

*RICHARD V. THE ATTORNEY GENERAL OF
CANADA: A CRITICAL ANALYSIS OF
IMMIGRATION DETENTION IN CANADIAN
PROVINCIAL JAILS UNDER THE EUROPEAN
CONVENTION ON HUMAN RIGHTS*

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ABSTRACT

On 5 July 2024, the Superior Court of Justice of Ontario declared admissible a class action lawsuit against Canada's federal government's policy of detaining immigrants in provincial jails on the basis that it could amount to a violation of several rights protected under the *Canadian Charter of Rights and Freedoms*. In this article, we engage in a hypothetical exercise in which we seek to establish what would be the outcome of the case if it were to be decided under the Council of Europe's human rights framework in general, and the European Court of Human Rights' case law on immigration detention specifically. Building on the evidence provided by several national and international organizations, we argue that Canada's policy of detaining immigrants in provincial jails would amount to cruel and unusual treatment contrary to article 3 of the *European Convention on Human Rights*. The conclusions of this article are purely

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speculative, yet they contribute to the painting of a more complete, critical, and complex portrait of Canada's immigration detention policies from a European perspective. The article also highlights how the focus of both European and Canadian courts on the conditions of detention may overshadow any debates on the legitimacy of immigration detention itself.

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RÉSUMÉ

Le 5 juillet 2024, la Cour supérieure de justice de l'Ontario a déclaré recevable un recours collectif contre la politique du gouvernement fédéral canadien consistant à détenir des personnes migrantes dans des établissements correctionnels provinciaux, au motif que cette pratique pourrait constituer une violation de plusieurs droits protégés par la *Charte canadienne des droits et libertés*. Dans cet article, nous nous livrons à un exercice hypothétique visant à déterminer quelle serait l'issue de l'affaire si elle devait être jugée au regard du cadre général des droits humains du Conseil de l'Europe, et plus particulièrement de la jurisprudence de la Cour européenne des droits de l'homme en matière de détention administrative des migrants. En nous appuyant sur les éléments de preuve fournis par plusieurs organisations nationales et internationales, nous soutenons que la politique canadienne consistant à détenir des personnes migrantes dans des établissements correctionnels provinciaux constituerait un traitement cruel et inhabituel contraire à l'article 3 de la *Convention européenne des droits de l'homme*. Les conclusions de cet article sont purement spéculatives, mais elles contribuent à brosser un portrait plus complet, critique et complexe des politiques canadiennes de détention en matière d'immigration d'un point de vue européen. L'article souligne également comment l'accent mis par les tribunaux européens et canadiens sur les conditions de détention peut occulter tout débat sur la légitimité de la détention des immigrants elle-même.

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INTRODUCTION

ON 5 July 2024, the Superior Court of Justice of Ontario (ONSC) certified¹ a class action lawsuit against Canada's federal government's policy of detaining immigrants in provincial jails.² The suit represents over eight thousand immigration detainees who claim that their detention in provincial jails by the Canada Border Services Agency (CBSA) amounted to an unjustified violation of their *Canadian Charter of Rights and Freedoms* (*Charter*) rights. These rights include the right to life, liberty, and security (section 7); the right not to be arbitrarily detained (section 9); the right not to be subjected to cruel and unusual treatment or punishment (section 12); and the right to equality and non-discrimination (section 15).

This might come as a surprise to some, considering that "Canada enjoys a global reputation as a defender of human rights, aided by a solid record on core civil and political rights protections."³ For a long time, Canada's stable imprisonment rates have helped paint the picture of a humanitarian country,⁴ one whose punishment practices are far more benevolent than those of other countries such as the United Kingdom or the

1 In Canada, class action lawsuits must pass through a procedural test called "certification" before being allowed to proceed as a class action. In Ontario, where *Richard* was filed, class action lawsuits are regulated by the *Class Proceedings Act, 1992* (see SO 1992, c 6, s 2(2), s 5). For the certification decision of the case see *Richard v The Attorney General of Canada*, 2024 ONSC 3800 at para 433 [*Richard*]. The certification was upheld by the Ontario Court of Appeal in *Richard v Canada (Attorney General)*, 2025 ONCA 713.

2 See Brigitte Bureau, "Ontario Court Approves Class-Action by Immigration Detainees Against Federal Government", *CBC News* (9 July 2024), online: <cbc.ca> [perma.cc/T6ZS-UAAK].

3 Human Rights Watch, "Canada" (last visited October 2025), online: <hrw.org> [perma.cc/A8E7-RQN7].

4 The authors wish to acknowledge the fact that, despite its stable numbers on the surface, Indigenous peoples suffer from extremely high imprisonment rates. To learn more about the overincarceration of Indigenous peoples in Canada, see generally Vicki Chartrand, "Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada" (2019) 61:3 Can J Corr 67; Michaela M McGuire & Danielle J Murdoch, "(In)-justice: An Exploration of the Dehumanization, Victimization, Criminalization, and Over-incarceration of Indigenous Women in Canada" (2021) 24:4 Punishment & Society 529 at 530.

United States.⁵ Such a positive reputation also extends to the Canadian immigration policy. Canada has consistently been portrayed as a welcoming country for refugees, it became a “champion country” for the *Global Compact for Safe, Regular and Orderly Migration* in 2020,⁶ and it was rated “the most welcoming country in the world” for migrants in 2021.⁷

Despite this reputation, criticism of Canadian immigration policies, and particularly of the country’s immigration detention practices, abounds in Canadian scholarship. Numerous scholars acknowledge the existing tension between Canada’s public perception as a humanitarian, welcoming country and the reality of the treatment it affords to noncitizens.⁸ Scholars have noted that economically driven amendments⁹ have led to a steady decline in effective protections for noncitizens under both the Canadian *Charter*¹⁰ and international human rights laws as interpreted in Canada.¹¹ Some have denounced the influence of the CBSA in shaping the country’s refugee system, arguing it has become an “unfair process,”¹² while others have questioned the integrity of the country’s

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- 5 Cheryl Marie Webster & Anthony N Doob, “US Punitiveness ‘Canadian Style’?: Cultural Values and Canadian Punishment Policy” (2015) 17:3 *Punishment & Society* 299 at 300.
 - 6 Dr Idil Atak, “Canada’s Role as a Champion Country for the Global Compact for Safe, Regular and Orderly Migration” (4 March 2022), online (blog): <rli.blogs.sas.ac.uk> [perma.cc/W5RU-X9WL].
 - 7 Colin R Singer, “Canada Rated Best Country in World For Welcoming Immigrants” (16 May 2021), online: <immigration.ca> [perma.cc/RPW3-5DF2].
 - 8 See e.g. Ava Torkaman, “Incarcerating the Innocent: Inside Canada’s Immigration Detention Centres” (2023) 13:2 *Flux* 37 at 38.
 - 9 Lotf Ali Jan Ali, “Welcome to Canada?: A Critical Review and Assessment of Canada’s Fast-Changing Immigration Policies” (2014) Ryerson Centre for Immigration and Settlement, Working Paper No 2014/6 at 3, online: <canadacommons.ca> [perma.cc/F6XR-7L5D].
 - 10 Catherine Dauvergne, “How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58:3 *McGill LJ* 663 at 666–67.
 - 11 Catherine Dauvergne, “International Human Rights in Canadian Immigration Law: The Case of the Immigration and Refugee Board of Canada” (2012) 19:1 *Ind J Global Leg Stud* 305 at 307.
 - 12 Idil Atak, Graham Hudson & Delphine Nakache, “Policing Canada’s Refugee System: A Critical Analysis of the Canada Border Services Agency” (2019) 31:4 *Intl J Refugee L* 464 at 468.

refugee protection regime altogether.¹³ Civil society organizations have also raised the alarm, with Human Rights Watch (HRW) and Amnesty International noting that “[e]ven though Canada holds itself out as a refugee-welcome and multicultural country, every year the federal government incarcerates thousands of people seeking safety or a better life.”¹⁴ Authors have also denounced specifically the deficiencies of the immigration detention system in Canada, noting its arbitrariness,¹⁵ arguing that it deliberately hinders access to justice for detainees,¹⁶ and highlighting its use by Canadian authorities as a means of punishing and excluding individuals deemed undesirable from society.¹⁷ Yet, despite these critical voices, Canada’s global reputation as a human rights defender persists.

The stark contrast with its southern neighbour can only contribute to reinforce Canada’s positive reputation. The United States’ incarceration rate is the highest among any democratic country in the world.¹⁸ Its criminal justice system—and resulting mass incarceration of minorities—is said to be the new face of slavery,¹⁹ and prison conditions are often described as unacceptable at best.²⁰ And, when it comes to immigration policy, the US-Mexico border regularly makes the news because of the

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- 13 See e.g. Jamie Chai Yun Liew, “Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law” (2017) 29:2 CJWL 290.
 - 14 Human Rights Watch & Amnesty International, “#WelcomeToCanada” (last visited 8 October 2025), online: <hrw.org> [perma.cc/8D28-KNNL] [hyperlink omitted].
 - 15 Siena Anstis, Joshua Blum & Jared Will, “Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty” (2017) 63:1 McGill LJ 1 at 7.
 - 16 Stephanie J Silverman & Petra Molnar, “Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada” (2016) 35:1 Refugee Survey Q 109.
 - 17 Simon Wallace, “The Next Jailor: An Empirical Study of Danger to the Public Immigration Detentions in Canada (Summer 2021)” (2023) 26:3 Punishment & Society 566 at 579–80.
 - 18 Emily Widra, “States of Incarceration: The Global Context 2024” (June 2024), online: <prisonpolicy.org> [perma.cc/KER3-8CYS].
 - 19 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010).
 - 20 Shon Hopwood, “How Atrocious Prison Conditions Make Us All Less Safe” in Lauren-Brooke Eisen, ed, *Excessive Punishment: How the Justice System Creates Mass Incarceration* (New York: Columbia University Press, 2024) 151.

serious and recurrent human rights violations that occur.²¹ Under such circumstances, Canada can easily claim to fare better than its neighbouring country. What would happen, though, if Canada was compared to European countries? Would its reputation as a welcoming, humanitarian country, still hold?

