquiry normally need not be discussed, except where they are inextricably tied to the reasons for believing the person will not appear e.g., an inquiry under 27(2)(f). Even in such cases, it should not be necessary to engage in direct questioning or to present “evidence”.

The result is that the Case Presenting Officer (CPO) is given an opportunity to “submit” why the person should be detained and the person can “submit” in reply why they should not be detained. In the end, the adjudicator makes the decision respecting the person’s detention without regard to any “evidence” but based on submissions alone.

Adjudicators refer to the following passage in Bauer as support for the proposition that evidence is not required:

I point out that in the present case the adjudicator was not required to make findings of fact but was required to review the reasons for detention and form an opinion as to whether the applicant would, if not detained, appear for the continuation of the inquiry.

However, this statement merely emphasizes that the role of the adjudicator is not to find, as a question of fact, that a person is dangerous or eluding immigration officials. The role of the adjudicator is to form an opinion as to whether that is the case.

As was pointed out in the Webb case, the opinion of the adjudicator must be supported by evidence.

Mr. Webb, the appellant who appears in person, submits that s. 104(3)(b) [of the Act] is unconstitutional because it permits the detention of a person on the basis of an opinion expressed by an official. He submits that an opinion in itself ought to be held to be arbitrary if it is not based on a reason which is supported by evidence. I accept that as a correct statement.

56. Supra note 12, at IE 10, pp. 34, 35.
58. Ibid. at p.3.
It is clear that a decision as important as whether or not to detain someone cannot be made without an evidentiary basis. In the *Mavour*\(^61\) case, it was held that a detention hearing is a judicial or quasi-judicial proceeding:

A decision whether to release a person from detention is one which, in my opinion, is required by law to be made on a judicial or quasi-judicial basis. The decision meets the criteria of a judicial or quasi-judicial decision laid down by Dickson J., as he then was, in The Minister of National Revenue v. Coopers and Lybrand [1979] 1 S.C.R. 495. It is serious in its effect because it involves the liberty of the person concerned. Although the decision has a discretionary element, as in the granting of bail in a criminal case (which has always been held to be judicial discretion), it involves the consideration of statutory criteria of a factual nature — whether the person concerned poses a danger to the public or if not detained would not otherwise appear for the inquiry or for the continuation thereof or for the removal from Canada — rather than a broad question of policy. There is a certain adversarial aspect inasmuch as release, or the proposed terms or conditions of release, may be opposed on behalf of the authorities. Finally, and most importantly there are indications in the [Immigration] Act and the Regulations that the person concerned is to be heard. Subsection 104(6), which provides for a review of the reasons for continued detention at certain times, requires that the person be brought before an adjudicator. A decision whether to release a person from detention that is made in the course of an inquiry is subject to the inquiry process with the procedural rights that affords to the person concerned.\(^62\)

In these circumstances, a decision made without any evidence cannot be justified:

The courts have tended to strike down purely arbitrary exercises of discretion. Thus, judicial review will occur where the delegate has acted upon no evidence whatever, or has ignored relevant considerations.\(^63\)

This principle has been applied in immigration matters by the Federal Court. In *Pacific Press*\(^64\) it was held that submissions with respect to the right of the public to attend an inquiry under section 29(3) of the *Immigration Act* did not constitute evidence:

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60. *Ibid.* at 269. It is interesting that the "evidence" which the Court relied on to uphold the detention in this case included the allegations in the report. The Federal Court stated in *Khan v. Minister of Education and Immigration* [1990] 1 F.C. 30 that allegations in a report do not constitute evidence.


64. *Pacific Press v. Minister of Employment and Immigration* (1990), 10 Imm. L.R.(2d) 42.
The adjudicator did not take that approach. Rather he held:

"I am satisfied that the onus of satisfying the adjudicator under subsection 29(3) of the Immigration Act lies with the applicant and, further, that it is not incumbent upon the person concerned's counsel to submit evidence per se but that any submissions may still be considered."

