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**Submission to Canada Border Services Agency's  
Consultation on the National Immigration Detention Framework**

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**Justice for Children and Youth**

**Introduction**

We welcome the opportunity to comment on CBSA's National Immigration Detention Framework ("NIDF"). The NIDF identifies four key topics for consultation: Infrastructure, Alternatives to Detention, Minors in Detention, and Detainee Health/Mental Health. The submissions of Justice for Children and Youth ("JFCY") will focus primarily on considerations for Minors in Detention.

**About Justice for Children and Youth**

JFCY is the operating arm of the Canadian Foundation for Children, Youth and the Law. We are a non-profit specialty legal aid clinic that provides legal services, advice, and

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representation to children and young people under the age of 18 years in Ontario and, to unstably housed and homeless young people up to the age of 25 years. Our services include advocacy and representation for young people in diverse areas of the law and in various systems, including criminal justice, education, social services, health and mental health, and immigration.

JFCY was founded nearly 40 years ago to protect and advance the legal rights and dignity of children and youth in Canada. JFCY recognizes children and youth as individual rights holders who are entitled to equal protection and recognition under the law. We strive to assist and empower young people to have their voices heard.

Since its inception, JFCY has been active in countless matters advancing the rights of children and youth under Canadian domestic legislation, the Canadian Charter of Rights and Freedoms, the United Nations Convention on the Rights of the Child (the “UNCRC”)<sup>4</sup>, and other human rights instruments. JFCY is a frequent intervener and party at all levels of court, including over 20 appearances before the Supreme Court of Canada<sup>5</sup>, on issues of importance to children in Canada.

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<sup>4</sup> United Nations General Assembly Session 44 *Resolution 25. Convention on the Rights of the Child* A/RES/44/25 20 November 1989 (“UNCRC”).

<sup>5</sup> *Kanthisamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 (“*Kanthisamy*”); *Moore v British Columbia (Education)*, 2012 SCC 61, 351 DLR (4th) 451; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 254; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 (“*Khadr*”); *R v JZS*, 2010 SCC 1, [2010] 1 SCR 3; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181; *R v AM*, 2009 SCC 19, [2008] 1 SCR 569; *R v. SAC*, 2008 SCC 47, [2008] 2 SCR 675; *R v LTH*, 2008 SCC 47, [2008] 2 SCR 675; *R v DB*, 2008 SCC 25, [2008] 2 SCR 3; *R v BWP*; *R v BVN*, 2006 SCC 27, [2006] 1 SCR 941; *R v CD*; *R v CDK*, 2005 SCC 78, [2005] 3 SCR 668; *R v RC*, 2005 SCC 61, [2005] 3 SCR 99; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (“*Cdn Foundation*”); *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880; *Baker v Canada (Minister of Citizenship and*

We are frequently consulted by governmental and non-governmental organizations to provide commentary and submissions on youth-related legal matters; we have participated in numerous working groups concerning children in immigration detention, and JFCY is a signatory to *A Statement Against the Immigration Detention of Children*.<sup>6</sup>

### **JFCY's Significant Immigration Cases**

With respect to immigration matters in particular, JFCY frequently provides direct representation to young people with respect to their rights within Canada's immigration system and has been a key participant in litigation concerning the consideration of the best interests of the child in immigration decisions.

JFCY intervened in the seminal case of *Baker v. Canada (Minister of Citizenship and Immigration)* in which the Supreme Court of Canada recognized the importance of considering the best interests of the child in immigration decisions affecting their interests, in accordance with Canada's humanitarian and compassionate tradition and obligations under the UNCRC and international law.<sup>7</sup>

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*Immigration*), [1999] 2 SCR 817, 174 DLR (4th) 193 ("*Baker*"); *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385; *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235; *A (LL) v B(A)*, [1995] 4 SCR 536, 130 DLR (4th) 422; *R. v. J.(M.A.)*, [1992] 2 S.C.R. 166; *R. v. S.(S.)*, [1990] 2 S.C.R. 254.