In this article, we use the case law of the European Court of Human Rights (ECtHR) on immigration detention as a framework to provide an answer to the question above. We first offer a brief overview of the Canadian immigration detention regime in Part I, and a summary of the plaintiffs' claims in Part II, followed by an outline of the ECtHR's position on immigration detention, and on immigration detention conditions in particular, in Part III. In Part IV, we then argue, based on the facts presented in the statement of claim in the case of *Richard v. The Attorney General of Canada* (*Richard*) and the evidence provided by several national and international organizations, that Canada's policy of detaining immigrants in provincial jails would amount to cruel and unusual treatment contrary to article 3 of the *European Convention on Human Rights* (ECHR). Part V shifts from the hypothetical findings of the European Court to the concrete contents of the ONSC's decision, and finally, we discuss the implications of our conclusions both in Canada and at a global scale.

While the argument on which this article is built is admittedly speculative, its hypothetical nature does not diminish its purpose: to offer a critical and original perspective on a country whose favorable geographic position often masks its more troubling immigration practices. Keeping in line with scholars who question the Nordic exceptionalism thesis,²² we hope to provide an alternative reference point against which Canada can be compared. By contrasting Canada with the case law of the ECtHR, we seek to contribute to drawing a more realistic and complete portrait of the country's detention regime. Our findings should also serve, we hope, as a warning about the dangers of centring human rights analysis on the

21 Stephen Lee, "Family Separation as Slow Death" (2019) 119:8 *Colum L Rev* 2319; Emily Ryo & Reed Humphrey, "Children in Custody: A Study of Detained Migrant Children in the United States" (2021) 68:1 *UCLA L Rev* 136.

22 Vanessa Barker, "Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-Faced Penal Regime" (2012) 17:1 *Theoretical Criminology* 5. Cf John Pratt, "The Nordic Exceptionalism Thesis Revisited" in David Nelken & Claire Hamilton, eds, *Research Handbook on Comparative Criminology* (Cheltenham: Edward Elgar, 2022) 109.

conditions of immigration detention while leaving the practice of immigration detention itself unchallenged.

I. IMMIGRATION DETENTION IN CANADA

Canada's detention regime is detailed in the *Immigration and Refugee Protection Act (IRPA)*.²³ Sections 54–61 of the *IRPA* and sections 244–50 of its regulations (*IRPR*)²⁴ govern detention procedures. This legal framework allows the CBSA and the Immigration Division of the Immigration and Refugee Board—two federal agencies charged with the execution of the country's immigration detention policy—to detain and review the detention of noncitizens for immigration purposes (including permanent residents, temporary residents such as temporary workers and students, and other foreign nationals like asylum claimants), following risk assessment-based decisions. Since 2022, around 5,000 noncitizens have been detained each year, with a daily average of around 250 individuals in detention on any given day.²⁵

Section 244 of the *IRPR* fleshes out the factors to be considered for detention: (1) if it is unlikely that the individual will appear for examination, an admissibility hearing, removal from Canada, or at other proceedings that could lead to a removal order—in other words, if the individual is considered a “flight risk”; (2) if the individual is considered a danger to the public; or (3) if the identity of the individual has not been established.²⁶ A CBSA agent can also detain an individual at a port of entry if they deem it necessary to do so in order for the examination of the

23 SC 2001, c 27, ss 54–61 [*IRPA*].

24 *Immigration and Refugee Protection Regulations*, SOR/2002-27, ss 244–50 [*IRPR*].

25 Specific numbers for each year can be found on the CBSA website (see CBSA, “Annual Detention Statistics: 2012 to 2025” (last modified 14 August 2025), online: <cbsa-asfc.gc.ca> [perma.cc/4GC9-J7A6] [CBSA, “Annual Detention Statistics”]).

26 Other grounds also include when there are reasonable grounds to suspect that the person is inadmissible for reasons of security (espionage, subversion, terrorism), violations of human or international rights, serious criminality or organized crime (see *IRPA*, *supra* note 23, ss 55(3)(b)); and mandatory detention occurs when a person is designated as a “designated foreign national” (see *ibid.*, ss 55(3.1)(a)–(b)).

person's status to be completed,²⁷ or if they have reasonable grounds to suspect that the noncitizen is inadmissible on certain grounds.²⁸

The criteria that must be taken into account when deciding to detain an individual include, inter alia, the reason of detention; the length of time already spent in detention if applicable; whether there are any elements that can assist in determining the length of time that detention is likely to continue; any unexplained delays or unexplained lack of diligence caused by the government, the CBSA or the person concerned; if there are any existing alternatives to detention; and the best interests of a directly affected child who is under eighteen years of age, if applicable.²⁹

While the CBSA is in charge of deciding to detain noncitizens, it is the Immigration Division of the IRB that reviews the reasons for detention within specific time frames.³⁰ Proceedings surrounding decisions on immigration detention placement, review and relief are opaque and dominated by high levels of discretion at multiple levels of the administrative apparatus. In her book *Securing Borders*, Anna Pratt notes that "[t]he discretionary powers exercised in the detention of noncitizens are multiple, diverse, and dispersed, both within and outside the 'formal institutions of the state.'"³¹ Such processes, scholars have found, are characterized by procedural unfairness,³² biases, and systemic racism.³³

These levels of opacity and discretion are particularly concerning because the "IRPA is ... silent on the maximum time limit for immigration

27 *IRPA*, *supra* note 23, s 55(3)(a).

28 Including security reasons, violating human or international rights, sanctions, serious criminality, criminality, transborder criminality or organized criminality (see *ibid*, s 55(3)(b)).

29 *IRPR*, *supra* note 24, s 248.

30 *IRPA*, *supra* note 23, ss 54, 57.

31 Anna Pratt, *Securing Borders: Detention and Deportation in Canada*, Law and Society Series (Vancouver: University of British Columbia Press, 2005) at 32.

32 Anstis, Blum & Will, *supra* note 15 at 10–12.

33 Louis-Philippe Jannard, "Les pratiques de détention de l'Agence des services frontaliers du Canada : la recherche d'informations au croisement de l'exercice du pouvoir discrétionnaire et des réseaux d'acteurs" (2023) 68:3 McGill LJ 329 at 351; Louis-Philippe Jannard, *L'exercice du pouvoir discrétionnaire au prisme du contrôle des indésirables : une étude des pratiques de détention de l'agence des services frontaliers du Canada* (LLD Thesis, Université du Québec à Montréal, 2023) [unpublished] at 44.

detention.”³⁴ The deleterious effects of time indeterminacy in detention settings are well documented;³⁵ scholars have found that being held for an indeterminate period of time contributes to detainees feeling disempowered and distressed,³⁶ and that even brief periods of detention can cause significantly high levels of posttraumatic stress, depression, and anxiety in immigration detainees—especially asylum seekers.³⁷ Despite these findings, the Supreme Court of Canada stated in *Charkaoui v. Canada (Citizenship and Immigration)* (*Charkaoui*) that indeterminate detention does not per se violate the immigration detainee’s *Charter* rights: the practice is lawful as long as there is “a meaningful process of ongoing review”³⁸ that regularly provides detainees with “meaningful opportunities to challenge their continued detention or the conditions of their release.”³⁹ More recently, the Supreme Court of Canada confirmed yet again the constitutionality and lawfulness of the Canadian immigration detention regime in the case of *Brown v. Canada (Citizenship and Immigration)*.⁴⁰

Publicly available data on the demographic characteristics of the population in immigration detention is fairly limited. Yet, despite the opacity with which the CBSA operates,⁴¹ we know that between 2016 and 2020, the adult detainee population was made up of an average of 85 per cent men and 15 per cent women,⁴² and the most represented

34 *Richard*, *supra* note 1 at para 47. See also Efrat Arbel & Ian C Davis, “Immigration Detention and the Problem of Time: Lessons from Solitary Confinement” (2018) 4:4 Intl J Migration & Border Studies 326 at 327.

35 Arbel & Davis, *supra* note 34 at 331.

36 Janet Cleveland et al, “Symbolic Violence and Disempowerment as Factors in the Adverse Impact of Immigration Detention on Adult Asylum Seekers’ Mental Health” (2018) 63:8 Intl J Public Health 1001 at 1002.

37 Janet Cleveland & Cécile Rousseau, “Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada” (2013) 58:7 Can J Psychiatry 409 at 415.

38 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 107 [*Charkaoui*].

39 *Ibid.*

40 2020 FCA 130 at paras 162–63.

41 Delphine Nakache, *The Human and Financial Costs of Detention of Asylum Seekers in Canada* (2011) at 35, online (pdf): <refworld.org> [perma.cc/AG3T-M4TE].