His reason for holding the inquiry in camera was based solely on undisputed submissions, not evidence, to the effect that McVey's wife, resident somewhere in the United States' “is suffering from terminal cancer and that the publicity issuing from an inquiry may have a severe adverse affect on her.” Nothing was said of other measures that might reasonably be taken to deny her access to the publicity. In my opinion, that provided no proper basis for an exercise of discretion to close the inquiry. Whatever freedom of the press entails, there must certainly be an evidentiary basis to support its lawful impairment in a judicial or quasi-judicial proceeding.65

Surely the same principles apply to a person whose liberty is at stake in a detention review hearing. The right of a person to liberty cannot be any less important than the right of the public to attend an inquiry.

Unfortunately, even faced with these decisions, adjudicators continue to detain persons without evidence. This may be due to their concerns about the consequences of receiving evidence.

In the following decision an adjudicator reviewed the case law and concluded as follows:

In my opinion, for an adjudicator to consider and decide the issue of detention without requiring evidence to be presented does not violate Section 9 of the Charter nor the principles of fundamental justice. Section 9, of course, is the constitutional safeguard against arbitrary detention or imprisonment.

The principles of fundamental justice have been described as qualifying the protected right not to be deprived of “life, liberty and security of the person” as referred to in Section 7 of the Charter. Many of those principles are, of course, procedural in nature.

Section 112 of the Immigration Act outlines all the powers and authority of an adjudicator to hear and receive evidence and to do all other things necessary to provide a full and proper inquiry.

The legislation is silent on whether an adjudicator has authority to receive evidence at a detention review, be it in or outside of an inquiry setting.

65. Ibid. at 43.
However the Immigration Regulations, specifically Sections 27 to 39, address the conduct of inquiries and hearings. More particularly subsections 37(1) and 37(2) deal with the issue of a person's detention as follows:

Where an inquiry is adjourned or where an adjudicator makes a removal order or a conditional removal order against the person concerned, the case presenting officer, in the event that detention or continued detention of the person is in that officer's opinion justified, shall request that the adjudicator make an order for the detention or continued detention of the person concerned and shall inform the adjudicator of the reasons for the request.

Subsection 2 goes on to say where a request for detention or continued detention is made pursuant to sub-section 1 the person concerned or his counsel shall be given a reasonable opportunity to reply to the request and make submissions with respect thereto.

Although Section 37 of the Regulations speaks to detention in the context of an inquiry, there is nothing in the Immigration Act or Regulations to suggest that the same principles should not be followed when a detention review is conducted outside of an inquiry. By requiring the Case Presenting Officer to inform the adjudicator of the reasons for which detention or continued detention is sought, the law provides the person concerned with an opportunity to know the case against him. By requiring that the person concerned or his counsel be given a reasonable opportunity to reply to the request and to make submissions with respect thereto, the law affords the person concerned an opportunity to be heard and considered before any decision is made concerning his liberty.

I fail to see how this procedure, albeit without a requirement that evidence be presented, violates Section 9 of the Charter or the principles of fundamental justice.

... While there is nothing in the Immigration legislation that prohibits an adjudicator from receiving evidence on the detention release issue, I believe that it is significant that an evidentiary basis for a decision on detention release is not required by the Act or regulation.

In my opinion, it was never the intent of legislators to turn detention reviews into mini inquiries or hearings requiring presentation of evidence because there is no need for evidence providing the principles of fundamental justice are served and the Charter has not been violated.66 [Emphasis added]

But the need for expediency cannot override the rights of the person to a fair hearing. In the Hajdu67 case the Court was dealing with a bail hearing in a criminal matter:

A justice of the peace must act judicially. He cannot act on conjecture, private information, gossip or what he reads in the papers. Provided that he is satisfied that it is credible or trustworthy he may act on unsworn evidence, for example the evidence of the child who does not understand the nature of an oath. Subject to the same limitation he may act on hearsay evidence. But he must act on evidence. The statement of the Crown Attorney in this case was not evidence. The Code permits the Crown Attorney to lead certain kinds of evidence, not give it. It does not purport to abolish the rule that counsel may not give evidence.68

... While a bail hearing must be to the point, there must be a meaningful inquiry. The calling and cross-examination of an investigating officer or a complainant need not be a lengthy or complex process and an accused should not be imprisoned on less.69

... I do not feel an accused should be detained in prison without a fair hearing. I do not think there can be a fair hearing if the prosecutor gives evidence, or if the evidence is given by any person who knows only what is reported to him, or if, on one of the issues, even a subsidiary issue such as probability of conviction, there is a bias in favour of the prosecution.70

There is no reason why a lesser standard should be applied to the deprivation of the liberty of a person facing detention for immigration purposes.

