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## **Litigation is “Just One Tool”: An Annotated Interview with Karin Baqi, Counsel for the End Immigration Detention Network in *Brown v Canada***

KRISTEN LLOYD\*

The End Immigration Detention Network (EIDN) was formed as a coalition of migrant detainees, their family members, and allies, who organized to bring an end to indefinite immigration detention in Canada. In October 2016, EIDN was granted third party public interest standing in a constitutional challenge to Canada’s immigration detention regime. This granted an unprecedented legitimacy to EIDN, and to the rights and lives of immigration detainees, and should in itself be considered a victory. That said, it was a moment that would not have arrived without the three years of intensive political organizing that came before it. This article attempts to situate the legal challenge within the broader context of the campaign to end indefinite detention, examine the ways it interacted with the goals of the network, and explore the implications of using litigation as a tool for social change.

IN OCTOBER 2016, THE END IMMIGRATION DETENTION NETWORK (EIDN), was granted third party public interest standing in a constitutional challenge to Canada’s immigration detention regime. EIDN was formed as a coalition of migrant detainees, their family members, and allies, who organized to bring an end to indefinite immigration detention in Canada. In his decision to grant standing to the network, Justice Patrick Gleeson stated that in light of “EIDN’s active and multi-year engagement in areas of immigration detainee support, research and reporting, [and] domestic and international advocacy,”<sup>1</sup> allowing the network’s participation would “ensure a full presentation of the issues”<sup>2</sup> before the court. This granted an unprecedented legitimacy to EIDN, and to the rights and lives of immigration detainees, and should in itself be considered a victory. That said, it was a moment that would not have arrived without the three years of intensive political organizing that came before it.

On 17 March 2018, I sat down with lawyer and organizer Karin Baqi, who acted as co-counsel for EIDN, to discuss her experience representing the organization before the Federal

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\* This article was written from my perspective and place of privilege as a white woman, a settler, and a law student, with full Canadian citizenship status. Through my past involvement with the End Immigration Detention Network I witnessed the important role that advocates can play in the lives of individual immigration detainees, as well as the important educative role that those with an understanding of the legal system can play in social movements more broadly. These experiences motivated me to pursue a legal education, and have also informed this article. I would like to acknowledge the irony of privileging the voice of a lawyer in a discussion of a legal challenge that intended to amplify the voices of those with lived experiences in the immigration detention system. I was uncomfortable asking a former or current detainee to participate in the creation of this piece without being able to compensate them for their time, especially because, unlike with participation in the legal challenge itself, there exists no real or tangible benefits to contributing to a piece such as this. As such, my intent is not to focus on the experience of life in the immigration detention system, but rather on the role that litigation can play in moving forward the demands of social movements, such as those of the campaign to end indefinite immigration detention in Canada. That said, I am open to criticism in regard to these choices.

<sup>1</sup> *Brown v Canada (Minister of Citizenship and Immigration)* (7 October 2016), Ottawa, FC IMM-364-15 (Motion for Public Interest Standing or Intervener Status) at para 16 [“EIDN Motion”].

<sup>2</sup> *Ibid* at para 23.

Court in *Brown v Canada*.<sup>3</sup> Baqi has practised immigration and poverty law for the past decade, and has been involved with various grassroots campaigns for migrant justice, including EIDN and the Immigration Legal Committee of the Law Union of Ontario. She represented EIDN in her capacity as a staff lawyer at the South Asian Legal Clinic of Ontario, alongside Swathi Sekhar, a Toronto-based immigration and refugee lawyer and advocate for migrant and prisoner rights. In what follows, I attempt to situate EIDN's involvement in the *Brown* legal challenge within the broader context of its campaign to end indefinite detention, examine the ways it interacted with the goals of the network, and explore the implications of using litigation as a tool for social change.<sup>4</sup>

## I. IMMIGRATION DETENTION IN CANADA

During the tenure of the Harper Conservative government, Canada jailed over 80,000 migrants.<sup>5</sup> In 2017, the year *Brown* was heard, the Canada Border Services Agency (CBSA) held 6251 migrants in detention.<sup>6</sup> Over four hundred of these individuals were classified as “long-term detainees,”<sup>7</sup> meaning they were held for ninety days or more in conditions “largely indistinguishable from the incarceration of prisoners convicted of crimes.”<sup>8</sup> Included among those detained by Canada for immigration purposes were children,<sup>9</sup> asylum seekers fleeing their countries of origin,<sup>10</sup> and permanent residents who knew no other home than Canada.<sup>11</sup>

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<sup>3</sup> *Brown v Canada (Minister of Citizenship and Immigration)* 2017 FC 710 [*Brown*].

<sup>4</sup> Where no specific reference is given this article is informed by my conversation with Karin Baqi or my own involvement with EIDN.

<sup>5</sup> Harsha Walia & Omar Chu, “Nearly 100,000 Migrants in Canada Jailed Without Charge” (2015), *NeverHome.ca*, online: <neverhome.ca/detention/> [perma.cc/9YHH-62VD]. This represents the number of individuals detained between 2006 and 2014.

<sup>6</sup> Canada Border Services Agency, “Arrests, Detentions and Removals: Annual Detention Statistics- 2012–2017,” (28 March 2018), online: <cbsa-asfc.gc.ca/security-secureite/detent/stat-2012-2017-eng.html> [perma.cc/D2WS-TCAD] [CBSA, “Arrests, Detentions and Removals”].

<sup>7</sup> *Ibid.*

<sup>8</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax & Winnipeg: Fernwood Publishing, 2017) at 167.

<sup>9</sup> See e.g. Rachel Browne, “What Are Babies Doing Behind Bars in Canada?,” *Maclean's* (18 June 2015), online: <macleans.ca/news/canada/what-are-babies-doing-behind-bars-in-canada/> [https://perma.cc/R5L7-SG3U]

Cameroonian asylum seeker Glory Anawa gave birth to her son Alpha while detained at the Toronto Immigration Holding Centre; he spent the first two years of his life in detention. In November 2017, Public Safety Minister Ralph Goodale issued a Ministerial Direction to the CBSA that stipulated minors should only be held in detention as a measure of last resort and that the best interests of the child must be a primary consideration (Public Safety Canada, *Ministerial Direction to the Canada Border Services Agency: Minors in Canada's Immigration Detention System* (6 November 2017). The number of minors in immigration detention in Canada decreased by nearly 50 per cent between 2014 and 2019, with 118 minors detained by the CBSA in the 2018/2019 fiscal year (Canada Border Services Agency, “Arrests, Detentions and Removals: Annual Detention Statistics- 2012–2019,” (20 August 2019), online: <www.cbsa-asfc.gc.ca/security-secureite/detent/stat-2012-2019-eng.html> [perma.cc/K85C-GLFP].

<sup>10</sup> Maynard, *supra* note 8 at 166.

<sup>11</sup> This was the reality of the Applicant Alvin Brown in the Federal Court challenge that is the focus of this article (see *Brown v Canada*, 2017 FC 710 (Applicant's Further Memorandum of Fact and Law) at para 10 [Applicant's Memo]) as well as for EIDN organizer and affiant Kyon Ferril (see *Brown v Canada*, 2017 FC 710 (Third Party's Further Memorandum of Fact and Law) at para 20 [EIDN's Memo]).

The CBSA, “under clear parameters to ensure the integrity of the immigration system and to ensure public safety,”<sup>12</sup> has been empowered by the Minister of Public Safety and Emergency Preparedness to perform the arrest and detention duties authorized by Canadian immigration legislation, the *Immigration and Refugee Protection Act* and its corresponding Regulations.<sup>13</sup> CBSA officers can detain foreign nationals or permanent residents seeking admission to Canada at official ports of entry.<sup>14</sup> Further, they can arrest any non-citizen, anywhere in the country, if their identity is in question,<sup>15</sup> or if reasonable grounds exist to believe they are inadmissible to Canada and they pose a danger to the public or are unlikely to appear for removal.<sup>16</sup> While Canada does not release data on the race or ethnic identities of those arrested or detained by the CBSA, Robyn Maynard writes that racialized, and in particular Black, migrants are subject to heightened surveillance and suspicion, and face an increased risk of “discovery, apprehension, detention and deportation.”<sup>17</sup> Indeed, many high-profile immigration detainees, including the individual Applicant in the challenge discussed herein, fit this profile.<sup>18</sup>

Non-citizens charged with a criminal offence are frequently found inadmissible to Canada,<sup>19</sup> receiving a “double punishment”<sup>20</sup>—a criminal sentence, followed by immigration detention and possible deportation—while those convicted of criminal offences who have full citizenship status are released after any period of incarceration to which they are sentenced. This creates a reality whereby “the bureaucratic difference between holding permanent resident status and full citizenship creates a staggering divergence in one’s life trajectory.”<sup>21</sup> Again, racialized

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<sup>12</sup> Canada Border Services Agency, “CBSA’s New National Immigration Detention Framework: A Summary of the Report of the Framework and Stakeholder Roundtable Discussions,” online: <cbsa-asfc.gc.ca/agency-agence/consult/consultations/nidf-cnmdi/menu-eng.html> [perma.cc/KRU6-MAJ3] [CBSA, “New Framework”].