42 Ana Ballesteros-Pena, “‘Same Content in New Bottles’ in the Immigration Detention System in Canada: Impacts on Young Adult and Adult Undocumented Migrants” in

nationalities were Mexican, Indian, American, Chinese, Nigerian, and Jamaican. Immigration detention in Canada has also been found to (re)produce discrimination and systemic racism dynamics, particularly against Black people. An HRW and Amnesty International report noted that, in 2019, the majority of people detained for immigration-related reasons for more than ninety days came from African countries,⁴³ while other sources have found that “approximately 13.5% of North African inmates spent 100 days or more in prison, compared with only 2.5% of European inmates and 1% of North American inmates.”⁴⁴ Black detainees are also asked to provide higher bonds to be released from detention.⁴⁵

Noncitizens are detained in different facilities, based on the individual’s risk assessment score, particularities of their case and their geographical location within Canada. The ONSC has noted that the “IRPA and IRPR are silent on who is responsible for determining the place and conditions of detention. In practice, [the] CBSA has assumed this jurisdiction and has sole authority to determine placement for all immigration detainees across the country.”⁴⁶ According to guidance provided by the 2020 CBSA policy guide on detention,⁴⁷ immigration holding centres (IHCs) should always be the default detention facilities. Three IHCs are operational across Canada: the Laval detention centre, which has a

Sílvia Gomes, Maria João Leote de Carvalho & Vera Duarte, eds, *Incarceration and Generation*, vol 1, *Multiple Faces of Confinement*, Palgrave Studies in Prisons and Penology (Cham, Switzerland: Palgrave Macmillan, 2021) 301 at 306.

43 Human Rights Watch & Amnesty International, “*I Didn’t Feel Like a Human in There*”: *Immigration Detention in Canada and Its Impact on Mental Health*, Index No AMR 20/4195/2021 (US: Human Rights Watch & Amnesty International, 2021) at 64 [Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”].

44 Oona Barrett, “Détention des migrant-es : un système jugé discriminatoire et arbitraire” (22 January 2024), online: <pivot.quebec> [perma.cc/G5ZF-JNTR] [translated by author].

45 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 65.

46 *Richard*, *supra* note 1 at para 46.

47 For the version relied on in *Richard*, see Immigration, Refugees and Citizenship Canada, *ENF 20: Detention* (Ottawa: IRCC, 23 March 2020) at 29, online (pdf): <canada.ca> [perma.cc/3TSA-MQQ2] [Immigration, Refugees and Citizenship Canada, *ENF 20*, 2020]. For a new version released since then, see Immigration, Refugees and Citizenship Canada, *ENF 20: Detention* (Ottawa: IRCC, 16 January 2023) at 26, online (pdf): <canada.ca> [perma.cc/7HVH-X67Q].

maximum capacity of 153 detainees and serves the regions of Quebec, Atlantic, and Northern Ontario; the Toronto detention centre, which has a maximum capacity of 183 detainees and serves the regions of Greater Toronto Area, Southern Ontario, and Northern Ontario; and the detention centre of British Columbia, which has a maximum capacity of 70 detainees and serves the regions of the Pacific and the Prairies.⁴⁸ In cases where the individual's risk cannot be mitigated in IHCs,⁴⁹ or in regions where such facilities are not available, immigrants can be detained elsewhere—including, for instance, in airport areas, police station holding cells, or correctional facilities. As a result, at the end of the 2023–2024 fiscal year, a quarter of immigration detentions occurred in settings intended for criminal populations.⁵⁰ Of those, approximately half (13 per cent of the total immigration detention population) were held in provincial jails⁵¹ thanks to the agreements entered into by provincial governments with the CBSA.

The detention of migrants in provincial correctional facilities has been contested as a practice. Challenges to the detention system began in 2021, when Amnesty International and HRW launched their #WelcomeToCanada campaign. The two non-profits joined efforts to denounce the human rights violations taking place in provincial jails, calling on provincial governments to put an end to their agreements which allowed federal authorities to hold immigration detainees in provincial jails.⁵² Many of the reported violations stemmed from the practice of housing immigration detainees in regular units alongside the general

48 Canada Border Services Agency, “Arrests, Detentions and Removals: Immigration Holding Centres” (last modified 18 September 2023), online (statistics): <cbsa-asgc.gc.ca> [perma.cc/D3BE-WBF8].

49 Risk levels are determined through the National Risk Assessment for Detention Form. The various factors are assigned points, and a points grid guides the decision on the location of detention (see Canada Border Services Agency, “National Immigration Detention Standards: Chapter 6.0: Administration and Management” (last modified 9 April 2025), s 6.1.5, online: <cbsa-asfc.gc.ca> [perma.cc/ZSL8-3YQ4]).

50 Canada Border Services Agency, “Quarterly Detention and Alternatives to Detention Statistics: Fourth Quarter, Fiscal Year 2023 to 2024” (last modified 6 February 2025) at Table 1.1, online (statistics): <cbsa-asfc.gc.ca> [perma.cc/QE8N-22Y3].

51 *Ibid.*

52 Amnesty International, “#WelcomeToCanada: Act Now to Stop the Federal Government from Using Prisons for Immigration Detention” (22 April 2024), online: <amnesty.ca> [perma.cc/NLH8-4EZV].

provincial jail population,⁵³ in what is referred to as “co-mingling with criminal inmates.”⁵⁴ The Red Cross had repeatedly emphasized that immigration detainees in provincial jails were subjected to the same regime, conditions and treatment as the general population:

When housed in correctional facilities and remand centers, immigration detainees are receiving the same treatment and follow the same rules as remanded and sentenced individuals despite their detention being administrative in nature. Policies which were designed to manage behavior of persons in the criminal justice system are being applied to persons in immigration detention, such as placement in administrative and disciplinary segregation, the use of restraints, and lockdowns.⁵⁵

While “[c]o-mingling is prohibited by various international human rights instruments” and has been described as “harmful and disproportionate” by the Red Cross,⁵⁶ its practice had been acknowledged both by the provincial and federal Canadian governments in previous class action proceedings targeting immigration detention practices.⁵⁷ However, the sustained efforts from HRW and Amnesty International led to an important shift in practices: starting with British Columbia in July 2022, all ten Canadian provinces announced that they were either terminating or not renewing their contracts with the CBSA. As the ONSC notes in *Richard*, “[a]s of February 2, 2024, all provinces with formal agreements had either terminated or given notice that they were terminating their agreements with [the] CBSA.”⁵⁸ Despite some ulterior extensions and postponements by certain provinces,⁵⁹ immigration detention in provincial

53 Nakache, *supra* note 41 at 31.

54 *Richard*, *supra* note 1 at para 81.

55 Canadian Red Cross, *Immigration Detention Monitoring Program (IDMP) Annual Monitoring Activity Report: Monitoring Period - September 2017 to March 2018* (Ottawa: Canadian Red Cross, 2018) at 7, online (pdf): <cbsa-asfc.gc.ca> [perma.cc/LQ64-VBH3].

56 *Richard*, *supra* note 1 at para 82.

57 See *Dadzie v Ontario*, 2021 ONSC 5049 (Statement of defence, Defendant at para 38) [*Dadzie*].

58 *Supra* note 1 at para 65.

59 See e.g. Letter from the Honourable Mike Ellis, Minister of Alberta Public Safety and Emergency Services to the Honourable Marco Mendicino, Minister of Public Safety Canada (17 January 2023), online (pdf): <open.alberta.ca> [perma.cc/H8ES-BDHS].

jails ended on 14 September 2025, when Ontario's last contract extension reached its expiry date.⁶⁰

Many provinces were quite vocal about their reasons for terminating the agreement, acknowledging the troubling aspects of detaining individuals in correctional facilities solely for administrative purposes. The government of Manitoba stated that “[p]rovincial jails should be used to detain people convicted of crimes or awaiting trial on serious offences, not to hold travellers and refugees who arrive in Manitoba with incomplete paperwork, or some other issue with their inbound immigration processing that needs to be straightened out,”⁶¹ and Alberta's minister of public safety and emergency services said that “[p]eople who come to Canada for a fresh start and a new life deserve a better welcome than a jail cell while paperwork is sorted out.”⁶² British Columbia's minister of public safety went a step further, noting that an internal review following the #WelcomeToCanada campaign had “brought to light that aspects of the arrangement do not align with our government's commitment to upholding human-rights standards or our dedication to pursuing social justice and equity for everyone.”⁶³

As provinces walked away from their agreements, the CBSA announced it was “taking every necessary step to ensure it can house higher-risk individuals in its own facilities, but [that] time [was] needed to make this transition happen.”⁶⁴ Official statistics show that, during the third quarter of the 2024–2025 fiscal year, 9 per cent of the detainees were

60 Samer Muscati, Hanna Gros & Julia Sande “Immigration Detention Ends in Provincial Jails Across Canada” (19 September 2025), online: <hrw.org> [perma.cc/NW3W-JWKA].

61 Brigitte Bureau, “Manitoba Becomes 4th Province to Say It Will Stop Imprisoning Migrants”, *CBC News* (24 October 2022), online: <cbc.ca> [perma.cc/G328-LHYW] [Bureau, “Manitoba”].

62 Alberta, News Release, “Alberta Ends Agreement to Hold Immigration Detainees” (18 January 2023), online: <alberta.ca> [perma.cc/P5DR-ZRBD].

63 British Columbia, News Release, “Minister's Statement on Ending Immigration Detention Arrangement with CBSA” (21 July 2022), online: <news.gov.bc.ca> [perma.cc/BW4F-N9BF].