5. WHAT STANDARDS OF TREATMENT ARE APPLICABLE TO PERSONS HELD IN IMMIGRATION DETENTION?

When a state exercises its right to detain it has a corresponding obligation to treat those detained in a fair manner. For example, the International Covenant on Civil and Political Rights71 provides in Article 10 that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. More specifically, the U.N. Standard Minimum Rules for the Treatment of Prisoners72 sets out specific rules concerning fair treatment of prisoners.

68. Ibid. at 566.
69. Ibid. at 568.
70. Ibid. at 571, 572.
Canada's immigration law does not contain any specific rules respecting the treatment of persons detained for immigration purposes. The Charter of Rights and Freedoms sets out the general rule that no one shall be subjected to cruel and unusual treatment or punishment and this certainly applies to those in detention. Other than this, we must look to the U.N. Standard Minimum Rules for guidance on fair treatment.

5.1 VIOLATIONS OF FAIR TREATMENT

In 1985 a crisis arose concerning the treatment of detainees in Canada's immigration detention centres. Refugee claimants and other immigrants were being detained for prolonged periods of time in unacceptable conditions. In Montreal, there was a detainees' strike and near riot requiring police intervention. Some detainees had been in detention for up to a year with virtually no access to fresh air or exercise.

In June, 1985 the Canadian Parliamentary Standing Committee on Labour, Employment and Immigration conducted an inquiry into immigration detention conditions and issued a report with recommendations for improvement. The Minister responded to this Report and there was some improvement in the conditions of detention.

However, by September, 1989, the Immigration Commission's own national headquarters' report revealed the existence of serious deficiencies in detention conditions:

... in terms of accommodation, facilities are plagued by insufficient space in common areas (i.e., day rooms, dining areas, outdoor recreational grounds), wasted space in sleeping quarters (e.g. double beds for single people), poor maintenance (e.g., soiled carpets, walls in need of fresh paint), lack of proper standards of cleanliness and hygiene, insufficient ventilation, unpleasant odours ...


73. Supra, note 14, s.12. In R. v. McC.(T), 4 O.R. (3d) 203, the Court relied on Section 12 to stay proceedings against 3 youth held in substandard conditions in a holding area.


75. Employment and Immigration Canada, Immigration detention: Response to the fourth report of the Standing Committee on Labour, Employment and Immigration, by The Honourable Walter F. McLean, Minister of State (Immigration), October, 1985 [hereinafter Minister's Response].
The NHQ Report went on to recognize that the problem had the potential to get worse:

It is anticipated that for the next two to three years, a major portion of EIC's clientele will be unsuccessful applicants from the backlog awaiting removal ... This change in detention centre population will place considerable strain on accommodation and security arrangements to the point that existing facilities will no longer be able to meet the department's requirements.\textsuperscript{77}

By April, 1992 non-governmental organizations concerned with immigration detention policy were again raising serious questions about the conditions of immigration detention.\textsuperscript{78} In July, 1992 these concerns were presented in a brief to the Parliamentary Committee looking into the proposed changes in Bill C-86.\textsuperscript{79} The concerns included the following:

- Lack of privacy for women
- Children and families detained in unsuitable facilities
- Health risks from second-hand smoke and poor ventilation
- Lack of outdoor exercise and fresh air
- Lack of recreational and leisure areas
- Arbitrary disciplinary action
- Improper use of handcuffs, leg irons and other instruments of restraint
- Long-term detention in unsuitable facilities
- Limitations on access to counsel

5.2 SPECIFIC CONCERNS
The concerns can be illustrated by reference to the conditions of detention at the Celebrity Inn detention centre. One measure of the adequacy of such


\textsuperscript{77} Ibid. at 9.

\textsuperscript{78} See, for example, TRAC letter, supra note 54, as well as \textit{Update on Detention}, Ecumenical Working Group for Refugees, Montreal.