<sup>13</sup> Ralph Goodale, “Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations,” online: <cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2016-07-eng.html> [perma.cc/F6W4-RTSX]; *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 54–61 [IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 244–250 [Regulations].

<sup>14</sup> Hanna Gros & Paloma van Groll, “*We Have No Rights: Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2015) at 46; Petra Molnar & Stephanie J Silverman, “Research Findings from Immigration Detention: Arguments for Increasing Access to Justice” (15 August 2016), *Canadian Association for Refugee and Forced Migration Studies Blog*, online: <carfms.org/blog/research-findings-from-immigration-detention-arguments-for-increasing-access-to-justice> [perma.cc/48W5-8GD2].

<sup>15</sup> IRPA, *supra* note 13, s 55(2)(b).

<sup>16</sup> *Ibid*, s 55(1)–(2). A number of factors set out in the *Regulations*, including compliance with previous immigration conditions, inform the assessment of whether a detainee falls into the category of flight risk, danger to the public, or a foreign national whose identity has not been established: *Regulations*, *supra* note 13, ss 244–47.

<sup>17</sup> Maynard, *supra* note 8 at 165.

<sup>18</sup> See *e.g.* the cases cited below at footnote 26.

<sup>19</sup> Permanent residents and foreign nationals who receive a prison sentence of over six months are inadmissible to Canada on grounds of serious criminality: IRPA, *supra* note 13, s 36(1)(a). Foreign nationals are also inadmissible for less serious criminality pursuant to IRPA, *supra* note 13, s 36(2)(a); See also Maynard, *supra* note 8 at 173; Again, this was the reality of both Alvin Brown (see Applicant’s Memo, *supra* note 11 at para 11) and Kyon Ferril (see EIDN’s Memo, *supra* note 11 at para 20) as well as many other detainees involved with EIDN.

<sup>20</sup> Maynard, *supra* note 8 at 173.

<sup>21</sup> *Ibid* at 175. Many detainees involved with the campaign to end detention arrived in Canada as children and were later deported to places they could barely remember, where they no longer had family or other support structures, as a result of having faced criminal charges in Canada. While not involved in the campaign, the case of Abdoul Abdi provides illustration. See *e.g.* Samer Muscati & Audrey Macklin, “Abdoul Abdi case: A Test of Canada’s Commitment to Rules and Compassion,” *The Globe and Mail* (16 January 2018), online:

migrants face this threat most acutely, as race “and Blackness in particular, largely determines who is seen, caught, arrested, charged, found guilty and sentenced for breaking the law.”<sup>22</sup>

Bodies within the United Nations have repeatedly criticized Canada’s detention regime for violating international human rights law.<sup>23</sup> While the United Nations High Commissioner for Refugees recommends that “maximum periods of detention ... be set in national legislation,”<sup>24</sup> Canada remains one of the only Western nations without such a limit,<sup>25</sup> and individuals have languished behind bars for upwards of a decade as a result.<sup>26</sup> Detentions are reviewed by a member of the Immigration Division of the Immigration and Refugee Board (IRB) within the first forty-eight hours after an individual is detained, again in the seven days following the initial review, and then every subsequent thirty days.<sup>27</sup> However, the process has been criticized as flawed and arbitrary by detainee advocates, and release rates vary dramatically across regions and among individual board members.<sup>28</sup>

The absence of a limit wreaks havoc on the mental wellbeing of detainees. Karin Baqi said that for many, “the most traumatizing part of [detention] was never knowing when you would get out,” and it is well-documented that for migrants, a population already vulnerable to

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<theglobeandmail.com/opinion/abdoul-abdi-case-a-test-of-canadas-commitment-to-rules-and-compassion/article37616825/> [perma.cc/2JA5-CPYT].

<sup>22</sup> Maynard, *supra* note 8 at 172.

<sup>23</sup> UNWGAD, 69th Sess, 15th Mtg, UN Doc A/HRC/WGAD/2014/15 (2014) at paras 23–26 (The Working Group found Canada’s seven-year detention of Cameroonian national Michael Mvogo unnecessary and arbitrary, and a violation of international human rights law); UNCERD, 21st–23rd Year, 2580th–2582nd Mtgs, UN Doc CERD/C/CAN/CO/21-23 (2017) at para 34 (among other recommendations, the committee called on Canada to establish a legal time limit for detentions). See also Nicholas Keung, “UN Chastises Canada Over Immigration Detention, Including Un-deportable Man Jailed 8 Years,” *Toronto Star* (24 July 2014), online: <thestar.com/news/immigration/2014/07/24/un\_chastises\_canada\_over\_immigration\_detention\_including\_undeporable\_man\_jailed\_8\_years.html> [perma.cc/4FQP-A9DX]; Nicholas Keung, “UN Calls Out Ottawa Over Lengthy Immigration Detention Stays,” *Toronto Star* (1 September 2017), online: <thestar.com/news/immigration/2017/08/31/un-calls-out-ottawa-over-lengthy-immigration-detention-stays.html> [perma.cc/S7H7-N3CM].

<sup>24</sup> United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 6 at 26, online: <refworld.org/docid/503489533b8.html> [perma.cc/6WB3-NAJ4].

<sup>25</sup> Molnar & Silverman, *supra* note 14; Syed Hussan, *Indefinite, Arbitrary and Unfair: The Truth About Immigration Detention in Canada* (Toronto, End Immigration Detention Network, 2014) at 2; Applicant’s Memo, *supra* note 11 at paras 69–73. The United States and European Union member states have either legislated or court-imposed limits on detention; some are hard caps and others can be extended in exceptional circumstances.

<sup>26</sup> See *e.g.* Applicant’s Memo, *supra* note 11 at para 14 (Alvin Brown was detained by CBSA for five years before his deportation); Brendan Kennedy, “Jailed Seven Years by Canada, Kashif Ali Now Walks Free,” *Toronto Star* (28 April 2017), online: <thestar.com/news/canada/2017/04/28/jailed-seven-years-by-canada-kashif-ali-now-walks-free.html> [perma.cc/L4DP-3LWF] (at the time of his release following a successful *habeas corpus* application in April 2017, Kashif Ali was the longest-serving detainee currently behind bars); Brendan Kennedy, “Immigration Detainee Ebrahim Toure Marks Five Years Without Freedom: ‘What’s Going On With Me is Not Right,’” *Toronto Star* (25 February 2018), online: <thestar.com/news/canada/2018/02/25/immigration-detainee-ebrahim-toure-marks-five-years-without-freedom-whats-going-on-with-me-is-not-right.html> [perma.cc/SU7R-AUTB] (Ebrahim Toure was detained for over five years and was the longest-serving detainee in Canada at the time of his release); Geoffrey York, “Freed From Canadian Detention, South African Man Left in Limbo,” *The Globe and Mail* (15 June 2016), online: <theglobeandmail.com/news/world/freed-from-canadian-detention-south-african-man-left-in-limbo/article30462108/> [perma.cc/HT76-U9PM] (Victor Vinnnetou, believed to be a South African anti-Apartheid hero, spent eleven years in immigration detention as Canada sought to establish his identity).

<sup>27</sup> *IRPA*, *supra* note 13, ss 57(1)(2).

<sup>28</sup> Hussan, *supra* note 25 at 3, 14–15.

mental health issues,<sup>29</sup> even short-term detention can be incredibly damaging.<sup>30</sup> Approximately one-third of immigration detainees are held in provincially operated criminal detention centres.<sup>31</sup> Many of these are maximum-security facilities,<sup>32</sup> where the deterioration of mental health is arguably much worse for the immigration detainees held within them.<sup>33</sup> Concerningly, once detainees are transferred to a provincial prison, jurisdiction over the environment in which they are held, as well as responsibility for their health and safety, becomes murky.<sup>34</sup> Baqi explained that detainees held in provincial facilities face added hardships related to a “lack of proper healthcare, lack of proper access to families [and] phone calls, [and] hygiene issues.”