64 Canada Border Services Agency, “Canada Border Services Agency Management Response and Action Plan to the Canadian Red Cross 2021–2022 and 2022–2023 Annual Reports” (last modified 11 October 2024), online: <cbas-asfc.gc.ca> [perma.cc/44LH-U3Z6] [Canada Border Services Agency, “Management Response”].

still held in provincial jails.⁶⁵ While the practice of detaining migrants and asylum seekers in provincial jails on administrative grounds officially ended in September 2025,⁶⁶ and despite the CBSA's promises to work toward the "ending [of] the co-mingling of immigration detainees and criminal inmates,"⁶⁷ administrative detention continues in Canada, though it is now carried out in federal correctional facilities rather than provincial ones. Indeed, in September 2024, the CBSA announced an agreement with Correctional Service Canada allowing high-risk immigration detainees to be detained in federal prisons.⁶⁸ As a result of such an agreement, in July 2025, immigration detainees started being held in Correctional Service Canada's federal facility in Sainte-Anne-des-Plaines, Quebec,⁶⁹ and the practice is expected to continue until June 2029, at least.⁷⁰

II. THE PLAINTIFF'S SUBMISSIONS IN *RICHARD V. CANADA*

In *Richard*, noncitizens held in provincial jails for administrative reasons by the CBSA challenged the agency's practice of placing immigration detainees in provincial jails.⁷¹ The suit covers the detention of 8,360 individuals from 16 May 2016 to 18 July 2023.

The plaintiffs argued that their detention in provincial jails had violated their right to life, liberty, and security, their right not to be arbitrarily detained, their right not to be subjected to cruel and unusual treatment

65 Canada Border Services Agency, "Quarterly Detention and Alternatives to Detention Statistics: Third Quarter, Fiscal Year 2024 to 2025" (last modified 14 August 2025) at Table 1.1: Detentions as a Percentage of Entries, by Length of Detention and by Facility, online: <cbasa-asfc.gc.ca> [perma.cc/G5N6-ZGRE].

66 Muscati, Gros & Sande, *supra* note 60.

67 Canada Border Services Agency, "Management Response", *supra* note 64.

68 Canada Border Services Agency, News Release, "Canada Border Services Agency and Correctional Service Canada to Work Together on a Temporary Solution to House High-Risk Immigration Detainees" (6 September 2024), online: <canada.ca> [perma.cc/9XA8-HF93] [Canada Border Services Agency, "Temporary Solution"].

69 Canada Border Services Agency, News Release, "CBSA's Designated Immigrant Station for High-Risk Detainees Now Operational in Sainte-Anne-des-Plaines" (30 July 2025), online: <canada.ca> [perma.cc/Q5G9-2Y8A] [Canada Border Services Agency, "Sainte-Anne-des-Plaines"].

70 Canada Border Services Agency, "Temporary Solution", *supra* note 68.

71 *Richard*, *supra* note 1 at para 7.

or punishment, and their right to equality and non-discrimination (sections 7, 9, 12, and 15 of the *Charter*, respectively).⁷² Crucially, anticipating potential arguments based on the sovereign right of Canada to control entry and stay in the country, they noted that “their claim ‘is not rooted in differential treatment regarding the right to remain in Canada, but rather differential treatment regarding the circumstances in which one may be detained in a penal institution.’”⁷³ Plaintiffs further argued that the Canadian authorities breached the duty of care owed to them.⁷⁴ They clarified that “the claim is not against any particular institution for any event arising during detention” but rather “against Canada for making the decision to incarcerate Immigration Detainees in provincial prisons.”⁷⁵ These claims are based on and supported by their own testimonies and experiences, as well as the evidence provided by an expert’s report.⁷⁶

Interestingly, the plaintiffs were not detained in the same provincial jail. In fact, the ONSC noted that “[d]uring the [c]lass [p]eriod, [the] CBSA placed the Immigration Detainees in 87 different prisons [jails] in every Canadian province and territory except Nunavut.”⁷⁷ This geographical diversity, however, is no obstacle to the class action claim: as the court highlighted, “Canada’s own evidence is that there are significant commonalities across the country in provincial prisons [jails]”⁷⁸ to justify the extension of the claim and the eventual findings across all Canadian regions. These common conditions across all provincial jails, according to the ONSC, include:

- (i) co-mingling with inmates imprisoned under criminal law,
- (ii) use of restraints, such as handcuffs and leg shackles,
- (iii) strip searches,

72 *Ibid* at para 9.

73 *Ibid* at para 250.

74 *Ibid* at para 289.

75 *Ibid*.

76 Expert report written by Dr. Efrat Arbel, Associate Professor at the University of British Columbia’s Peter Allard School of Law.

77 *Richard*, *supra* note 1 at para 55.

78 *Ibid* at para 329.

- (iv) application of prison rules and prison punishments,
- (v) exposure to physical violence and threats of physical violence,
- (vi) restrictions on communication and interaction with the outside world, including “no touch” visits with friends and family, and
- (vii) mandated prison clothing (with the exception of Quebec).⁷⁹

The ONSC further noted that both Canadian authorities and the plaintiffs agreed that these conditions are particular to immigration detention in provincial jails and do not exist in IHCs.

III. THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS

States have the right, under article 5(1)(f) of the *ECHR*, to deprive noncitizens of their liberty for immigration purposes. They can do so in two contexts: either for purposes of removal (i.e., to ensure that the person will be available for deportation) or prior to the State’s authorization to enter the country. In any case, the State’s right to detain noncitizens must be exercised in accordance with the provisions of the convention.⁸⁰

To be compatible with article 5 of the *ECHR*, the deprivation of liberty must be lawful (as in, it must conform to the substantive and procedural rules of domestic law), and it must protect the individual from arbitrariness.⁸¹ As the European court said in *Saadi v. the United Kingdom*,⁸² this means that immigration detention must be carried out in good faith, that its execution must conform with the purpose of preventing unauthorized entry to the country, that the length of the detention should not be unreasonable and that “there must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the

79 *Ibid* at para 79.

80 *Tabesh c Grèce*, No 8256/07 (26 November 2009), ECLI:CE:ECHR:2009:1126JUD000825607 at para 37 [*Tabesh*].

81 *Chahal v the United Kingdom* [GC], No 22414/93 (15 November 1996), ECLI:CE:ECHR:1996:1115JUD002241493 at para 118.

82 *Saadi v the United Kingdom* [GC], No 13229/03 (29 January 2008), ECLI:CE:ECHR:2008:0129JUD001322903 at paras 67, 69–72, 74.

place and conditions of detention.”⁸³ The ECtHR has further noted that, when evaluating the place and conditions of detention, it should be borne in mind “that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”⁸⁴

The place and conditions of detention can therefore prompt a finding of arbitrariness contrary to article 5 of the *ECHR*, and they can also amount to cruel, inhuman or degrading treatment contrary to article 3 of the *ECHR* if the ill-treatment attains a certain level of severity.⁸⁵ The general principles guiding the ECtHR in its assessment of the conditions of immigration detention under article 3 of the *ECHR* are essentially the same as the principles related to prisoners’ rights and prison conditions.⁸⁶ As it is the case with imprisonment, treatment will be considered “inhuman” when it is “premeditated ... applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering,”⁸⁷ and the conditions will be deemed “degrading” when they “humiliat[e] or debas[e] an individual, showing a lack of respect for, or diminishing, his or her human dignity,” as recalled by the ECtHR in its jurisprudence.⁸⁸ Be it inhuman or degrading, article 3 of the *ECHR* enshrines a “fundamental value in democratic societies” and the prohibition it contains is absolute.⁸⁹

To establish whether article 3 of the *ECHR* has been breached, the ECtHR will analyze whether the State subjects the immigration detainee to “distress or hardship of an intensity exceeding the unavoidable level

83 *Ibid* at para 69.

84 *Ibid* at para 74, citing *Amuur v France*, No 19776/92 (25 June 1996), ECLI:CE:ECHR:1996:0625JUD001977692 at para 43.

85 *AD v Malta*, No 12427/22 (17 October 2023), ECLI:CE:ECHR:2023:1017JUD001242722 at paras 111, 188 [AD].

86 See e.g. *Sakir c Grèce*, No 48475/09 (24 March 2016), ECLI:CE:ECHR:2016:0324JUD004847509 at para 50.

87 *MSS v Belgium and Greece* [GC], No 30696/09 (21 January 2011), ECLI:CE:ECHR:2011:0121JUD003069609 at para 220 [MSS], citing *Kudła v Poland* [GC], No 30210/96 (26 October 2000), ECLI:CE:ECHR:2000:1026JUD003021096 at para 92.

88 *MSS*, *supra* note 87 at para 220.

89 *Ibid* at para 218; *Khlaifia and Others v Italy* [GC], No 16483/12 (15 December 2016), ECLI:CE:ECHR:2016:1215JUD001648312 at para 158 [Khlaifia]; *Darboe and Camara v Italy*, No 5797/17 (21 July 2022), ECLI:CE:ECHR:2022:0721JUD000579717 at para 168.

of suffering inherent in detention.”⁹⁰ The ECtHR will take into consideration all the circumstances of the case, including the length of the detention period, the physical and mental effects of detention on the detainee and the specific personal circumstances of the person—such as gender, age, health, and general well-being.⁹¹ The ECtHR has noted in this regard that, “as a ‘particularly underprivileged and vulnerable’ population group, asylum seekers require ‘special protection.’”⁹²

The ECtHR’s case law has further established that severe overcrowding of jail cells creates a strong presumption that the conditions of detention amount to degrading treatment.⁹³ The same principle applies in respect of immigration detention: lack of personal space in a detention institution can, in itself, amount to a breach of article 3 of the *ECHR*.⁹⁴ Poor immigration detention conditions—such as insufficient access to outdoor exercise; lack of natural light, air, or ventilation; and deficient sanitary and hygiene requirements—can result in inhumane or degrading treatment.⁹⁵ The presumption is triggered by the “3 square metres rule”—that is, when the personal space available to a detainee falls below 3 square metres in a multi-occupancy cell.⁹⁶ In *T. and A. v. Turkey*,⁹⁷ for instance, the ECtHR found that detaining a person for three days in an airport, in a room which allowed the detainee to have between 1.23 and 2.3 square metres of personal space, was incompatible with article 3 of the *ECHR*.