\textsuperscript{79} \textit{Bill C-86 and Immigration Detention: Brief to the Legislative Committee on Bill C-86}, July 23, 1992, submitted by the Toronto Refugee Affairs Council, Subcommittee on Detention, and South Etobicoke Community Legal Services [hereinafter TRAC Brief].
conditions is the *U.N. Standard Minimum Rules*. These rules provide guidelines for the fair treatment of so-called "civil prisoners":

**Civil Prisoners**

94. In countries where the law permits imprisonment for debt, or by order of a court under any non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall not be less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.  

Persons detained for immigration purposes are imprisoned under a non-criminal process. They are not charged with an offence. They are being detained pending a determination of their right to stay in the country or in order to arrange for their removal. The *U.N. Minimum Standard Rules* require that their treatment be at least as favourable as that of untried prisoners.

5.2.1 **Privacy for women**

The *U.N. Standard Minimum Rules* provide:

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate …

53.(1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

These standards are not being met. At the Celebrity Inn, the second floor is used to detain women. Privacy is sorely lacking. Doorways to the rooms are open. Male guards have been stationed at either end of the floor. There is an immigration office at one end of the floor with male personnel coming and going. Male detainees on the first floor have to travel through the women’s section to reach the dining room for their meals.


82. *TRAC Brief, supra*, note 79.
The position of the Immigration Commission appears to be that it is not possible to improve the situation because of a lack of resources. This is unacceptable given the 37% increase in resources for enforcement in the Toronto area.

In May, 1992 the Canadian Council for Refugees (CCR) passed the following resolution:

Whereas: Women, and especially women with children, in detention centres are deprived of their human rights and dignity by: a) inadequate facilities for proper care of their children which may lead to separation; b) lack of privacy; Therefore be it resolved that: The CCR communicate with the Government of Canada requesting that a national body be established to monitor detention centres to ensure that: 1. The specific needs of women with children be addressed to prevent splitting of families; 2. Women be separated from men to whom they are not related either legally or by common law; 3. People be placed under the observation of guards of their own gender. 4. Reasonable bail conditions be set so that they can be bailed out.

5.2.2 Children and families in detention
The NHQ Report concluded as follows:

The following classifications of detainee are not considered appropriate for general housing in a detention facility and should be removed from the facility and housed elsewhere:

* families and juveniles...

Families are being detained at immigration detention centres. This has included young children, even infants. On one occasion, apparently 5 babies were being detained at the Celebrity Inn.

5.2.3 Second-hand smoke
There do not seem to be adequate restrictions on smoking in the detention centres. For example, the air on the second floor of the Celebrity Inn, where women and children are detained, is smoky. Given the known health risks, especially to pregnant women who are detained, it is difficult to understand why steps have not been taken to restrict smoking to designated areas.

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84. NHQ Report, supra, note 76.
85. TRAC Brief, supra, note 79.
86. Ibid.
5.2.4 Outdoor exercise and fresh air

The *U.N Standard Minimum Rules* provide:

21(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.\(^87\)

The *Standing Committee Report on Immigration Detention* and the *Minister’s Response* both recommended that all detainees detained for a continuous period of seven days or more should have daily access to indoor and outdoor exercise.\(^88\) The Immigration Commission adopted this position in its *Standard Operating Principles*.\(^89\)

4. Accommodation Requirements

**EXERCISE**

1) Those persons who are in detention for a continuous period of seven days or more must be given daily access to indoor and outdoor exercise. Space must be provided outdoors which is large enough to allow the detainees to walk about or to play some sports. The acquisition of such controlled space forms part of the basic requirements when negotiating contracts. It is a requirement in all seasons, as detainees must be allowed to have access to fresh air daily.

2) Those who are in detention for short periods of a day or so may request to go outside to this area. These requests should be accommodated where feasible. The schedule for exercise should be one-hour minimum.

3) A common room which is designated for serving of meals may be converted to an indoor exercise room. An evaluation of the exercise needs of residents should be made in order to budget for equipment.

4) The nature of the equipment and the amounts to be spent on purchasing such items is a local decision. Examples of equipment for inside areas include a stationary bicycle or sit-up bench. For outside exercise, a basketball net and ball or a soccer ball would provide good exercise and would not be costly.

5) Not every detainee will wish to participate in an exercise activity, but at least the opportunity should be available to walk about and received some fresh air.

\(^{87}\) *UN Standard Minimum Rules*, supra note 72.