## II. THE CAMPAIGN TO END INDEFINITE DETENTION

On 17 September 2013, 191 migrant detainees began a historic hunger strike to protest the conditions of their imprisonment at the Central East Correctional Centre (CECC) in Lindsay, Ontario. Predominantly Black and Brown men, these detainees had recently been transferred from facilities in Toronto to a maximum-security prison more than two hours away, effectively isolating them from family and legal supports. Their original grievances centered around prison conditions: a lack of access to medical care; poor quality of food; frequent lockdowns; and the exorbitant cost of phone calls.<sup>35</sup> Eight detainees continued the hunger strike for several weeks and were placed in solitary confinement as a result.<sup>36</sup> However, beyond the first few days, media coverage of this unprecedented event was almost non-existent.

From the hunger strike emerged a sustained, detainee-led political campaign, which organized around the following four demands:

- (1) Freedom for the wrongly jailed: Release all migrant detainees who have been held for longer than 90 days.

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<sup>29</sup> Gros & van Groll, *supra* note 14 at 20.

<sup>30</sup> *Ibid* at 18, 20–23; Maynard, *supra* note 8 at 167.

<sup>31</sup> Laura Track & Josh Paterson, *Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency* (Vancouver: BC Civil Liberties Association, 2017) at 16; Gros & van Groll, *supra* note 14 at 75.

<sup>32</sup> Maynard, *supra* note 8 at 167.

<sup>33</sup> Gros & van Groll, *supra* note 14 at 22.

<sup>34</sup> *Ibid* at 5, 7, 89; Applicant’s Memo, *supra* note 11 at paras 50, 52.

<sup>35</sup> End Immigration Detention Network, “FAQ,” online: <endimmigrationdetention.com/faq/> [perma.cc/A8HW-8PCG]; End Immigration Detention Network, Media Release, “Nearly 200 Immigration Detainees Striking Over Prison Conditions” (23 September 2013), online: <endimmigrationdetention.com/2013/09/23/advisory-nearly-200-immigration-detainees-striking-after-being-moved-from-toronto-to-jail-in-lindsay-ontario/> [perma.cc/J5D2-R8YT]; Nicholas Keung, “Immigration Detainees in Lindsay Jail Stage Protest and Hunger Strike,” *Toronto Star* (20 September 2013), online: <thestar.com/news/immigration/2013/09/20/immigration\_detainees\_stage\_protest\_and\_hunger\_strike.html> [perma.cc/B5V7-S4J4]; Nicholas Keung, “Immigration Detainees Vow to Continue Hunger Strike,” *Toronto Star* (25 September 2013), online: <thestar.com/news/immigration/2013/09/25/immigration\_detainees\_vow\_to\_continue\_hunger\_strike.html> [perma.cc/GM7Z-HX3Z].

<sup>36</sup> End Immigration Detention Network, Media Release, “Jailed migrants in critical condition as historic strike enters Day 15” (1 October 2013), online: <endimmigrationdetention.com/2013/10/01/259/> [perma.cc/59R5-RWD4]; End Immigration Detention Network, Media Release, “Denied justice and in jail, man petitions against Canada at the UN” (23 October 2013), online: <endimmigrationdetention.com/2013/10/23/mvogounadvisory/> [perma.cc/3XWT-MHL8].

(2) End arbitrary and indefinite detention: If removal cannot happen within 90 days, immigration detainees must be released. Limits on detention periods are recommended by the United Nations, and are the law in the United States and the European Union.<sup>37</sup>

(3) No maximum-security holds: Immigration detainees should not be held in maximum security provincial jails; must have access to basic services and be close to family members.

(4) Overhaul the adjudication process: Give migrants fair and full access to judicial review, legal aid, bail programs and pro bono representation.<sup>38</sup>

Over the past several years, the End Immigration Detention Network has held large-scale demonstrations in tandem with protests inside prison walls,<sup>39</sup> released a damning report showing the arbitrary nature of Canada's immigration detention system,<sup>40</sup> operated a free phone line for detainees, organized visits to detention centres, lobbied politicians, and engaged in public education.<sup>41</sup> Distressingly, the campaign to end detention has also been galvanized by several deaths in CBSA custody. Since 2000, at least fifteen immigration detainees have died,<sup>42</sup> and each of the lives lost since EIDN's inception has added great urgency and strength to the detainees' original demands.<sup>43</sup>

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<sup>37</sup> See footnote 25, *supra*, which explains that the legal limits on detention in the E.U. and the U.S. are not unqualified and can be extended in exceptional circumstances.

<sup>38</sup> End Immigration Detention Network, "Demands," online: <endimmigrationdetention.com/demands/> [perma.cc/KS5J-2UCT].

<sup>39</sup> End Immigration Detention Network, Media Release, "Immigration detainees re-start hunger fast; hundreds rally outside Lindsay jail" (12 December 2013), online: <endimmigrationdetention.com/2013/12/12/media-advisory-immigration-detainees-re-start-hunger-fast-hundreds-rally-outside-lindsay-jail/> [perma.cc/23M9-8CRD]; No One Is Illegal, "Rally at Lindsay Jail Calls for End to Indefinite Immigration Detention" (17 December 2013), *Rabble* (blog), online: <rabble.ca/blogs/bloggers/no-one-illegal/2013/12/rally-lindsay-jail-calls-end-to-indefinite-immigration-detenti> [perma.cc/3AZ9-4CYG]; End Immigration Detention Network, Media Release, "Jailed immigrants begin historic boycott of 'Detention Reviews'" (2 June 2014), online: <endimmigrationdetention.com/2014/06/02/jailed-immigrants-begin-historic-boycott-of-detention-reviews/> [perma.cc/JBT8-U79C]; Daniel Tseghay, "Boycotting Immigration Detention in Canada" (9 June 2014), *Rabble* (blog), online: <rabble.ca/blogs/bloggers/mainlander/2014/06/boycotting-immigration-detention-canada> [perma.cc/B6RL-2Z4G].

<sup>40</sup> Hussan, *supra* note 25.

<sup>41</sup> EIDN's Memo, *supra* note 11 at para 5.

<sup>42</sup> Amara McLaughlin, "Death of Woman, 50, Detained by Canada Border Agency in Milton, Renews Calls for More Oversight," *CBC News* (2 November 2017), online: <cbc.ca/news/canada/toronto/death-of-woman-50-detained-by-canada-border-agency-in-milton-renews-calls-for-more-oversight-1.4384996> [perma.cc/497V-XDMA]; Brendan Kennedy, "Caged by Canada: Part 1," *Toronto Star* (17 March 2017), online: <projects.thestar.com/caged-by-canada-immigration-detention/part-1/> [perma.cc/RH4U-PWNV] (The CBSA has not released the names or cause of several of the deaths that have occurred in the agency's custody).

<sup>43</sup> End Immigration Detention Network, Media Release, "End Immigration Detention Network responds to death in immigration custody" (12 June 2015), online: <endimmigrationdetention.com/2015/06/12/end-immigration-detention-network-responds-to-death-in-immigration-custody/> [perma.cc/7GLM-7L8R]; End Immigration Detention Network, Media Release, "Second death in immigration custody in one week reignites calls for detentions overhaul" (15 March 2016), online: <endimmigrationdetention.com/2016/03/15/second-death-in-immigration-custody-in-one-week-reignites-calls-for-detentions-overhaul/> [perma.cc/2FJU-DDXC]; following a series of deaths

In July 2016, following years of government inaction in the wake of deaths and public condemnation, over fifty detainees began a new hunger strike and demanded to meet with Public Safety Minister Ralph Goodale.<sup>44</sup> The strike lasted eighteen days, and while the Minister refused to meet with detainees he could no longer ignore the political pressure they created. On 15 August 2016 the Federal Government announced a new “National Immigration Detention Framework,” which included a 138-million-dollar investment to upgrade Canada’s immigration detention facilities.<sup>45</sup>

The announcement failed to address the systemic issues and rights violations EIDN had raised throughout the preceding several years, and the network took issue with the Liberals’ choice to respond to a “hunger strike denouncing gross human rights violation[s] in detention”<sup>46</sup> by investing even more money into detention. Though the fight to end indefinite detention is far from over, in Baqi’s opinion, Goodale’s announcement is symptomatic of EIDN’s biggest victory—securing immigration detention’s place on the national agenda:

[I]n 2013, when the hunger strike began, nobody was really talking about indefinite immigration detention . . . . [In] the press, or even in immigration law circles, they weren’t talking about this as being a systemic problem, or a public interest issue . . . . I do believe that but for EIDN, indefinite immigration detention wouldn’t have had the traction it’s had in Canada, at all.