In the past, the court has also declared that detaining a person in a cell that affords them less than 4 square metres, in conjunction with the

90 *AD*, *supra* note 85 at para 112.

91 *Ibid* at para 111; *Khlaifia*, *supra* note 89 at para 163; *MSS*, *supra* note 87 at para 219.

92 *Tarakhel v Switzerland* [GC], No 29217/12 (4 November 2014), ECLI:CE:ECHR:2014:1104JUD002921712 at para 118.

93 See e.g. *Ananyev and Others v Russia*, No 42525/07 (10 January 2012), ECLI:CE:ECHR:2012:0110JUD004252507 at paras 143, 148; *Karalevičius v Lithuania*, No 53254/99 (7 April 2005), ECLI:CE:ECHR:2002:0606DEC005325499 at para 40; *Muršić v Croatia* [GC], No 7334/13 (20 October 2016), ECLI:CE:ECHR:2016:1020JUD000733413 at para 102.

94 See e.g. *T and A v Turkey*, No 47146/11 (21 October 2014), ECLI:CE:ECHR:2014:1021JUD004714611 at para 96.

95 *AD*, *supra* note 85 at para 114; *ZA and Others v Russia* [GC], No 61411/15 (21 November 2019), ECLI:CE:ECHR:2019:1121JUD006141115 at para 186 [*ZA v Russia*].

96 *Khlaifia*, *supra* note 89 at paras 165–66.

97 *Supra* note 94 at para 96.

fact that the detainee enjoyed practically no out-of-cell time and “had to spend almost the entirety of the days inside those cells ... failed to respect basic human dignity.”⁹⁸ The ECtHR has also found that confining an asylum seeker in a prefabricated building for two months, without access to outdoor space or to a telephone, and without being provided with clean sheets or sufficient toiletries, amounted to cruel and degrading treatment under article 3 of the *ECHR* despite there not being any severe overcrowding involved.⁹⁹ In *Tabesh c. Grèce*,¹⁰⁰ detaining an asylum seeker on police premises without access to leisure activities or decent meals for a period of three months was also considered to amount to degrading treatment in breach of article 3 of the *ECHR*, again without any extreme lack of personal space. In *Z.A. and Others v. Russia*, the ECtHR further ruled that detaining a person “in a constantly lit, crowded and noisy airport transit zone without unimpeded access to shower or cooking facilities and without outdoor exercise” also breached article 3 of the *ECHR*.¹⁰¹

This strong presumption of a breach of article 3 due to overcrowding and lack of personal space can, however, be rebutted; to do so, the concerned state is required to show that the cumulative effects of the other conditions of detention—such as out-of-cell activities, length of detention and state of the facilities—compensate for the lack of personal space.¹⁰²

IV. RICHARD V. CANADA: WHAT WOULD BE THE ASSESSMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS?

Having set the table, we now turn to our cross-border analysis and consider the hypothetical resolution of the claim lodged before the ONSC, based on article 3 of the *ECHR* jurisprudence of the ECtHR.

98 *István Gábor Kovács v Hungary*, No 15707/10 (17 January 2012), ECLI:CE:ECHR:2012:0117JUD001570710 at para 26.

99 *SD c Grèce*, No 53541/07 (11 June 2009), ECLI:CE:ECHR:2009:0611JUD005354107 at para 51.

100 *Tabesh*, *supra* note 80 at paras 43–44.

101 *Supra* note 95 at para 191.

102 *Khlaifia*, *supra* note 89 at para 166.

A. Overcrowding

Immigration detainees suffered from a lack of personal space in Canadian provincial jails. In 2015, the Public Services Foundation of Canada declared that overcrowding in provincial correctional centres had “reached a crisis point.”¹⁰³ At the time, for instance, British Columbia provincial jails were operating at 140 per cent capacity.¹⁰⁴ The situation was similar in other provinces. Overcrowding levels of up to 134 per cent had been reported in several institutions in Ontario, with individual cells holding up to three individuals.¹⁰⁵ In Nova Scotia, institutions opted to allow inmates to return home on Saturdays and Sundays because of the unacceptable levels of overcrowding they experienced on weekends.¹⁰⁶

The issue of widespread overcrowding in provincial jails is brought to the attention of the court in *Richard* by the plaintiffs’ statement of claim, which states that “[p]rovincial [p]risons are overwhelmingly violent and frightening places where there are significant issues with gangs, weapons, drugs and overcrowding.”¹⁰⁷ And, while the ONSC does not explicitly mention overcrowding in the certification decision, it does acknowledge that one of the plaintiffs “suffered an almost total loss of privacy,” further noting that “[t]he cell was tiny—only as long as the bunks and less than a few metres wide.”¹⁰⁸

Specific numbers on overcrowding levels are not discussed in *Richard*, but they are available through the joint report on immigration detention in Canadian provincial jails written by HRW and Amnesty

103 Public Services Foundation of Canada, “Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities” (April 2015) at 2, online (pdf): <ontario.cmha.ca> [perma.cc/3GQ2-YL2W].

104 Office of the Auditor General of British Columbia, “An Audit of the Adult Custody Division’s Correctional Facilities and Programs” (January 2015) at 5, online (pdf): <oag.bc.ca> [perma.cc/57A8-3WC7].

105 Liam Casey, “Ontario Jail Inmate Numbers Spike in Last Year, Now Well Over Capacity, Data Shows”, *Global News* (6 March 2024), online: <globalnews.ca> [perma.cc/33RM-K9XN].

106 “N.S. Inmates Sent Home Due to Overcrowding”, *CBS News* (2 October 2010), online: <cbc.ca> [perma.cc/F5W3-77WX].

107 *Richard v The Attorney General of Canada*, 2024 ONSC 3800 (Statement of claim, Plaintiff at para 45.)

108 *Richard*, *supra* note 1 at para 114.

International.¹⁰⁹ The report notes that typical double-occupancy cells measure 11 feet by 8 feet, which equates to 3.35 metres by 2.44 metres, or a total of 8.17 square metres. While normal occupancy rates would see each inmate enjoying 4.9 square metres of personal space, the report notes that in many cases immigration detainees are held in cells with three occupants. This translates into each detainee enjoying only 2.72 square metres of personal space, which falls below the 3 square metres rule. As such, the presumption of a violation of article 3 of the *ECHR* due to lack of personal space arises here.

B. Other Detention Conditions

The presumption of violation outlined above is a rebuttable one. Despite detainees enjoying less than 3 square metres of personal space in Canadian jails, the ECtHR would be compelled to find that Canada does not breach article 3 of the *ECHR* if the country proves that “the cumulative effects of the other aspects of the conditions of detention compensated for the scarce allocation of personal space.”¹¹⁰ These other conditions, including the length of the detention, the availability of out-of-cell activities, and other conditions such as access to outdoor space or general hygiene and sanitary conditions, are analyzed in this section.

C. Length of Detention

As noted above, Canada is one of the rare countries in the Global North where no legislative limit is imposed on the length of immigration detention.¹¹¹ CBSA statistics show that, since 2012, the average length of detention has ranged between fourteen and thirty days.¹¹² However, detention can sometimes last years. According to the estimates by HRW and Amnesty International, since 2016 over three hundred immigration

109 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43.

110 *Khlaifia*, *supra* note 89 at para 166.

111 *Richard*, *supra* note 1 at para 47. See also Arbel & Davis, *supra* note 34 at 327.

112 CBSA, “Annual Detention Statistics”, *supra* note 25.

detainees have been deprived of their freedom for longer than a year, with one person being detained over eleven years.¹¹³

Beyond these findings, Canadian government-appointed bodies have also raised concerns about prolonged immigration detention. In 2017, the Immigration and Refugee Board commissioned an external audit to assess the procedural fairness of over three hundred hearings and decisions in cases where detention exceeded one hundred days.¹¹⁴ The auditor's report concluded that extended detention was frequently linked to delays caused by CBSA officers, as well as procedural shortcomings and questionable interpretations of immigration detention rules by immigration officials. The recommendations issued by the auditor called for a substantive reform of the detention review system—including the need for enhanced transparency in decision-making proceedings, increased oversight and questioning of CBSA officials in cases of negligence, and the implementation of a pilot protocol for the immediate review of long-term detentions. Such measures, however, were never implemented.

The uncertainty surrounding the exact length of detention adds another layer of suffering to the experience. Not knowing when they can expect to be released causes significant levels of distress and anxiety to detainees.¹¹⁵ Individuals interviewed by HRW and Amnesty International expressed they often felt powerless and started having suicidal thoughts as they lost hope in the Canadian system.¹¹⁶

113 The report states that it was the longest period of detention and “involved a man with an apparent mental health condition, who was subjected to solitary confinement in jail and whose identity the government could not establish” (*supra* note 43 at 3).

114 Immigration and Refugee Board of Canada, *Report of the 2017/2018 External Audit (Detention Review)* (Ottawa: IRBC, 2018), online: <irb-cisr.gc.ca> [perma.cc/RG2T-WMWE].