<sup>6</sup> A Statement Against the Immigration Detention of Children, available online

<https://www.cba.org/CMSPages/GetFile.aspx?guid=4cc12757-a866-4ada-8ccb-2e17944abd91>,

<sup>7</sup> *Baker, supra*, at para 69-71, 74-75

JFCY intervened at the Supreme Court of Canada in *Kanthisamy v. Canada (Citizenship and Immigration)*, which concerns the consideration of the best interests of the child where a child is the subject of immigration proceedings. The Court confirmed the primacy of the best interests of the child and that the best interests must influence the manner in which the child's circumstances are evaluated, given that children will rarely, if ever, be deserving of any hardship.<sup>8</sup>

JFCY was granted public interest standing before the Federal Court of Canada in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, which concerned the constitutionality of cuts to the Interim Federal Health Program, being recognized as having particular expertise and being uniquely positioned to address the impact on child refugees and migrants and the differential impact on children's rights and health.<sup>9</sup>

JFCY was a public interest litigant in *BB and Justice for Children and Youth v. Canada (Citizenship and Immigration)*, concerning the consideration of the best interests of a child with respect to decisions regarding their detained parent. JFCY also advocated directly for the detained Canadian-citizen child C, whose mental health and well-being were severely negatively impacted, and whose educational and recreational opportunities were significantly curtailed by her detention. This case resulted in a consent order from the Federal Court and direction to members of the Immigration Division of the Immigration and Refugee Board that both the *Immigration and Refugee Protection Act*

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<sup>8</sup> *Kanthisamy, supra*, at para 34-41

<sup>9</sup> *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para 352-3

and *Regulations* allow for, and indeed require, that the best interests of the child be considered as a factor in determining whether to continue the detention of a parent.<sup>10</sup>

JFCY intervened in *Lewis v. Canada (Minister of Citizenship and Immigration)* at the Federal Court of Appeal, which concerns the consideration of the best interests of an Aboriginal child – and the principles established in *Kanthasamy* - in the removal context.<sup>11</sup> A decision in this matter remains pending.

JFCY has a genuine and significant interest in ensuring that policies adopted by CBSA with respect to the immigration detention of minors is informed by the principle of the best interests of the child as recognized in Canadian law, is consistent with constitutional and quasi-constitutional rights and obligations, and is consistent with Canada’s obligations under the UNCRC, and other international legal norms.

### **Children in Immigration Detention**

Children are detained in the immigration context in two separate manners – as individuals who are detained in immigration detention, (usually with a parent or caregiver, but also as unaccompanied minors), or who, although they are Canadian citizens or permanent residents, are *de facto* detained as what is colloquially known as a “guest” when a primary parent or caregiver is detained.

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<sup>10</sup> *BB and Justice for Children and Youth*, (24 August 2016, IMM-5754-15, per Hughes J.) (FC); Instructions from CBSA to its Hearings Officers, Distributed by CBSA on August 29, 2016.

<sup>11</sup> *Lewis v Canada (Minister of Citizenship and Immigration)*, A-17-16, heard 7 March 2017 (FCA)

As noted in the Summary Report of the Framework and Stakeholder Roundtable Discussions, 201 minors were detained or *de facto* detained during fiscal year 2015-2016. While this number decreased in 2016 to 121, CBSA must take steps to immediately end the detention of children, consistent with Canada's legal and international obligations.

### **Canada's Obligations Under International Human Rights Law**

The importance of recognizing the unique features of the human rights of children has been understood at an international level since at least 1924 when the Geneva Declaration of Rights of the Child was adopted. In 1948, the *Universal Declaration of Human Rights*<sup>12</sup>, followed by the United Nations *Declaration of the Rights of the Child* in 1959<sup>13</sup>, recognized that children are entitled to special care, protection and assistance. The UNCRC was adopted and opened for signature in 1989; Canada became a signatory in 1990 and ratified the UNCRC in 1991. By doing so Canada declared to the world, and to the children of the world, that we would ensure that we would safe guard the human rights of children, and in particular that we would ensure that the best interests of the child would be the only primary consideration in all our actions concerning children<sup>14</sup>.

Nonetheless, in the intervening years Canada has struggled, and has in fact failed, to protect the human rights and best interests of migrant children, and Canadian children

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<sup>12</sup> Universal Declaration of Human Rights, GA Res 217A(III), UNGAOR, 3<sup>rd</sup> Sess, Supp No 13, UN Doc A/810 (1948) 71, Article 25(2).