It was against this backdrop of political organizing and advocacy that EIDN became involved in the Federal Court challenge to Canada’s immigration detention regime.

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in detention in early 2016, scores of healthcare and legal professionals took a public stance and added their voices to EIDN’s calls to stop the detention of migrants: see Nicholas Keung, “Healthcare Providers Urge Ontario to End Immigration Detention,” *Toronto Star* (17 May 2016), online: <[thestar.com/news/immigration/2016/05/17/healthcare-providers-urge-ontario-to-end-immigration-detention.html](http://thestar.com/news/immigration/2016/05/17/healthcare-providers-urge-ontario-to-end-immigration-detention.html)>; [perma.cc/6MJV-553L]; Nicholas Keung, “Lawyers Join Doctors and Nurses in ‘End Immigration Detention’ Campaign,” *Toronto Star* (28 May 2016), online: <[thestar.com/news/immigration/2016/05/28/lawyers-join-doctors-and-nurses-in-end-immigration-detention-campaign.html](http://thestar.com/news/immigration/2016/05/28/lawyers-join-doctors-and-nurses-in-end-immigration-detention-campaign.html)> [perma.cc/G9BD-LLFD].

<sup>44</sup> End Immigration Detention Network, Media Release, “Immigration detainees refusing food to call for end to indefinite maximum-security detention” (11 July 2016), online: <[https://docs.google.com/document/d/1uO\\_11g2VNfyfdddefFtHOc-CN1h-dkqQHjkcLTmkVGmc/edit](https://docs.google.com/document/d/1uO_11g2VNfyfdddefFtHOc-CN1h-dkqQHjkcLTmkVGmc/edit)>; Muriel Draaisma, “Immigration Detainees on Hunger Strike Demand Meeting With Goodale,” *CBC News* (12 July 2016), online: <[cbc.ca/news/canada/toronto/immigration-detainees-hunger-strike-ontario-prisons-ralph-goodale-1.3676576](http://cbc.ca/news/canada/toronto/immigration-detainees-hunger-strike-ontario-prisons-ralph-goodale-1.3676576)> [perma.cc/9S43-SRQB]; Geraldine Malone, “Immigration Detainees Go on Hunger Strike to Highlight Canada’s Disturbing Detention Policy,” *Vice News* (12 July 2016), online: <[vice.com/en\\_ca/article/yvek7v/immigration-detainees-go-on-hunger-strike-to-highlight-canadas-disturbing-detention-policy](http://vice.com/en_ca/article/yvek7v/immigration-detainees-go-on-hunger-strike-to-highlight-canadas-disturbing-detention-policy)> [perma.cc/E5QD-HFGC].

<sup>45</sup> Canada Border Services Agency, Media Release, “Minister Goodale introduces new initiatives for a better, fairer immigration detention system” (15 August 2016), online: <[canada.ca/en/border-services-agency/news/2016/08/minister-goodale-introduces-new-initiatives-for-a-better-fairer-immigration-detention-system.html](http://canada.ca/en/border-services-agency/news/2016/08/minister-goodale-introduces-new-initiatives-for-a-better-fairer-immigration-detention-system.html)> [perma.cc/VZD2-M2ZL]; CBC News, “Canada’s Immigration Detention Program to Get \$138M Makeover,” *CBC News* (15 August 2016), online: <[cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125](http://cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125)> [perma.cc/VD6X-ATEZ]; CBSA, “New Framework,” *supra* note 12.

<sup>46</sup> End Immigration Detention Network, Media Release, “Hunger strike forces announcement on detentions- the struggle continues” (15 September 2016), online: <[endimmigrationdetention.com/2016/09/15/hunger-strike-forces-announcement-on-detentions-the-struggle-continues/](http://endimmigrationdetention.com/2016/09/15/hunger-strike-forces-announcement-on-detentions-the-struggle-continues/)> [perma.cc/V24P-WKWP].



### III. CHALLENGING THE DETENTION REGIME IN COURT: *BROWN v CANADA*

#### A. BACKGROUND

Alvin Brown is a Jamaican national who arrived in Canada as a young child in the early 1980s and became a permanent resident.<sup>47</sup> As Baqi described, “[h]is entire life was here, his family, all of his connections.” Mr. Brown was found criminally inadmissible to Canada and ordered deported,<sup>48</sup> however, before being removed to Jamaica in 2016 he was detained by the CBSA in maximum-security jails for a total of five years. The sole impediment to Mr. Brown’s deportation was an inability to obtain travel documents from his country of origin, yet every month his detention was sustained by board members who could find no reason to depart from previous findings of risk and order him released back into his community in Canada.<sup>49</sup> “His status was lost and then he found himself in indefinite detention, where throughout the period of his incarceration ... no one could tell him when he would be released or removed,” Baqi explained. Indefinite detention took a heavy toll on the mental health of Mr. Brown, who was diagnosed with schizophrenia while in CBSA custody.<sup>50</sup> Speaking of his experience, he recounted: “It was horrible, I would have rather been dead than detained, not knowing when I would be released.”<sup>51</sup>

During a monthly review in August 2014, Mr. Brown challenged the constitutionality of his detention, arguing that at more than three years in length, it violated his rights under the *Canadian Charter of Rights and Freedoms*.<sup>52</sup> He also challenged the legality of the detention regime’s enabling legislation,<sup>53</sup> eventually bringing the matter to Federal Court.<sup>54</sup> Baqi explained that for EIDN, a major objective of joining the challenge was to be able to raise the campaign’s four main demands before the courts; Mr. Brown’s challenge to the *IRPA* itself provided an opportunity to extend EIDN’s political organizing into the legal realm.

#### B. EIDN AS THIRD PARTY

As mentioned above, EIDN’s motion to be granted public interest standing as a third party was granted in October 2016.<sup>55</sup> In Baqi’s opinion, the network would not have been granted third party status without the sustained political organizing that preceded the court challenge, however she admits she was surprised when EIDN was granted leave to participate. Baqi remembers thinking: “We don’t have legitimacy, immigration detainees’ lives don’t have legitimacy, so how

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<sup>47</sup> *Brown*, *supra* note 3 at para 9; Applicant’s Memo, *supra* note 11 at para 10.

<sup>48</sup> *Ibid*; *Brown*, *supra* note 3 at paras 9–15.

<sup>49</sup> Applicant’s Memo, *supra* note 11 at paras 15, 16. *Brown*, *supra* note 3 at paras 16–18.

<sup>50</sup> Applicant’s Memo, *supra* note 11 at para 18.

<sup>51</sup> Quoted in End Immigration Detention Network, Media Release, “Federal court questions border enforcement on constitutionality of indefinite detention” (15 May 2017), online: <endimmigrationdetention.com/2017/05/15/media-release-federal-court-questions-border-enforcement-on-constitutionality-of-indefinite-detention/> [https://perma.cc/6LJR-W86D].

<sup>52</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK), 1982*, c 11 [*Charter*]; Applicant’s Memo, *supra* note 11 at para 19; *Brown*, *supra* note 3 at para 19.

<sup>53</sup> *Ibid*; Applicant’s Memo, *supra* note 11 at para 19.

<sup>54</sup> *Brown*, *supra* note 3 at para 25.

<sup>55</sup> EIDN Motion, *supra* note 1 at para 24.

are we ever going to get this?” As such, she views EIDN’s third party status as a “big victory,” and a recognition that “these are legal issues that [the Federal Court] should consider.”