\(^{88}\) *Standing Committee Report on Immigration Detention*, supra, note 74, and *Minister’s Report*, supra, note 75.

\(^{89}\) *Supra*, note 12 IE 10, Appendix B: Detention Centres: Standard Operating Principles.
Attempts to justify the seven-day rule are based on assertions that most persons are detained for short periods of time. However, it is questionable whether such a limitation is in compliance with the *U.N. Minimum Standard Rules*. At the Celebrity Inn, where the air is smoky, it would seem mandatory to provide fresh air every day.

Even the seven-day rule is not being respected. At the Celebrity Inn, the general policy has been that detainees will only be allowed out where the majority wish to go out. Officials say that otherwise there are not enough guards to maintain security.

### 5.2.5 Recreational and leisure areas

The *NHQ Report* stated:

> Indoor and outdoor activities and exercises are very important to the physical and mental well-being of individuals, providing a positive outlet for detainees' energies. Many of their problems and complaints stem directly from being confined to their rooms for long periods during which they can do nothing but watch television or worry about their predicaments.\(^{90}\)

The *Standing Committee Report on Immigration Detention* and the *Minister's Response* also recognized this.\(^{91}\) There do not appear to be any proper recreational or leisure areas in the Celebrity Inn. The general rule seems to be that people stay in their rooms except for mealtime.\(^{92}\)

### 5.2.6 Transfers to correctional institutions – disciplinary action

Detainees are sometimes transferred from immigration detention centres to provincial correctional facilities. In some instances, this is done as a form of disciplinary action.

The Immigration Policy Manual provides that detainees may be detained in correctional facilities where:

\[...
\]

\[v)\text{ detainee has exhibited violent behaviour towards staff or other detainee at the leased hotel}
\]

\[vi)\text{ detainee has escaped previously from the hotel facility or has attempted to escape;}
\]

\(^{90}\) *NHQ Report, supra,* note 76.

\(^{91}\) *Minister's Response, supra,* note 75.

\(^{92}\) *TRAC Brief, supra,* note 79.
vii) detainee attempts suicide or goes on a hunger strike while in the hotel facility;\(^9\)

However, detainees seem to be transferred from the “hotel” to the “jail” for a variety of other reasons not listed in the manual. Moreover, these decisions to transfer to the jail are made, in practice, by security guards. This is contrary to the stated position of the Minister. The *Standing Committee Report on Immigration Detention* recommended as follows:

(11) Duties of security personnel should not be restricted solely to custodial duties. In particular, security personnel *should not* be responsible for:
- a) deciding whether detainees should be transferred to correctional centres;
- b) deciding whether detainees should receive medical treatment; and
- c) determining disciplinary policy.\(^9\)

Another concern is that there do not seem to be any objective criteria used in such transfers. Sometimes the reasons given seem very insufficient.\(^9\)

The *U.N Standard Minimum Rules* provide:

30. (2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defense. The competent authority shall conduct a thorough examination of the case.\(^9\)

The serious decision to transfer an immigration detainee to the jail should be made in an accountable fashion. There are no adequate means for a detainee to complain about an unfair transfer or any other form of unfair treatment. Apparently non-governmental organizations have asked for a more formal complaint process, but this has been refused by the Immigration Commission.

### 5.2.7 Use of handcuffs and leg irons and other instruments of restraint

The *U.N. Standard Minimum Rules* provide:

33. Instruments of restraint, such as handcuffs, chains, irons and straight jackets, shall never be applied as punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
- (a) As a measure of precaution against escape during transfer, provided they shall be removed when the prisoner appears before a judicial or administrative authority ...\(^7\)

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94. *Supra*, note 74.
95. *TRAC Brief, supra*, note 79.
96. *Supra*, note 72.
Firstly, the Immigration Commission uses leg “irons” as an instrument of restraint. This practice should be discontinued.

Secondly, it is the practice of the Immigration Commission to keep immigration detainees shackled during immigration hearings. This is not the practice in the Canadian criminal justice system. The practice should be discontinued for immigration proceedings as well.

Finally, the Immigration Commission has implemented a new policy of “gagging” persons who are in the removal stream and may cause a disturbance on the airplane. The Immigration Commission has abandoned the practice of drugging uncooperative deportees and replaced it with this. Surgical tape is used over the mouth and around the wrists. The tape is not supposed to cause damage when removed, although apparently one person suffered damage to the wrists in the process. It is hard to imagine that this practice is defensible under the Charter.