115 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, 2015) at 26, online (pdf): <ihrp.law.utoronto.ca> [perma.cc/T3Z8-YK5Q].

116 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 19, 36.

D. Out-of-cell Time

In *Richard*, the ONSC observes—based on the Red Cross findings—that immigration detainees in provincial jails enjoyed “limited time out of cell.”¹¹⁷ The Red Cross reports that, under ordinary circumstances, time out-of-cell in Canadian provincial jails could vary from one to eleven hours per day depending on the institution.¹¹⁸ Because immigration detainees were held with the general jail population, these out-of-cell time periods applied to them as well. However, as lockdowns and segregation practices are frequently implemented in jails, this impacted the number of out-of-cell hours, both for inmates and migrant detainees.

The Ontario Human Rights Commission defines “lockdown” as the “conditions of confinement where prisoners are locked in their cells, usually for reasons of health and safety, with extremely limited movement within the institution for a period ranging from hours to weeks.”¹¹⁹ During lockdown periods, detainees cannot access their phones, cannot shower and cannot enjoy fresh air.¹²⁰ Furthermore, the Ontario Human Rights Commission defines “segregation” as “the physical and social isolation of a prisoner, with high surveillance and minimal stimulation, for up to 22 hours per day.”¹²¹ Overuse of both practices has been documented across Canadian provincial jails for years,¹²² and Canadian courts have repeatedly expressed their human rights concerns over both.

117 *Richard*, *supra* note 1 at para 91.

118 Canadian Red Cross, *Immigration Detention Monitoring Program (IDMP) Annual Report: Monitoring Period – April 2020 to March 2021* (Ottawa: Canadian Red Cross, 2022) at 12, online (pdf): <cbsa-asfc.gc.ca> [perma.cc/D4DK-DSJ7] [Canadian Red Cross, 2020–2021].

119 Ontario Human Rights Commission, “Report on Conditions of Confinement at Toronto South Detention Centre” (30 March 2020), online (report): <ohrc.on.ca> [perma.cc/29W8-6XYP].

120 *R v Persad*, 2020 ONSC 188 at paras 2, 9, 16 [*Persad*].

121 Ontario Human Rights Commission, *supra* note 119.

122 For Nova Scotia, see e.g. “Staff Shortages Leave Central Nova Correctional Facility in Perpetual State of Lockdown”, *Global News* (3 December 2020), online (video): <globalnews.ca> [perma.cc/X2MZ-UHTA]. For Newfoundland and Labrador, see e.g. Malone Mullin, “HMP on the Verge of Total Lockdown as Prison Grapples with Lack of Guards”, *CBC News* (12 August 2022), online: <cbc.ca> [perma.cc/5NPH-JF58].

With regard to lockdowns, the ONSC has, for example, declared that lockdowns at a Toronto jail were so frequent (with detainees spending almost half of their detention days under lockdown) that living conditions had become “inhumane” and failed to ensure “basic standards of human decency.”¹²³ In some cases, inmates report having suffered eighteen lockdowns in a single month,¹²⁴ and, according to the Red Cross, the short periods of time during which detainees could access outdoor space were spent in yards that could hardly be considered as being open-air.¹²⁵ Frequent lockdowns have made living conditions so harsh that Canadian courts are conceding generous credits for presentence custody at sentencing, to make up to detainees for the deplorable detention conditions they have to endure while in pretrial detention.¹²⁶

In *Khlaifia and Others v. Italy*, the ECtHR had taken note of the “major migration crisis.”¹²⁷ Italy was going through at the time as a context that could, to a certain extent, justify a less strict standard of treatment. Yet, no such unprecedented situation is taking place in Canada. In *R. v. Charley*,¹²⁸ the ONSC recognized that provincial jails suffer from chronic understaffing and that such issue is the root cause of most lockdowns. The same court concluded that, far from being caught off guard by a sudden change of circumstances, Canadian authorities had “chosen to ignore” the issue.¹²⁹ As the Nova Scotia Supreme Court stated, “the previously ‘extraordinary’ recourse to lockdowns has become the presently ‘ordinary.’”¹³⁰ Leniency is, therefore, uncalled for.

Data related to segregation practices does not improve things for Canada. Several provincial courts’ rulings have declared that solitary confinement—which, in Canada, was referred to as “segregation”—amounts to cruel and unusual punishment or treatment if it extends to

123 *Persad*, *supra* note 120 at para 2.

124 *R v Oskem*, 2019 ONSC 6283 at para 27.

125 Canadian Red Cross, 2020–2021, *supra* note 118 at 12.

126 In Canada, detainees awaiting trial are held in provincial jails (see e.g. *R v Duncan*, 2016 ONCA 754 at para 6).

127 *Supra* note 89 at paras 179–80.

128 *R v Charley*, 2019 ONSC 6490 at para 62.

129 *Persad*, *supra* note 120 at para 2.

130 *Diggs v Nova Scotia (Attorney General)*, 2024 NSSC 11 at para 10.

periods of over fifteen days.¹³¹ It is also contrary to the human rights of the detainees, regardless of the period of time it lasts, if the inmate suffers severe mental health issues.¹³²

Yet, provincial jails continue to rely on segregation practices. In its latest report, the Red Cross observed placement of people with mental health conditions in segregation cells in at least three provincial jails, and also warned that “many detained individuals who were suicidal were placed on suicide watch units, which is a segregation regime where a person must wear a tear-proof garment and is under 24-hour surveillance.”¹³³

In 2020, in the case of *Francis v. Ontario*, Justice Perrell declared that administrative segregation in Ontario provincial jails was as “a dungeon inside a prison.”¹³⁴ He described segregation cells in Ontario as follows:

[They] are small. Some are windowless or have frosted opaque windows. The cells tend to be ill kept and be fouled with excrement and blood. The cells are separated from the outside by a metal door with a slot or hatch for food and communication purposes. In some institutions there has been the practice of never turning off the lights.¹³⁵

In the said case, the ONSC found that Ontario’s practices of placing inmates in administrative segregation for a period of more than fifteen days, or for any period of time if the inmate has serious mental illnesses, contravened section 12 of the *Charter*.¹³⁶ Yet the practice has continued nonetheless, and Ontario still has not proclaimed into force the legislation prohibiting segregation in its provincial jails.

Again, immigration detainees in provincial jails were subjected to the same treatment as inmates detained under the *Criminal Code*. HRW and Amnesty International have shown that, in Ontario, 17 per cent of the immigration detainees were placed in solitary confinement at least once

131 *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para 75; *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at paras 23, 150.

132 *Francis v Ontario*, 2021 ONCA 197 at paras 31–33, 49.

133 Canadian Red Cross, 2020–2021, *supra* note 118 at 15.

134 2020 ONSC 1644 at para 1.

135 *Ibid* at para 186.

136 *Ibid* at paras 47–49.

during the 2019–2020 fiscal year.¹³⁷ Most worrisome is the fact that 46 per cent of those individuals suffered from mental health issues and/or suicidal thoughts.¹³⁸ This should not come as a surprise, since suffering from mental health issues was one of the main reasons evoked by the CBSA to send an immigration detainee to a provincial jail.¹³⁹ Such practice, however, goes against the human rights standards which, as noted above, establish that segregation automatically amounts to cruel, inhuman or degrading treatment if applied to people with mental health issues.

E. Healthcare Conditions

Available data suggests that access to both physical and mental health care for immigration detainees held in Canadian provincial jails was inadequate. This has been acknowledged by Canadian watchdogs,¹⁴⁰ human rights organizations, and even Canadian courts.¹⁴¹

Access to medical care in Canadian provincial jails is difficult, to say the least. Immigration detainees who wanted to see a doctor had to request an appointment, but the way jail authorities processed these requests was opaque. Detainees have said that they never knew if and when they would have an appointment, with some having submitted “five or six requests” without ever getting a response.¹⁴² Once a request was finally processed, detainees faced long waiting times. Delays to be seen varied from one facility to another, but could range from two¹⁴³ to up to eight weeks.¹⁴⁴ Moreover, despite the long wait, in some cases visits

137 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 45.

138 *Ibid.*

139 Gros & van Groll, *supra* note 115 at 78.

140 Independent Review of Ontario Corrections, *Corrections in Ontario: Directions for Reform* (Toronto: Queen’s Printer for Ontario, 2017) at 200–01, online (pdf): <files.ontario.ca> [perma.cc/49SY-Y9RZ].

141 See e.g. *Ali v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660 at para 39.

142 Gros & van Groll, *supra* note 115 at 35.

143 *Ibid.*

144 Canadian Red Cross, 2020–2021, *supra* note 118 at 12.

would only take place over video link.¹⁴⁵ Under such conditions, many detainees simply opted to wait for their pain or other symptoms to disappear, rather than face the challenges of trying to get a medical appointment.¹⁴⁶

With regard to mental health, the ONSC notes in *Richard* that detainees with mental health concerns were more likely to be detained in provincial jails than in IHCs.¹⁴⁷ This resulted from the application of the National Risk Assessment for Detention—whose assessment grid links mental health issues with “danger” and the possibility of “future violent behaviour”¹⁴⁸—and also from the classification by the CBSA of noncitizens at immediate risk of suicide as “high risk” individuals.¹⁴⁹ CBSA officers have openly stated in this regard that “individuals with mental health conditions may be detained in a provincial jail in order to ‘effectively manage them in light of their behavior’ or to facilitate ‘access to specialized care.’”¹⁵⁰ Yet in *Richard*, the ONSC echoes the findings from the Red Cross, HRW, and Amnesty International,¹⁵¹ noting that immigration detainees did not have adequate mental health support in provincial jails and that they were often excluded from support services, assessments or treatment facilities otherwise available to regular prison inmates. Immigration detainees’ only treatment was often reduced to over-medication practices with sleeping pills and antidepressants to control their potentially disruptive behaviour.¹⁵² Conversely, the needs of those who suffer from mental health conditions not stereotypically associated with aggressive or threatening behaviour, such as depression or anxiety, were simply ignored.¹⁵³ Instances where detainees avoided seeking help to deal with

145 Gros & van Groll, *supra* note 115 at 35.

146 *Ibid*; Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43.