In order to be named as a public interest party in the litigation commenced by Mr. Brown, EIDN had to demonstrate that the following factors, laid out in the Supreme Court of Canada’s decision in *Downtown Eastside*, were satisfied: “(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.”<sup>56</sup> Gleeson J found that EIDN easily satisfied the first two factors, which the Respondent Minister did not dispute.<sup>57</sup>

At the time EIDN brought its motion seeking standing as a party, Mr. Brown had already been deported to Jamaica.<sup>58</sup> As such, with respect to the third *Downtown Eastside* factor, EIDN submitted that a grant of standing would allow the network to continue the proceeding on Mr. Brown’s behalf should the matter be found moot as a result of his removal.<sup>59</sup> The Respondent argued instead that it would be most reasonable and effective for another long-term immigration detainee to bring this issue before the Court.<sup>60</sup> While Gleeson J agreed that, in theory, there exists a number of individual litigants who could bring a similar challenge before the Court as of right,<sup>61</sup> he rejected the Respondent’s argument and noted the many practical obstacles that would likely prevent another long-term detainee from bringing forth a challenge to the legality of the immigration detention regime.<sup>62</sup> Importantly, EIDN’s presence as a third party led Justice Simon Fothergill, who presided over the challenge in Federal Court, to exercise his discretion to hear the case in the broader public interest, “notwithstanding that it [had] likely become moot due to Mr. Brown’s removal to Jamaica.”<sup>63</sup>

While the facts of Mr. Brown’s challenge focused on his own experience, as a party to the proceedings EIDN was able to bring a “cross section of detainee experiences” before the court. EIDN’s evidence consisted of the experiences of both men and women who had been detained at CECC and the Toronto Immigration Holding Centre, as well as family members of detainees.<sup>64</sup> Many of EIDN’s affiants were organizers in the campaign who wanted to share their experiences of detention.

## C. THE LEGAL ARGUMENTS

Counsel for EIDN and Mr. Brown worked in close collaboration with one another, and together argued that the legislative scheme<sup>65</sup> governing Canada’s immigration detention regime violates sections 7, 9, and 12 of the *Charter*.<sup>66</sup>

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<sup>56</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37 [*Downtown Eastside*].

<sup>57</sup> EIDN Motion, *supra* note 1 at paras 14-16.

<sup>58</sup> *Brown*, *supra* note 3 at para 18.

<sup>59</sup> EIDN Motion, *supra* note 1 at paras 13, 17.

<sup>60</sup> *Ibid* at para 17.

<sup>61</sup> *Ibid* at para 20.

<sup>62</sup> *Ibid* at para 23.

<sup>63</sup> *Brown*, *supra* note 3 at paras 33-38.

<sup>64</sup> See *Brown*, *supra* note 3 at paras 52-72, 92.

<sup>65</sup> *IRPA*, *supra* note 13 at ss 57 and 58; *Regulations*, *supra* note 13 at ss 244-48.

<sup>66</sup> *Brown*, *supra* note 3 at para 30.

The parties argued that the lack of a statutory limit to the length of detention leads to situations of unconstitutional, indefinite detention,<sup>67</sup> in violation of both section 7, which protects “the right to life, liberty and security of the person,”<sup>68</sup> and section 9 of the *Charter*, which protects against arbitrary detention.<sup>69</sup> Furthermore, they argued that the legislation’s silence in relation to conditions and location of detention also violate section 7 liberty interests,<sup>70</sup> because as Baqi notes, “the CBSA ends up having unfettered discretion to do whatever they want, and the law doesn’t constrain the state’s power;” there exists no way to ensure that detention conditions are reflective of a detainee’s actual level of risk, which the parties therefore argued is not minimally impairing in accordance with the *Charter*.<sup>71</sup>

EIDN and Mr. Brown also submitted that the detention regime violates section 12 of the *Charter*,<sup>72</sup> which protects against cruel and unusual punishment, as a result of the length, indeterminacy, and what Baqi describes as the “actual material circumstances and conditions under which people are detained.” The parties argued that the section 12 infringement stems from: detention conditions, which especially in provincial prisons, are *de facto* punitive; the psychological impact of indefinite detention; and, the inadequate healthcare provided to detainees.<sup>73</sup> In support of this argument, EIDN presented evidence about jail conditions, including frequent lockdowns, lack of proper healthcare, hygiene issues, lack of access to family visits and phone calls, and a lack of programming and rehabilitative supports.

The parties’ final central argument related to the lack of fairness and procedural protections built into the detention review process.<sup>74</sup> Counsel argued that a “process in which the state is *de facto* and unjustifiably relieved of its burden of proof to show continuing grounds for detention is unfair and thus contrary to the principles of fundamental justice,”<sup>75</sup> and leaves detainees with the near impossible task of justifying their own release.<sup>76</sup> Baqi illustrates the reverse onus that exists in practice, showing how past behaviour can become *prima facie* evidence that a detainee is a flight risk or a danger to the public:

[I]f you have a past conviction, [the Minister] can just say “you’re a danger.” Even if there’s been a big passage of time they are still able to rely on that one conviction, and there’s nothing you can do to overcome that, especially if there’s no rehabilitative programming to show you’ve been rehabilitated, and that happens all the time. So, we’re saying there’s a reverse onus here, and that’s not minimally restrictive [on one’s liberty interests].

Adding to the lack of fairness, counsel argued that because the legislation does not require the Minister to provide evidence or disclosure at detention reviews, detainees are

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<sup>67</sup> Applicant’s Memo, *supra* note 11 at paras 23, 74; *Brown*, *supra* note 3 at para 142.

<sup>68</sup> *Charter*, *supra* note 52 at s 7; Applicant’s Memo, *supra* note 11 at paras 41–44, 54–59, 77–90.

<sup>69</sup> *Charter*, *supra* note 52 at s 9; Applicant’s Memo, *supra* note 11 at paras 54–90. *Brown*, *supra* note 3 at para 115.

<sup>70</sup> Applicant’s Memo, *supra* note 11 at paras 41–44; *Brown*, *supra* note 3 at paras 114, 129.

<sup>71</sup> Applicant’s Memo, *supra* note 11 at para 41.

<sup>72</sup> *Charter*, *supra* note 52 at s 12; *Brown*, *supra* note 3 at paras 153–54; Applicant’s Memo, *supra* note 11 at paras 24, 91–114.

<sup>73</sup> *Brown*, *supra* note 3 at paras 153–54.

<sup>74</sup> Applicant’s Memo, *supra* note 11 at paras 25–40; *Brown*, *supra* note 3 at paras 114, 116.

<sup>75</sup> Applicant’s Memo, *supra* note 11 at para 27.

<sup>76</sup> *Ibid* at paras 31–40; *Brown*, *supra* note 3 at paras 114, 116.

precluded from knowing the case against them and from meaningfully challenging the allegations asserted to justify their continued detention.<sup>77</sup>

The parties sought to have the entire detention regime declared unconstitutional. In the alternative however, Mr. Brown asked for a number of specific remedies, including the imposition of a six-month presumptive limit and an eighteen-month hard limit on detentions.<sup>78</sup> For its part, EIDN sought to secure a ninety-day limit on detentions,<sup>79</sup> to reflect the demands that emerged from the original detainee hunger strike.

## D. RESULT

Unsurprisingly to the parties, the outcome of Justice Fothergill’s July 2017 decision was not favourable. Mr. Brown’s application was refused, however in doing so, Fothergill J opted not to meaningfully engage with the *Charter* issues raised by EIDN and Mr. Brown. Instead, he suggested the parties’ concerns were the result of a “maladministration”<sup>80</sup> of the *IRPA* and that when “properly interpreted and applied,”<sup>81</sup> the legislation is constitutionally compliant.

Fothergill J found that “many of the legal principles that inform the constitutional analysis in this case [to be] well-established.”<sup>82</sup> Throughout the decision he cites jurisprudence and rules that articulate the requirements of lawful detention and a constitutionally compliant review process,<sup>83</sup> and repeatedly states that the issues raised by Mr. Brown and EIDN are “not an indication that the statutory scheme is itself unconstitutional.”<sup>84</sup> Thus, instead of grappling with the abundance of evidence put forth by the parties of legislative deficiencies and *Charter* infringements occurring under the auspices of the immigration detention regime, he relies on the existing jurisprudence to reaffirm the constitutionality of the legislative framework.<sup>85</sup>

In Baqi’s opinion, the decision could have been worse because, as opposed to explicitly rejecting them, “the judge did not address many of the arguments,” leaving room on appeal to raise and rely on the *Charter* arguments that were not squarely addressed in the Federal Court decision. Fothergill J determined that the Federal Court of Appeal had “yet to consider whether the *Charter* imposes a requirement that detention for immigration purposes not exceed a prescribed period of time,” and certified a question for appeal to that effect.<sup>86</sup>

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<sup>77</sup> Applicant’s Memo, *supra* note 11 at paras 25, 28–30; *Brown*, *supra* note 3 at paras 114, 121.