5.2.8 Long-term detention
The NHQ Report states:

It has been assumed ... that EIC facilities will be used to detain people for short periods of time only (maximum 10 days), while their identity or their status is clarified or while travel documents and arrangements for deportation are completed, and that any longer term detention would require a different solution (e.g., release of detainees or incarceration in a provincial institution) or additional resources and procedures.98

The Standing Committee Report on Immigration Detention recommended that all persons detained for a period of 30 days should have the right to appeal their detention review to a court. The Minister’s Response to the Standing Committee Report on Immigration Detention responded that the existing detention review system satisfactorily met this concern.

There should be such a review. This is especially true for long-term detention in a facility that is designed only for short term detention. For example, Mrs “S”, a refugee claimant from Iraq, was detained for over two months at the Celebrity Inn. She was pregnant at the time. She apparently lost 8.5 kilograms (18.7 pounds) while detained. Following her release, a doctor recommended that she see an obstetrician immediately because “the baby is not developing well”.99

97. Ibid.

98. Supra, note 76 at 2.
Bill C-86 proposes to amend section 103(6) of the *Immigration Act* to provide that detention reviews shall take place every thirty days rather than every seven days. Given the concerns about the conditions of detention, such a change would not appear desirable at this time.\(^{100}\)

### 5.2.9 Right to Counsel

Everyone who is detained has a right to retain and instruct counsel without delay and to be informed of that right pursuant to the *Charter*.\(^ {101}\) This right is being violated in respect of immigration detainees. Firstly, there are problems with the right to retain. If that right is to be reasonably exercised, there must be access to the outside world. This is primarily by telephone.

At the Celebrity Inn there are difficulties telephoning out, especially when the facility is overcrowded. When there are in excess of 100 people in the centre the system does not work. There have been reports of fights breaking out amongst detainees over access to the telephone. There can be upwards of 40 people lined up at one time to use the telephone.\(^ {102}\)

The *Minister's Response* states as follows:

**Committee Recommendation**

(20) All detainees should have free and greater access to local telephone calls.

**Response**

The Commission agrees with the principle of this recommendation. The Commission has always provided the right to counsel which includes the unrestricted use of the telephone, and as well has allowed access for other calls within guidelines established at each centre. These guidelines ensure fair and equal access for all detainees.\(^ {103}\)

Another problem with overcrowding is that a great deal of confusion as to the whereabouts of detainees at any particular time. Those who are familiar with the system are not necessarily denied access as a result. However, for family and friends of the detainee, a statement by a security guard that the person is not present (either at all or because he or she is at a hearing elsewhere) can be very frustrating.

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100. *Supra*, note 6.
101. *Charter*, supra, note 14, s. 10(b).
102. *TRAC Brief*, supra, note 79.
103. *Supra*, note 75.
Counsel are often frustrated by these same issues. For example, Mrs. "C" and her three children were arrested and brought to the Celebrity Inn on a Tuesday night. On Wednesday, a visitor and counsel attended at the Celebrity Inn for a visit. They were told that Mrs. "C" was not there. Inquiries were made concerning the possibility of a discrepancy in the name. The visitors insisted that the person and her children were present but the security personnel assured them that no woman with three children was presently there nor admitted the day before. The visitors left and attended at Central Removals Unit and were told that the woman was in fact at the Celebrity Inn. This was later confirmed to be the case.\(^{104}\)

Another violation is that counsel rooms are inadequate. The primary concern is that they do not ensure any privacy between the person and his or her counsel.\(^{105}\) Firstly, the doors are inadequate. They cannot be properly closed and the door knobs have been removed leaving a hole in their place. Secondly, security guards are often stationed just outside this door during interviews between counsel and their clients. Conversation in a normal tone of voice can be overheard. Guards and immigration officers walk in and out of the room without notice. The courts have clearly stated that a person is deprived the right to counsel where adequate privacy is not ensured.

The *U.N Standard Minimum Rules* provide:

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall is he so desires, be supplied with writing materials. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.\(^{106}\)

The *Minister's Response* provides as follows:

Committee Recommendation
(17) All detention centres should provide facilities for meals in common and for private interviews and consultations between detainees and their counsel.