147 *Supra* note 1 at para 101.

148 *Ibid* at paras 59, 100. See also Immigration, Refugees and Citizenship Canada, *ENF* 20, 2020, *supra* note 47 at 18.

149 CBSA, Operational Bulletin PRG-2014-52, cited in *Richard*, *supra* note 1 at para 102.

150 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 35. This report is also cited in *Richard*, *supra* note 1 at para 103.

151 *Richard*, *supra* note 1 at para 105.

152 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 39.

153 Gros & van Groll, *supra* note 115 at 27.

suicidal thoughts because they feared segregation practices were also reported.¹⁵⁴

F. Other Living Conditions

Material living conditions in Canadian provincial jails are far from being satisfactory. Detainees have described, for example, “being provided with clothing, bedding and towels that were often stained with urine, faeces or blood.”¹⁵⁵ Others have reported being forced to shower in facilities covered in mold, in which guards wore facemasks to protect themselves from breathing it.¹⁵⁶ Conditions have been so dire that in 2020 a group of about one hundred detainees held in an Ontario jail initiated a hunger strike to denounce issues such as “lack of clean drinkable water, dirty clothing, poor food quality, lack of programming, lack of access to quality hygiene products, and bad air quality.”¹⁵⁷ Some detainees have also complained of extreme cold, with one of them stating that “they purposely freeze you in there so you wouldn’t like the conditions.”¹⁵⁸

The environment in which immigration detainees were held only adds up to their suffering. Because they were detained alongside the general population, immigration detainees were immersed in the climate of violence that is prevalent in jails. The Red Cross reports that immigration detainees were frequently “witness or subject to threats and physical violence and [were] feeling unsafe and frustrated for being held in a criminal facility.”¹⁵⁹ Immigration detainees lived in constant fear and were often victims of intimidation, threats, and physical assaults, including stab-bings and rape.¹⁶⁰ The treatment they received from jail staff was also the same as the general prison population. In its most recent report, the Red

154 *Ibid.*

155 *Persad*, *supra* note 120 at para 12.

156 Gros & van Groll, *supra* note 115 at 31.

157 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 44 at 56.

158 Gros & van Groll, *supra* note 115 at 30.

159 Canadian Red Cross, *Immigration Detention Monitoring Program (IDMP) Annual Report Monitoring Period – April 2019 to March 2020* (Ottawa: Canadian Red Cross, 2020) at 8.

160 Canadian Red Cross, 2020–2021, *supra* note 118 at 12–13; Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 54.

Cross confirmed that “people detained under IRPA and placed in PCFs [provincial correctional facilities] [were] subject to the same disciplinary regime and to the same security measures as those detained under the Criminal Code, including strip searches.”¹⁶¹ As such, use of force, handcuffs, and frequent strip searches were part of the routine for immigration detainees held in provincial jails.¹⁶² Scholars have also reported that, particularly during the Covid-19 pandemic, immigration detainees in provincial jails had their immigration detention review hearings delayed because they had to share limited videoconferencing stations with criminal detainees, whose bail hearings were often prioritized by prison staff.¹⁶³

It is also noteworthy to mention that, in previous proceedings related to immigration detention conditions in provincial jails, Canadian authorities did not deny the existence of the conditions described above. They only argued that these did not amount to cruel and unusual treatment, without further explanation.¹⁶⁴

G. *The ECtHR’s Assessment*

The assessment of the conditions of detention presented in Part IV-B above allows us to conclude that their cumulative effects do not compensate for the scarce personal space allocated to immigration detainees in Canadian provincial jails. Therefore, it is our conclusion that the presumption of a breach of article 3 of the *ECHR* is not rebutted. We believe that, would the facts of *Richard* be analysed by the ECtHR, the court would find that immigration detainees held in Canadian provincial jails were subjected to cruel, inhuman and degrading treatment contrary to the right to human dignity enshrined in article 3 of the *ECHR*.

This finding warrants some degree of nuance. While we have already acknowledged the speculative nature of this article, we wish to further stress certain limitations. The ECtHR’s case law on detention conditions

161 Canadian Red Cross, 2020–2021, *supra* note 118 at 13.

162 Human Rights Watch & Amnesty International, “*Didn’t Feel Like a Human*”, *supra* note 43 at 49; Gros & van Groll, *supra* note 115 at 29.

163 Efrat Arbel & Molly Joeck, “Back to Business as Usual: The Impact of the COVID-19 Pandemic on Immigration Detention in Canada” (28 March 2023), online (blog): <blogs.law.ox.ac.uk> [perma.cc/6W75-HBHW].

164 *Dadzie*, *supra* note 57 at para 58.

under article 3 of the *ECHR* builds on the specific circumstances of an individual, in a particular detention facility and during a specific period. Our conclusions stem from the experiences of many different individuals, detained in different jails, at different moments in time. We have strived to ensure that the conditions of detention described in this article are representative of the Canadian system as a whole, but it is likely that some individual experiences might not correspond with the exact circumstances reported in this paper.

V. THE ONSC'S DECISION

The exercise undertaken in the previous section is purely speculative, and the ECtHR's finding that Canada is inflicting cruel, inhuman, or degrading treatment on immigration detainees held in provincial jails remains entirely hypothetical. Less hypothetical, however, are the contents of the ONSC's certification decision in *Richard*.

Although the Canadian government has appealed the ONSC's decision to certify *Richard*,¹⁶⁵ the ruling of the Ontario court—and, most importantly, the justifications and explanations the court advances to ground its decision—supports the same conclusion as our hypothetical analysis: the ONSC unequivocally finds that there is a sufficient factual basis to support the plaintiffs' claim that immigration detainees held in Canadian provincial jails have experienced multiple violations of their *Charter* rights—specifically sections 7, 9, 12, and 15.¹⁶⁶

The contents of the ONSC's certification decision therefore allow stakeholders to be cautiously optimistic. The Ontario court emphasized that decisions made under the *IRPA* must align with the *Charter* and conform to Canada's international human rights obligations.¹⁶⁷ It also underscored that the CBSA is required to treat all immigration detainees with dignity and respect,¹⁶⁸ in what could be read as an encouraging effort by the judiciary to remind authorities of the inherent rights of any individual, regardless of their immigration status.

165 Foreman & Company, "Immigration Imprisonment Class Action" (last visited 8 October 2025), online: <foremancompany.com> [perma.cc/7CZP-TKG9].

166 *Richard*, *supra* note 1 at para 14(i).

167 *Ibid* at para 18.

168 *Ibid* at para 26(ii).

Encouraging signs can also be found in the ONSC's decision regarding section 12 of the *Charter*, where the court concluded that the plaintiffs had brought to the table sufficient material facts to support their claim that the conditions under which they had been detained in provincial jails could breach their right not to be subjected to cruel or unusual treatment. The ONSC started by acknowledging that the section 12 standard set by the Supreme Court of Canada is only engaged in rare and exceptional cases.¹⁶⁹ Indeed, the Supreme Court noted in *R. v. Boudreault* that "demonstrating a breach of section 12 of the Charter is 'a high bar,'" for the treatment "must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society."¹⁷⁰ The ONSC also cites the Supreme Court's decision in the case of *R. v. Bissonnette*, where it was established that, for a form of treatment to contravene section 12, it had to be "so grossly disproportionate as to be incompatible with human dignity."¹⁷¹

Yet, despite this high standard, the ONSC observed that conditions of detention in provincial jails alleged by the plaintiffs—including strip searches, use of handcuffs and leg shackles, restrictive prison rules and limitations on communications with the outside world—could indeed be seen as "grossly disproportionate" under section 12.¹⁷² In fact, the Ontario court went as far as saying that,

[b]ased on Canada's own evidence in the Conditions Chart, [the plaintiffs' expert's] evidence, and the evidence of the representative plaintiffs and the two subclass members, there is a basis in fact that all Immigration Detainees in provincial prisons would have suffered some damage solely by being detained in a provincial prison.¹⁷³

The ONSC's decision on section 15—the right to equality and non-discrimination—is equally encouraging. The plaintiffs argued they had suffered discrimination based on their citizenship and mental health status. And, although the Supreme Court of Canada had previously

169 *Ibid* at paras 221–23.

170 2018 SCC 58 at para 45, citing *R v Lloyd*, 2016 SCC 13 at para 24.

171 *R v Bissonnette*, 2022 SCC 23 at para 52.

172 *Richard*, *supra* note 1 at para 229.