<sup>78</sup> Applicant’s Memo, *supra* note 11 at para 119. *Brown*, *supra* note 3 at paras 31, 143.

<sup>79</sup> EIDN’s Memo, *supra* note 11 at para 111; *Brown*, *supra* note 3 at para 143.

<sup>80</sup> *Brown*, *supra* note 3 at paras 120, 127, 156.

<sup>81</sup> *Brown*, *supra* note 3 at para 156.

<sup>82</sup> *Ibid* at para 161.

<sup>83</sup> *Ibid* at paras 119–20, 124–28, 131, 134–35, 138, 151–52, 155–56.

<sup>84</sup> *Ibid* at para 127.

<sup>85</sup> Fothergill J concluded his decision by rearticulating a list of the “minimum requirements of lawful detention for immigration purposes under the *IRPA* and the Regulations” (*Brown*, *supra* note 3 at para 159).

<sup>86</sup> The certified question is as follows: “Does the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?” (*Brown*, *supra* note 3 at para 162).

Shortly before the publication of this piece, the Federal Court of Appeal released its decision wherein it upheld the constitutionality of the immigration detention regime<sup>87</sup> and again attributed acknowledged deficiencies in the regime to maladministration and not the legislation itself. In its decision, the Court of Appeal lays out in further detail the requirements of a detention that complies with both the *Charter* and administrative law principles,<sup>88</sup> stating that “[a]lthough the appellants’ challenge to the validity of the sections fails, many of their arguments are vindicated by what is said in these reasons concerning what judges conducting detention reviews must consider.”<sup>89</sup> The Court of Appeal rejected the arguments of the parties that *IRPA* is rendered unconstitutional because it does not impose a maximum period of detention or expressly state that there can be no detention absent a reasonably foreseeable prospect of removal;<sup>90</sup> having found the detention regime not to infringe sections 7 and 9 of the *Charter*, the Court of Appeal concludes that: “No principle of statutory interpretation requires that, to ensure constitutionality, the legislature must state that which the law already requires.”<sup>91</sup> In regards to section 12 of the *Charter*, the Court of Appeal found that the “evidence of conditions of detention falls far short of the threshold of cruel and unusual punishment set by the Supreme Court.”<sup>92</sup>

#### IV. LITIGATION AS A TOOL FOR SOCIAL CHANGE

The ability of litigation to generate meaningful social change has long been debated,<sup>93</sup> and it is difficult to define “success” when legal challenges are used to seek such change.<sup>94</sup> Skeptics worry that in asking for recognition of rights, social movement actors acquiesce to the court’s power to determine which human beings have value, and which do not.<sup>95</sup> Some critical legal scholars argue this creates a harmful reliance on the state, thereby “weaken[ing] the power of a popular movement,”<sup>96</sup> while at the same time “lending legitimacy to [a] political system”<sup>97</sup> that a movement might fundamentally oppose.

Others argue that to be skeptical of legally granted rights and legitimacy “is, in large measure, a luxury that is only truly available for those who already enjoy the experience of

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<sup>87</sup> *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras 22, 37.

<sup>88</sup> *Ibid* at paras 89–149.

<sup>89</sup> *Ibid* at para 20.

<sup>90</sup> *Ibid* at para 39.

<sup>91</sup> *Ibid* at para 60. See also paras 44, 78.

<sup>92</sup> *Ibid* at para 111.

<sup>93</sup> See e.g. Tracy Heffernan, Fay Faraday & Peter Rosenthal, “Fighting for the Right to Housing in Canada” (2015) 24 *J L & Soc Pol’y* 10; Steven E Barkan, “Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation” (1980) 58:3 *Social Forces* 944; Lisa Vanhala, “Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements” (2009) 42:4 *Can J Political Science* 981; Fay Faraday, “Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse” (1994) 32:1 *Osgoode Hall LJ* 33; Judy Fudge, “What Do We Mean by Law and Social Transformation?” (1990) 5 *CJLS* 47; Elizabeth M Schneider, “The Dialectic of Rights and Politics: Perspectives from the Women’s movement” (1986) 61 *NYU L Rev* 589.

<sup>94</sup> See e.g. FL Morton & Avril Allen, “Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada” (2001) 34:1 *Can J Political Science* 55 at 56, 63–4.

<sup>95</sup> Heffernan, Faraday & Rosenthal, *supra* note 93 at 14; Schneider, *supra* note 93 at 596.

<sup>96</sup> Schneider, *supra* note 93 at 596.

<sup>97</sup> Barkan, *supra* note 93 at 947.

rights.”<sup>98</sup> The granting of legal rights can allow “a group’s experiences [to] acquire public value for the first time,”<sup>99</sup> providing momentum to movements as actors begin to “perceive their discontent as worthy of political attention.”<sup>100</sup> Moreover, the acceptance of an issue as justiciable by the courts acts as an acknowledgement that a wrong has occurred, and that a remedy is required.<sup>101</sup> As Fay Faraday argues, “the power to name ... experiences as injuries has more than symbolic importance.”<sup>102</sup>

## A. EIDN’S LITIGATION EXPERIENCE

Unsurprisingly, EIDN’s experience did not demonstrate litigation to be a definitively positive or negative force in advancing the demands of the campaign. Knowing they were entering “a very conservative venue,” Baqi acknowledged that EIDN did not have “many expectations of being successful in the Federal Court.” Though she understood they would likely need to appeal the decision before finding legal success, the network was not solely interested in victory as defined in narrow legalistic terms: “[O]bviously we wanted to win ... but for us this legal strategy was going to be just one tool in an overall strategy.” Engaging in litigation allowed EIDN to shed light on the experiences and demands of immigration detainees, however, as Baqi made clear throughout our interview, the intent was always to bring forth those voices both inside *and* outside the courtroom:

Part of the reason we did the litigation was also to raise awareness ... . EIDN planned to do a lot of public relations work and media work around it and give the opportunity to detainees and family members to speak to it, and it was just more likely to get picked up [by the media] if it was in court.

### 1. BENEFITS TO THE CAMPAIGN

Asserting legal rights in the courtroom can act as a platform to “express the politics, vision, and demands of a social movement;”<sup>103</sup> regardless of the success of a legal challenge, movement actors are provided the opportunity to articulate their own political analyses.<sup>104</sup> The highly publicized Federal Court challenge allowed EIDN to engage extensively with media, and with the legitimacy of third party standing, the network was in a position to influence public consciousness, frame the discourse surrounding the legal challenge, and define the problems associated with immigration detention, exemplifying one way that “rights litigation is not antithetical to grassroots organizing but complementary.”<sup>105</sup>

EIDN’s participation in the Federal Court challenge provided a focal point for detainees to rally around: “[A] lot of detainees were very interested in the case, and what was amazing was that so many former detainees and their family members did show up for those two days in court,

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<sup>98</sup> Heffernan, Faraday & Rosenthal, *supra* note 93 at 14.

<sup>99</sup> Faraday, *supra* note 93 at 36.

<sup>100</sup> Barkan, *supra* note 93 at 948.

<sup>101</sup> Faraday, *supra* note 93 at 37.

<sup>102</sup> *Ibid.*

<sup>103</sup> Schneider, *supra* note 93 at 605.

<sup>104</sup> Schneider, *supra* note 93; Barkan, *supra* note 93.

<sup>105</sup> Morton & Allen, *supra* note 94 at 82–83.

and a lot of detainees did get more involved in the campaign as a result.” Despite what was, in a legal sense, a negative outcome, Baqi explained that being able to share their stories and see their experiences taken seriously before the court empowered those involved: “[P]eople certainly told us that they felt some sort of vindication or support while the hearing was happening, for these arguments to be raised.”

The highly publicized Federal Court challenge provided EIDN with a platform to engage extensively with media,<sup>106</sup> and in doing so to centre the voices of detainees and their family members. EIDN focused its messaging on the need for a limit on the length of detentions, while also drawing attention to the violations of international human rights law inherent in the immigration detention system, and the many deaths that have occurred under the CBSA’s watch.<sup>107</sup> Instead of hearing exclusively from legal actors in media coverage, centering the voices of detainees, family members, and Mr. Brown himself, humanized the issue and demonstrated the toll that indefinite detention takes on the mental health of individual detainees, as well as the families whose lives are violently interrupted by the immigration detention system.<sup>108</sup> Backed by the legitimacy that came with being a party to the litigation, EIDN was in a position to frame the discourse surrounding the legal challenge, and infuse the demands of the network into public consciousness on a larger scale. This opportunity to define the problems associated with immigration detention exemplifies one way that litigation efforts can be complimentary, rather than antithetical, to grassroots organizing.