<sup>13</sup> United Nations General Assembly, Session 14 *Resolution 1386. Declaration of the Rights of the Child* A/RES/1386(XIV) 20 November 1959.

<sup>14</sup> UNCRC Article 3.

whose parents are involved in immigration detention decisions, when those children are detained for immigration purposes. Canada must formulate humanitarian and compassionate responses to the issues faced by children in the context of migration – especially when governing the complex issues that may arise for migrant children. The detention of children in this context is not consistent with the human rights of children, does not have regard for the best interests of children, does not promote security, does not promote the dignity of children and families, and is not consistent with humanitarian and compassionate values.

Canada must immediately put an end to the immigration detention of children. We can much more easily develop appropriate responses, honouring security, the rule of law, domestic legislation, and human dignity, than we can continue to try and justify the shameful practice of detaining children for immigration law purposes.

Keeping children in immigration detention jeopardises their physical and psychological health, and causes harm. Indeed, the UN Committee on the Rights of the Child (the “CRC Committee”) has concluded that immigration detention can never be in the best interests of a child, noting the consensus of international research on this point.<sup>15</sup>

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<sup>15</sup> International Human Rights Program, “No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation” (2016), University of Toronto Faculty of Law, Foreword by Francois Crepeau, UN Special Rapporteur on the Human Rights of Migrants, p 1; Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, UNCRCOR at para 32

Detention imposes serious and significant harms to children’s physical and psychological well-being and their development.<sup>16</sup>

The CRC Committee has repeatedly criticized Canada for its child detention practices, expressing grave concern regarding the scale of child detention in Canada and the ongoing failure of Canadian immigration officials to recognize, protect, and promote the best interests of children.<sup>17</sup> Recognizing the harm to children, the CRC Committee identified that children detained or residing in immigration holding centres face significant barriers to accessing adequate education and recreational activity, and face significant psychological and mental health consequences.

Research demonstrates that “immigration detention is an acutely stressful and traumatic experience for children” and that children react with “extreme distress, fear, and a deterioration of functioning” and experience high levels of emotional stress and psychiatric symptoms, including self-harm, suicidality, severe depression, regression of milestones, physical health problems, and post-traumatic presentations.<sup>18</sup> Detention is

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<sup>16</sup> International Human Rights Program, “No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation” (2016), University of Toronto Faculty of Law, Foreword by Francois Crepeau, UN Special Rapporteur on the Human Rights of Migrants, p 1; Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, UNCRCOR at para 32

<sup>17</sup> IHRP, “No Life for a Child”, *supra*, at p 10; UN Committee on the Rights of the Child, Concluding Observations: Canada, 65<sup>th</sup> Sess, CRC/C/CAN/CO/3-4 (2012) at para 74

<sup>18</sup> IHRP, *supra*, p 15; Kronick, R, Rousseau, C., and Cleveland J. “Asylum-seeking children’s experiences of detention in Canada: A qualitative study”, (2015) 85:3, *American Journal of Orthopsychiatry*, 287-94 at 287, 292-3; Kronick, R, Rousseau, C., and Cleveland J., ““They cut your wings over here . . . and you can do nothing”: Voices of children and parents held in immigration detention in Canada.” *Detaining the Immigrant Other: Global and Transnational Issues*. Eds. Furman, R., Epps, D., Lamphear, G. Oxford University Press, 195-207.

“an experience of deprivation that shatters children’s sense of safety and emotional well-being”.<sup>19</sup>

Detaining parents, and not allowing their children to be with them, thereby separating children from their primary caregivers, is not an appropriate response. Children whose parents are facing immigration detention processes, both migrant children and Canadian born children, often have no alternative caregivers. Family separation – the result of housing children apart from their detained parents, often in the care of children’s aid societies – also causes significant distress and trauma for children, and is often more detrimental than allowing children to remain in detention with their parents.<sup>20</sup>

The best interests of the child cannot be meaningfully accommodated where immigration detainees face the option of either subjecting their children to *de facto* detention or separating from them. Deciding between these alternatives is effectively a choice between modalities for the production of grave mental health consequences. It is never in the best interests of children to be separated from the care of their parents or to live in immigration detention.<sup>21</sup>

In order to appropriately and adequately ensure the human rights, dignity, security, and *Charter* rights of children in the context of immigration detention, all policy framework and standards adopted by CBSA must appropriately recognize and incorporate the principle of the best interests of the child as set out in Canadian law and the UNCRC, the Refugee Convention, and the related guidelines, commentary, and reports.