173 *Ibid* at para 340.

declared—notably in the cases of *Canada (Minster of Employment and Immigration) v. Chiarelli*¹⁷⁴ and *Charkaoui*¹⁷⁵—that differential treatment in deportation matters based on citizenship does not per se infringe the noncitizens' right to equality,¹⁷⁶ the ONSC seems to suggest in *Richard* that things could be different when it comes to detention. Indeed, the court concludes that an argument could certainly be made that immigration detention in provincial jails is “unhinged from the goal of administrative detention”¹⁷⁷ and that it is exacerbating and perpetuating a discriminatory distinction based on mental health disabilities.¹⁷⁸

Through its findings, the ONSC aligns itself with the position taken by Justice Abella in her dissenting opinion in the Supreme Court's *Canada (Public Safety and Emergency Preparedness) v. Chhina (Chhina)* decision. In *Chhina*, Justice Abella had strongly argued that “[t]he application of the *Charter* to the *IRPA* scheme guarantees the full panoply of rights to detained individuals.”¹⁷⁹ While the Supreme Court's majority held that the protection of fundamental rights for immigration detainees must be derived from sources *external* to the immigration system—namely the habeas corpus remedies traditionally rooted in the criminal justice system—Justice Abella's dissenting opinion in *Chhina* contended that *IRPA* itself could and should be read in conjunction with the *Charter* as providing protection against cruel or inhuman treatment *within* the immigration system. The *IRPA*—she argued—“should be interpreted in a way that guarantees the fullest possible range of scrutiny for detention, including the conditions of detention,”¹⁸⁰ as immigration authorities have the “obligation to assess the length, future duration and *conditions of detention*

174 [1992] 1 SCR 711 at 736, 1992 CanLII 87 (SCC).

175 *Supra* note 38 at paras 129–30.

176 The Supreme Court of Canada concluded in both decisions that section 6 of the *Charter* allowed authorities to remove noncitizens from the Canadian territory, establishing that only Canadian citizens have an absolute right to enter and remain in Canada.

177 *Richard*, *supra* note 1 at para 254.

178 *Ibid* at para 261.

179 *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 92, Abella J, dissenting.

180 *Ibid* at para 72.

when balancing the state's objectives against the detained individual's rights."¹⁸¹

The ONSC adopts a similar interpretive approach in *Richard*, emphasizing that the plaintiffs are not challenging the legality of immigration detention under the *IRPA*, but rather the conditions in which that detention occurred in practice.¹⁸² In finding that immigration detainees could have had their *Charter* rights infringed because of their *conditions* of detention—and not because of their detention per se—the ONSC's decision in *Richard* can be read as a reminder that despite Canada's power to suspend or deprive noncitizens of certain rights—namely the right to enter and remain in the country—it cannot deprive them of their other fundamental rights under the *Charter*. As with the approach taken by the ECtHR, the ONSC concludes that noncitizens retain, through the *IRPA* itself, full claim to all their other fundamental rights protected by the *Charter*.

As encouraging as these findings may be, stakeholders should approach their significance with caution. First, as noted above, the certification decision is now under appeal.¹⁸³ Second, and most importantly, as outlined in section 5(5) of the *Ontario Class Proceedings Act, 1992*,¹⁸⁴ a certification order does not constitute a determination on the merits of the case; rather, it is a procedural mechanism intended to screen cases that are unsuitable for resolution through a class proceeding. The evidentiary threshold that plaintiffs must meet at the certification stage is relatively low: they need only show that it is not plain and obvious that their claim cannot succeed. Therefore, while the ONSC has found that the plaintiffs' claims disclose a plausible cause of action at this stage of proceedings, it remains to be seen whether those claims will withstand more rigorous standards at later stages of the proceedings.

CONCLUSION

Using the ECtHR case law on immigration detention as a framework, we have argued that, based on the facts stated in the statement of claim in *Richard* and the contents of the ONSC's certification decision in the

181 *Ibid* at para 131 [emphasis in original].

182 *Richard*, *supra* note 1 at para 250.

183 *Foreman & Company*, *supra* note 164.

184 *Supra* note 1, s 5(5).

same case, the detention of migrants in Canadian provincial jails would amount to cruel and unusual treatment contrary to article 3 of the ECHR. Indeed, not only was the lack of personal space under the required minimum standard of 3 square metres, but other detention conditions do not rebut the presumption that the conditions of detention of immigrants in Canadian provincial jails amounted to cruel and degrading treatment. When analysing the additional cumulative conditions, we conclude that the latter actually made life in detention worse, particularly because of the prevalence of lockdowns and segregation practices.

The Canadian government appealed *Richard*'s certification decision shortly after it was issued.¹⁸⁵ But even if the certification ends up being upheld, it remains to be seen whether the reasoning of the Canadian court that will decide the *Richard* case is aligned with our assessment—in other words, if it will also find violations of human rights. In any event, and regardless of the outcome in the *Richard* case, our analysis shows that Canada's international reputation as a humanitarian and rights-respecting country is not entirely warranted. While the country often positions itself as a global leader in human rights, closer scrutiny reveals that certain practices in the area of immigration detention are in direct breach of many international and regional human rights standards. We therefore encourage scholars and practitioners not to take Canada's benevolent reputation at face value, but rather to engage with it critically.

Applying such a critical approach to *Richard* not only reveals a more nuanced portrait of Canada, but it also shows that the country may be taking a dangerous path. The contents of the ONSC's certification decision in *Richard* suggest that the Ontario court is—at least *prima facie*—opening the door to more robust protections for immigration detainees, one that may help Canada move closer to the ECtHR's standards. But while this development may appear promising insofar as it affirms that administrative measures set by the *IRPA* must conform to and respect the fundamental human rights of all individuals, it simultaneously reinforces the notion that the practice of immigration detention itself remains legitimate, immune to any substantive legal challenge as long as its material conditions are acceptable. This is evident not only in Canada but also across the national systems that fall under the *ECHR*. The review of ECtHR's case law on which the first part of this article is based reveals that

185 Foreman & Company, *supra* note 164.

the ECtHR tends to scrutinize the *conditions* of detention, but not the *practice* of detention as such. By addressing only its most egregious features without questioning the practice itself, the approach taken both by Canadian and European courts risks to ultimately contribute to the further normalization and legitimization of the broader system of immigration detention.

Canada, it seems, has already picked up on this. As stressed at the beginning of this paper, all Canadian provinces have, as of September 2025, ended their agreements with the CBSA to detain immigrants in provincial jails.¹⁸⁶ However, the federal government has already turned toward the holding of immigration detainees in federal penitentiaries,¹⁸⁷ where reported conditions are slightly—if not considerably—better than in provincial jails.¹⁸⁸ Since July 2025, over twenty immigration detainees have been held in the federal correctional facility in Sainte-Anne-des-Plaines.¹⁸⁹ Yet, although federal institutions may offer comparatively better conditions than provincial facilities, the shift may have the perverse effect of reinforcing the practice of immigration detention in Canada by rendering it more humane on the surface, thus deflecting attention from the more fundamental question of whether depriving individuals of their most fundamental freedoms for immigration purposes is justified at all.

Under such framework, a decision by the Ontario court ruling that the detention of immigrants in provincial jails violated section 12 of the *Charter* due to the substandard conditions would not be entirely bad news for the Canadian government, especially now that detention in provincial jails has ended. Such a ruling would indeed signal that the *Charter*

186 Muscati, Gros & Sande, *supra* note 60; Bureau, “Manitoba”, *supra* note 61; Alberta, *supra* note 62; British Columbia, *supra* note 63.

187 Canada, Department of Finance, *Budget 2024: Fairness for Every Generation*, Catalogue No F1-24/3E-PDF (Ottawa: FIN, 2024) at 409, online (pdf): <budget.canada.ca> [perma.cc/G87U-EKJG]; Amnesty International, “Open Letter: Canadian Government Must Cancel Plans to Use Federal Prisons for Immigration Detention” (13 May 2024), online: <amnesty.ca> [perma.cc/Z87J-GY5L]; Brigitte Bureau, “Federal Government Plans on Incarcerating Migrants in Its Penitentiaries”, *CBC News* (18 April 2024), online: <cbc.ca> [perma.cc/BFE4-CVXF].

188 See e.g. David Dorson, “Horror of Provincial Jails in Canada”, *Law360* (16 June 2025), online: <law360.ca> [perma.cc/E9FA-4RAA].

189 See Canada Border Services Agency, “Temporary Solution”, *supra* note 68; Canada Border Services Agency, “Sainte-Anne-des-Plaines”, *supra* note 69.

protects against *conditions* that are cruel or unusual, rather than targeting the practice of detention itself. Paradoxically, then, while the decision would affirm the class action's claim by recognizing the violation of immigration detainees' rights, it would simultaneously allow the Canadian government to argue that detention in federal facilities—where conditions could potentially meet *Charter* standards—remains lawful. Ultimately, the ruling would reinforce the principle that section 12 is concerned with the quality of detention, without challenging the broader policy of immigration incarceration.

Canada's policy shift highlights that its sole focus was to address some of the most pressing concerns related to detention conditions. Its efforts centred on ameliorating detention conditions, which risk legitimizing the system itself, rather than challenging its underlying logics. Echoing the claims of those who call for the application of carceral abolitionism to the field of immigration detention,¹⁹⁰ we argue that Canadian scholars and activists must move beyond incremental reform strategies and should instead adopt a more radical, systemic approach grounded in abolitionist frameworks and decarceration principles that directly challenge the very practice of immigration detention, rather than its surface conditions.

190 David Moffette, "When the State Promotes 'Alternatives to Detention': Institutional Co-optation and Condition-Based Carcerality" (2021) 11 *Annual Rev Interdisciplinary Justice Research* 92. See also Sharry Aiken & Stephanie J Silverman, "Decarceral Futures: Bridging Immigration and Prison Justice Towards an Abolitionist Future" (2021) 25:2 *Citizenship Studies* 141.