Political effects of the litigation emerged shortly after the release of the decision, with the Immigration and Refugee Board announcing plans to “audit” the detention reviews of long-term detainees. Citing *Brown*, which clarified the requirements of constitutional detention,<sup>109</sup> the IRB stated that depriving liberty requires them to “be proactive in identifying and pursuing opportunities for improvement.”<sup>110</sup> A report of the external audit was released in July 2018.<sup>111</sup>

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<sup>106</sup> Shanifa Nasser, “Federal Court Hearing Landmark Challenge on Indefinite Immigration Detention,” *CBC News* (15 May 2017), online: <[cbc.ca/news/canada/toronto/immigration-detention-canada-challenge-1.4114908](http://cbc.ca/news/canada/toronto/immigration-detention-canada-challenge-1.4114908)> [perma.cc/7WFK-KH4E]; Jackie Dunham, “Court Hearing Landmark Challenge to Indefinite Immigration Detention,” *CTV News* (15 May 2017), online: <[ctvnews.ca/canada/court-hearing-landmark-challenge-to-indefinite-immigration-detention-1.3414185](http://ctvnews.ca/canada/court-hearing-landmark-challenge-to-indefinite-immigration-detention-1.3414185)> [perma.cc/7UGG-KPUN]; Colin Perkel, “Indefinite Immigration Detention in Canada Under Fire in Federal Court,” *Globe and Mail* (15 May 2017), online: <[theglobeandmail.com/news/national/indefinite-immigration-detention-in-canada-under-fire-in-federal-court/article34994185/](http://theglobeandmail.com/news/national/indefinite-immigration-detention-in-canada-under-fire-in-federal-court/article34994185/)> [perma.cc/6746-YFQK].

<sup>107</sup> See e.g. End Immigration Detention Network, Media Release, “Federal court questions border enforcement on constitutionality of indefinite detention (15 May 2017),” online: <https://endimmigrationdetention.com/2017/05/15/media-release-federal-court-questions-border-enforcement-on-constitutionality-of-indefinite-detention/> [perma.cc/QJ52-7RT4].

<sup>108</sup> Shanifa Nasser, “Federal Court hearing landmark challenge on indefinite immigration detention,” *CBC News* (15 May 2017), online: <[www.cbc.ca/news/canada/toronto/immigration-detention-canada-challenge-1.4114908](http://www.cbc.ca/news/canada/toronto/immigration-detention-canada-challenge-1.4114908)> [perma.cc/W8MT-2787]; Jackie Dunham, “Court hearing landmark challenge to indefinite immigration detention,” *CTV News* (15 May 2017), online: <[www.ctvnews.ca/canada/court-hearing-landmark-challenge-to-indefinite-immigration-detention-1.3414185](http://www.ctvnews.ca/canada/court-hearing-landmark-challenge-to-indefinite-immigration-detention-1.3414185)> [perma.cc/DS6B-PVSQ]; Colin Perkel, “Indefinite immigration detention in Canada under fire in Federal Court,” *Globe and Mail* (15 May 2017), online: <<https://www.theglobeandmail.com/news/national/indefinite-immigration-detention-in-canada-under-fire-in-federal-court/article34994185/>> [perma.cc/BA72-JZLN].

<sup>109</sup> *Brown*, *supra* note 4 at para 159.

<sup>110</sup> Immigration and Refugee Board, News Release, “Immigration and Refugee Board of Canada to carry out audit of long-term detention reviews,” online: <[irb-cisr.gc.ca/en/news/2017/Pages/aud-ver-det.aspx](http://irb-cisr.gc.ca/en/news/2017/Pages/aud-ver-det.aspx)> [perma.cc/5TYS-8SWY]; Paola Loriggio, “Immigration Board to Audit Long-Term Detention Process After ‘Endless Circle of Mistakes,’” *CBC News* (17 August 2017), online: <[cbc.ca/news/canada/toronto/immigration-board-audit-1.4251651](http://cbc.ca/news/canada/toronto/immigration-board-audit-1.4251651)> [perma.cc/7MM7-6UGA].

The report found that “in a significant number of [reviewed] hearings and decisions, there were notable discrepancies between the expectations articulated by the courts and the practice of the ID,”<sup>112</sup> especially in “very” long-term detention cases, and noted that “there is cause for concern to the extent that the courts have been critical of practices which the audit found to be present in many of the files reviewed.”<sup>113</sup> The audit report identified with concern many of the same issues with the review process that were raised by EIDN and Mr. Brown at Federal Court, including the tendency for the onus to shift to detainees to justify their own release.<sup>114</sup> The report identified areas where change is required to meet *Charter* and procedural fairness requirements set out in *Brown* and other jurisprudence.<sup>115</sup>

Throughout the litigation process, EIDN was able to frame immigration detention as violent, inhumane, and arbitrary. In the aftermath of the *Brown* challenge, along with other recent litigation and advocacy,<sup>116</sup> it has become difficult to dismiss long-term detention as simply the collateral damage of a neutral administrative process. Post-*Brown*, “there are very few long-term detainees”<sup>117</sup> and “more people being released on conditions,” which are often stringent. Baqi said: “I don’t know if I’d call it a victory, but it’s movement. I think the government’s scared, and was scared of this litigation, and put a lot of resources into it.” Ahead of the litigation, detainee organizers had the government’s feet held firmly to the fire, and the Federal Court challenge further intensified this pressure.

## 2. LITIGATION LIMITATIONS

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<sup>111</sup> Immigration and Refugee Board of Canada, “Report of the 2017/2018 External Audit (Detention Review),” (20 July 2018), online: <<https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx>> .

<sup>112</sup> *Ibid* at “Introduction.”

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* at “Overarching observations” (“Too often in these hearings, it appeared that the onus of proof had slipped over to the detained person who was almost always unrepresented and powerless to articulate fresh argument for release or to demonstrate rehabilitation while incarcerated without access to supportive programming that could assist with rehabilitation”). Other issues included, but were not limited to: “Uncritical Reliance on Statements by CBSA Hearing Officers” (“Over time, inaccurate statements by CBSA officers can become accepted facts that are repeated in decisions”) and “Inaccuracies and Inconsistencies in Factual Findings” (“In some files, one can see an inconsistent or false narrative developing over time. Negative assumptions, not rigorously supported by the evidence, would sometimes gradually become part of the accepted history for the detained person.”).

<sup>115</sup> *Ibid* at “Introduction,” “Overarching observations,” and “Recommendations.” In response to the audit and evolving jurisprudence, the Chairperson of the IRB issued a revised Guideline on Detention, which includes “hearing protocols supporting active adjudication, more fulsome guidance on alternatives to detention, elaboration on the treatment of minors and vulnerable persons, and reinforcement of the statutory default of release.” (Immigration and Refugee Board of Canada, News Release, “Chairperson’s Revised Guidelines on Detention,” (18 March 2019), online: <https://irb-cisr.gc.ca/en/news/2019/Pages/revised-guideline-detention.aspx>. The revised guidelines came in to effect 1 April 2019 and can be found online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx>.

<sup>116</sup> See the important *habeas corpus* jurisprudence from the Ontario Superior Court and Court of Appeal, including: *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700; *Ali v Canada (Attorney General)*, 2017 ONSC 2660; *Scotland v Canada (Attorney General)*, 2017 ONSC 4850. These decisions were highly critical of Canada’s practice of long-term, indefinite detention, and put a spotlight on the procedural fairness issues inherent in the detention regime. Also see the Supreme Court of Canada’s decision in *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, in which EIDN acted as an Intervener, which confirmed that Superior courts have the jurisdiction to hear *habeas corpus* applications of immigration detainees seeking to challenge long-term detentions.

<sup>117</sup> Baqi was speaking anecdotally, but the number of long-term detainees as reported by the CBSA has decreased significantly over the past two years: CBSA, “Arrests, Detentions and Removals,” *supra* note 6.



Faraday cautions that “by framing social conflicts in terms of legal rights, the discourse presupposes a *legal* solution,”<sup>118</sup> and as EIDN’s experience demonstrates, the legal system is largely unable to provide the types of change sought by social movements.