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<sup>19</sup> Kronick, R. et al, *supra*, “Asylum-seeking children’s experiences” at 293.

<sup>20</sup> IHRP, “No Life for a Child, *supra*, at p 24

<sup>21</sup> *Ibid.*

## **The Best Interests of the Child**

*IRPA* is to be applied and construed in a manner that is consistent with the *Charter* and with the international human rights instruments to which Canada is a signatory.<sup>22</sup> This includes the UNCRC.

The Supreme Court of Canada has furthermore affirmed that Canadian law and related policy must be interpreted to comply with Canada's international treaty obligations<sup>23</sup> and that "(c)hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society"<sup>24</sup>. The recognition of the inherent vulnerability of children and the importance of attention to their unique interests has consistent and deep roots in Canadian law, as repeatedly affirmed by the Supreme Court.<sup>25</sup>

Article 3(1) of the UNCRC provides that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". This is the only primary consideration provided for in the UNCRC. This primacy is consistently recognized by the UNHCR and the CRC Committee. In the context of child migration, the CRC Committee has stated that:

In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in a child or a parents' detention, return or

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<sup>22</sup> *IRPA*, s 3(3)(d) and (f)

<sup>23</sup> *Baker, supra*, para 70

<sup>24</sup> *Ibid.*, para 67.

<sup>25</sup> *AB v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, 2012 SCC 46, para 17; see also *MM v. United States of America*, [2015] 3 S.C.R. 973, 2015 SCC 62, para 262

deportation . . . States should make clear in their legislation, policy, and practice that the principle of the best interests takes priority over migration and policy or other administrative considerations.<sup>26</sup> (emphasis added)

The CRC Committee's report regarding Canada's compliance with the UNCRC urged Canada to:

Ensure that legislation and procedures use the best interests of the child as the primary consideration in all asylum processes. . . [T]he Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principles of the best interests of the child that immigration authorities be trained on the principle and procedures of the best interest of the child.<sup>27</sup> (emphasis added)

In *Baker*, the Supreme Court confirmed that the values and principles of the UNCRC recognize:

the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights.<sup>28</sup>

The Court found that the best interests of children must be a primary consideration when assessing an application on humanitarian and compassionate grounds and that a

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<sup>26</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, UNCRCOR at paras 72-73

<sup>27</sup> Committee on the Rights of the Child, *Concluding Observations: Canada, 65<sup>th</sup> Sess, CRC/C/CAN/CO/3-4* (2012 at para 74

<sup>28</sup> *Baker supra*, para 71

decision-maker must be consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.<sup>29</sup>

The Court in *Kanhasamy* further expanded the obligation to consider of the best interests of the child analysis, emphasizing the centrality and singular importance of a best interests analysis:

International human rights instruments to which Canada is a signatory, including the *Convention on the Rights of the Child*, also stress the centrality of the best interests of a child. Article 3(1) of the *Convention* in particular confirms the primacy of the best interests principle.<sup>30</sup>

Indeed, *Kanhasamy* directs that the best interests of the child must be of singular, significant focus and must influence the manner in which all of the child’s circumstances are evaluated. The Court furthermore recognized that “children experience greater hardship than adults when faced with a comparable situation”.<sup>31</sup>

The UNCRC obliges states parties to ensure that the best interests of the child are appropriately integrated and consistently applied in every action taken by a public institution and that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the best interests of the child have been

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<sup>29</sup> Ibid., para 75.

<sup>30</sup> *Kanhasamy, supra*, para 40

<sup>31</sup> Ibid., para 41

a primary consideration, including the short-, medium-, and long-term effects of actions related to the development of the child over time.<sup>32</sup>

The UNCRC is to be read as a whole. The Articles of the UNCRC identify specific and independent rights to which children are entitled. They also provide context for understanding children's rights generally. While the best interests of the child is the only primary consideration, all of the other Articles of the UNCRC assist us in understanding and interpreting the relevant considerations and content of the best interests of the child.