Response
Private areas for interview between counsel and client exist in Commission facilities.\(^{107}\)

\(^{104}\) *Ibid.*

\(^{105}\) *Ibid.*

\(^{106}\) *Supra*, note 72.
5.2.10 The need for monitoring

The need for monitoring of the conditions of immigration detention centres is clearly recognized by the *U.N. Standard Minimum Rules*:

> 55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are not administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.\(^\text{108}\)

The *Standing Committee Report on Immigration Detention* suggested the following:

Uniform rules and guidelines governing the behaviour and rights of detainees as well as those governing the operations of detention centres (including the provision of security, accommodation, transportation and meal services) should be established by the Minister. The implementation of these rules and guidelines should be actively monitored by a local advisory group appointed by, and responsible to the Minister.\(^\text{109}\)

The *Minister's Response* was as follows:

> ... I am gratified by the level of co-operation which has been demonstrated by non-governmental organizations who not only speak out on behalf of Immigration detainees, but who also inform and advise the government on these concerns. I do not believe a need exists to formalize the avenue of communication. I do not see that advisory boards would enhance the existing rapport. In fact, the creation of advisory boards could add a level of bureaucracy which could possibly impede this communication. I expect the organizations to continue to inform the government where they perceive inadequacies, and the government will respond, as it has in the past, to problem areas.\(^\text{110}\)

Unfortunately, the government does not seem to have responded to problem areas. The *NHQ Report*, issued four years after the *Minister's Response*, again called for additional monitoring:

> Consideration should be given to establishing an informal committee to monitor regularly the quality of detention centres.\(^\text{111}\)

\(^\text{107}\) *Supra*, note 75.


\(^\text{109}\) *Standing Committee Report on Immigration Detention*, *supra*, note 74.

\(^\text{110}\) *Minister's Response*, *supra*, note 75.

\(^\text{111}\) *NHQ Report*, *supra*, note 76.
6. CONCLUSION

We have seen that the immigration authorities in Canada are granted wide powers of arrest and detention. We have examined some of the current issues surrounding the exercise of those powers, including the right to counsel at the port of entry, the requirement of evidence at detention hearings, and the standards of treatment of persons in immigration detention. A number of problems have been identified.

What are the chances of raising these problems with the government and working toward some kind of resolution?

Part of the difficulty lies in the fact that Canada does not seem to be clear on the objectives of its immigration detention policy. In September, 1989 the Immigration Commission's *NHQ Report* on immigration detention posed the following question:

> The second issue concerns the role assigned to the detention function. Is it, as some suggest, to be used only to withdraw temporarily an individual's freedom of movement until legal requirements (proper documentation, details of personal history, etc.) are satisfied? Or is it as others believe (in the United States, for instance) a very powerful and very effective deterrent for those who considering entering the country illegally?\(^{112}\)

The authors of the report do not answer the question. It seems as if Canada lies somewhere in between the two positions, sometimes wavering back and forth.

For example, in early 1989 internal immigration policy guidelines known as the "Perfect Plan" surfaced with the implementation of Canada's new refugee determination procedure.\(^{113}\) These guidelines named detention as part of the tough new system designed to deter refugee claimants from coming to Canada once the "word" gets around.

On the other hand, immigration officials vehemently deny that immigration detention is used for anything other than strictly "legal requirements". This is supported by the fact that while the number of persons detained has been increasing, it is still relatively low.

The changes to immigration detention law and policy being proposed in Bill C-86 are not a hopeful sign.\(^{114}\) While it can be argued that these changes are

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114. *Supra*, note 79.
well within the "legal requirements" model, they also point to a hardening of attitudes concerning immigration detention. That lends support to the deterrence side.

In this context, it is unlikely there will be much support from within government for responding to the problems which currently exist. Immigration detention is certainly not perceived as an issue the Canadian public is seriously concerned about.

Nonetheless, lawyers and advocates need to keep raising the issues with the government. They also need to pursue cases in the courts wherever possible. In the end, immigration detention should only be used as a last resort and where there are legitimate grounds. Every effort should be made to ensure that it is not used as a deterrent in order to achieve other immigration policy objectives.