#### i. Resource Intensity

Baqi made it clear that litigation was never “supposed to be the central strategy” of EIDN’s campaign. She bemoaned the fact that it became so central “because litigation takes so many resources and time ... . It happens at the expense of mobilizing for other reasons.” Elizabeth Schneider echoes her concerns, suggesting that “the concreteness and immediacy of legal struggle tends to subsume the more diffuse role of political organizing and education”<sup>119</sup> and cautions that “the articulation of a right can, despite a movement’s best efforts, put the focus of immediate political struggle on winning the right in court,” to the detriment of other organizing and educating efforts.<sup>120</sup> Given that a victory in court does not dismantle the oppressive social and economic systems that movements are born from, this monopolization of resources is a problematic consequence of litigation that can limit capacity to engage in other necessary work. While Faraday emphasizes the “need for extralegal political activity in order to give legal entitlements any substantive meaning,”<sup>121</sup> the incredible human and financial resource drain created by litigation makes this a challenge.

Because of the intense resource demands of litigation, movements may adopt a cautious approach to engaging in litigation to further social change. Steven Barkan argues that “[g]iven the particular needs and goals of a social movement organization, the probable costs of a potential ... case in time, energy, and money must not outweigh the possible advantages of litigation.”<sup>122</sup> Resource constraints pose a particular challenge for grassroots organizations like EIDN, which has no paid staff, operating budget, or defined leadership. As Baqi recounted: “We were very poorly resourced, ... and even getting transcripts and experts [was challenging].” Test case funding from Legal Aid Ontario covered some of co-counsel Swathi Sekhar’s legal fees, but that was after the motion for leave had been filed on a *pro bono* basis. Baqi was retained through her pre-existing clinic job, which devoted “a lot of resources” to allow her to represent EIDN. Even so, the legal team contributed a significant amount of uncompensated time to the challenge.

Baqi recounted the frustrating reality of working on a “dream case” that aligned closely with her politics while feeling completely overwhelmed “for four months straight” due to the all-consuming nature of the challenge and the sheer volume of work. She said that while working countless hours of unpaid overtime was ultimately worthwhile, “it was not sustainable.” Similarly, while EIDN secured limited funding to compensate the detainees and family members who provided affidavit evidence, it was insufficient to fully account for the time and emotional energy spent participating in the challenge.

#### ii. Narrowness of the Law

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<sup>118</sup> Faraday, *supra* note 93 at 40.

<sup>119</sup> Schneider, *supra* note 93 at 630.

<sup>120</sup> *Ibid.*

<sup>121</sup> Faraday, *supra* note 93 at 40.

<sup>122</sup> Barkan, *supra* note 93 at 955.

Baqi explained that the legal strategy used to challenge the detention regime was “really interesting, but also really frustrating ... because the law is so narrow.” One of the trade-offs of being granted third party standing was being forced to play by the rules of the legal system, which meant making palatable, legally-supportable arguments, even when they did not map on to the demands and political principles of the network; in order to be taken seriously within the courtroom, much of EIDN’s political vision had to be checked at the door. Baqi illustrated this using EIDN’s key demand of a ninety-day limit on detentions:

I don’t think there would have been a legal basis to really say that, because we are relying on precedent, and other jurisdictions ... . So, we had to frame the demand for release after ninety days into a presumptive period of ninety days. After the ninety days the idea is that the person should be released, but the state would be able to rebut that presumption ... . Certainly the government wouldn’t explicitly acknowledge this, but when you’re talking about hugely marginalized, racialized, predominantly Black migrants that are in detention, conveniently the government always has a reason to rebut that presumption ... and so practically speaking, you know I’m not confident that [a presumptive period] would actually do very much in the lives of people facing detention, short of a socio-political change in how racialized migrants are viewed and treated.

It was frustrating to water down EIDN’s central political demand of a ninety-day limit on detentions, especially because, as Baqi notes, organizers with the campaign firmly believed that “people should not be detained for immigration purposes period.”

Litigating on behalf of immigration detainees is an uphill and contradictory battle as it involves an appeal for understanding and sympathy from a legal system that limits the rights and entitlements of non-citizens at every turn. The understanding that non-citizens do not have an unqualified right to enter and remain in Canada is fundamental to immigration law,<sup>123</sup> which Baqi argues has created a “different rights regime for non-citizens ... especially around detention.” Moreover, because immigration detention in Canada is characterized by the government as an administrative process, and not a punitive one,<sup>124</sup> there exists a disconnect between the legal understanding of detention and the harsh lived realities of immigration detainees. Unlike in a criminal law context, Baqi argued:

[I]n the immigration context, there’s not even space to bring [race and racial profiling] up, because immigration detention and deportation are legally not seen as punishment, so it’s not punitive, it’s fully administrative [and, theoretically] you’re not being targeted in anyway. If detention is not even seen as punishment, how do you even make these arguments?

### iii. Erasure of Broader Context

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<sup>123</sup> *Chiarelli v Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC).

<sup>124</sup> See e.g. CBSA, “New Framework,” *supra* note 12 (“Immigration detention is not punitive, but exercised under the law (*Immigration and Refugee Protection Act* or IRPA) under clear parameters to ensure the integrity of the immigration system and to ensure public safety”).

For Baqi, the absence of a discussion about systemic racism was “the thing that was really maddening about this whole piece.” Though “almost every single one of the people who are in long-term detention is Black,”<sup>125</sup> race remained the “giant elephant in the room.” At a certain point in the challenge, Baqi remembers the process began to feel pointless because so much broader context, specifically around race, borders, and criminalization, was silenced: “[T]hat’s what borders are about, that’s what control of these Black bodies is about, that’s what deprivation of liberty without real accountability is about ... and it’s nowhere to be seen in any of this.”

Reference to the broader social and political context in which the immigration detention regime operates was similarly silenced throughout the entire court process. As Baqi acknowledged, “we’re on stolen [Indigenous] land, these are colonial borders, this is a colonial government who has imperial interests around the world that displace people,” yet within the courtroom, no space existed to question Canada’s authority to detain migrants on this territory, nor its role in creating conditions of displacement around the world. Context critical to understanding immigration detention as part of a violent and oppressive system, instead of the neutral bureaucratic administration of Canadian immigration law, was consequently missing from the legal argument.

## V. CONCLUSION

A dialectical relationship exists between legal rights and political organizing, and it is too simple to dismiss the use of litigation as a tool for social movements because of the “politically debilitating”<sup>126</sup> potential of relying on rights claims. Schneider argues we should recognize the “affirming, expressive, and creative aspects of rights claims,” while being critical of the role and potential of legal challenges.<sup>127</sup> Heffernan et al echo this critical embrace of law as a tool for social change, arguing that “while it involves risks, litigation is a valid and at times necessary field of engagement both as a process of movement building and as a defence of core entitlements.”<sup>128</sup>

While legal challenges alone “are not a basis for building a sustained political movement, nor can rights claims perform the task of social reconstruction,”<sup>129</sup> engaging in litigation was valuable for EIDN. The process granted value and legitimacy to the lives of immigration detainees, captured the attention of media and government, consolidated support for the campaign, and allowed the voices and perspectives of detainees to be heard before the court.

The parties are currently in the process of filing an application for leave to appeal the decision to the Supreme Court of Canada. However, regardless of whether Mr. Brown and EIDN ultimately find legal success, the work of dismantling the systems that facilitate the surveillance, criminalization, and detention of migrants will be far from over. The trajectory of the End Immigration Detention Network reinforces the importance of building collective power within social movements and being cautious of rights granted from within the vacuum of the legal

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<sup>125</sup> Baqi is speaking anecdotally as Canada does not release statistics on the race or ethnic identity of detainees. As mentioned, several high-profile detainees held by Canada have been Black men (see footnote 26, *supra*), including Alvin Brown. The majority of detainees involved with the campaign to end indefinite detention also fit this profile.

<sup>126</sup> Schneider, *supra* note 93 at 596.

<sup>127</sup> *Ibid* at 652.

<sup>128</sup> Heffernan, Faraday & Rosenthal, *supra* note 93 at 15.

<sup>129</sup> Schneider, *supra* note 93 at 622.

system. Most importantly, EIDN’s experience demonstrates that to bring an end to both indefinite detention and the broader structures that uphold the Canadian immigration detention regime, litigation must necessarily be only one tool, carefully selected and wielded, in an overall strategy for change.