The UNCRC protects a child's right not to be separated from his or her parents, except when determined by competent authorities to be consistent with their best interests.<sup>33</sup>

The UNCRC protects a child's right to the highest attainable standard of health and that no child is deprived of his or her right of access to health care services, to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, a right to education, and a right to play and to recreational activities. These, and other rights, must be understood as integral components of what will contribute to the best interests of a child.

The CRC Committee has called upon states to expeditiously and completely cease the detention of children on the basis of their immigration status and furthermore requires that "primary consideration should be given to the best interests of the child in any

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<sup>32</sup> Committee on the Right of the Child, General Comment No. 14 (2013) on the right of the child have his or her best interests taken as a primary consideration (art. 3 para. 1) Sess 66, CRC/C/GC/14

<sup>33</sup> UNCRC, Article 9(1)

proceeding resulting the in child's or their parents' detention".<sup>34</sup> The CRC Committee has called out Canada, commenting that the best interests of the child is not appropriately or consistently integrated or applied in Canadian immigration law, particularly with respect to immigration detention.<sup>35</sup>

The *Immigration and Refugee Protection Act* provides that a minor child shall only be detained as a measure of last resort, "taking into account the other applicable grounds and criteria including the best interests of the child."<sup>36</sup> While the Regulations provide for "special considerations for minor children", these largely relate only to the conditions of detention for children and do not take account of the particular needs, interests, and vulnerabilities of children.<sup>37</sup> The legislation does not provide for the consideration of the best interests of a child affected by a parent or caregiver's detention.

In *BB and Justice for Children and Youth v. Canada (Minister of Citizenship and Immigration)*, by agreement and consent order of the Federal Court, it was recognized that the considerations with respect to continued detention under *IRPR* are not closed categories and that the best interests of the child can be considered among the enumerated factors that would justify a parent's release from detention. As a consequence, CBSA has directed its Hearings Officers to take positions consistent with the Court's order.

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<sup>34</sup> IHRP, "No Life for a Child", *supra*, at p 38

<sup>35</sup> *Ibid.*

<sup>36</sup> *Immigration and Refugee Protection Act ("IRPA")*, SC 2001 c 27, s 60

<sup>37</sup> *Immigration and Refugee Protection Regulations ("IRPR")*, SOR/2002-227, s 249

However, the consent order does not recognize the primacy of the best interests analysis, requiring only that the best interests of the child be considered a factor among other relevant factors. Moreover, JFCY is aware of cases where the decision has been incorrectly and inconsistently applied by the Immigration Division in detention review decisions. Accordingly, the protection available under *IRPA* and *IRPR* for the best interests of the child remains inadequate and inconsistent with international and domestic law.

### **Recommendations to CBSA**

In view of the recognized detrimental effect of immigration detention on minor children – whether as a detained person or guest – and of family separation, as well as Canada’s commitment under international law as affirmed by the Supreme Court of Canada, CBSA must cease the detention of children.

These changes should be implemented by enacting binding legislative amendments that expressly incorporate the UNCRC into the *Immigration and Refugee Protection Act and Regulations*, as it does with the Convention Against Torture and the Refugee Convention, and prohibit the detention of minor children, consistent with Canada’s commitments under the UNCRC and the admonishment of the CRC Committee. Where children are affected by the detention of a parent or caregiver, *IRPA* should provide that the best interests of the child be given primary consideration with respect to their continued detention, consistent with the UNCRC.

Alternatives to Detention for adults that will ensure that children are not detained must be implemented.

Alternatively, within the policy framework proposed by CBSA, JFCY urges CBSA to provide clear direction that children may not be detained and, where children are *de facto* detained as guests of their parents, that the interests of the children are the primary consideration in decision-making concerning the continued detention of their parents.

Thank you for your consideration of this Submission. We welcome further discussion, and further opportunities for protecting and advancing the human rights of children in Canada.

JUSTICE FOR CHILDREN AND YOUTH