

GLOBAL **NEXTGEN** INDEX

Protecting the liberty of our next generation, today.

End Child Detention Scorecard

CANADA

This scorecard was published in August 2018. Data was collected from June 2017 – June 2018.



FINAL SCORE

70

Children can be detained in Canada, with 151 cases recorded in fiscal year 2017/2018. Children can be “housed” in detention with their parents, or separated from their detained parents, while children who arrive in Canada without a guardian are rarely detained.

In recent years, Canada has introduced a series of positive policy developments in the area of immigration detention through the [2016 National Immigration Detention Framework](#) and its accompanying directives. While this policy aims to limit child detention and family separation “as much as humanly possible,” the government has yet to commit to ending these practices.

Canada has improved its commitment to transparency and open dialogue through a series of public consultations, as well as by releasing comprehensive statistics on immigration detention, disaggregated by region, age, gender, length of detention, and ground for detention. The National Directive for the Detention or Housing of Minors, issued and implemented in November 2017, has also had an immense impact on child detention. The fourth quarter of 2017/2018 saw 12 children housed or detained – a 68% drop from the previous quarter, where 38 children were housed or detained. The average length of detention has also been decreasing. Canada is also retrofitting or replacing detention facilities to ensure family unity. While child detention is always a violation of children’s rights, family unity is an important aspect of the best interests of the child. Finally, regulatory amendments are currently underway to incorporate these recent policy developments.

Canada continues its immigration detention reform, with important improvements for children expected to be forthcoming in oversight, best interest determinations, and expanding alternatives to detention. We look forward to these improvements being reflected in future scorecards once they have been implemented.

| | Canada | Possible |
|------------------|-----------|------------|
| Treaties | 16 | 20 |
| National laws | 0 | 10 |
| Processing | 19 | 26 |
| Placement | 11 | 12 |
| Rights | 15 | 20 |
| Oversight | 9 | 12 |
| Sub Total | 70 | 100 |
| Points off | -11 | -15 |
| Bonus points | +11 | +15 |

Treaties 16/20

The Government of Canada has ratified four of the six Conventions and Protocols that assist in the protection of children in the context of migration. The consultation process regarding ratification of *the Optional Protocol against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) has been underway for over two years.

Recommendation: The Government of Canada is acknowledged and congratulated for its ratification of international treaties to date. The government is encouraged to swiftly ratify OPCAT and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

National laws 0/10

Although section 60 of the Immigration and Refugee Protection Act (IRPA) provides that "a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria, including the best interests of the child," there is no legislative prohibition against the detention of children in Canada. There is also no differentiation in law among infants, young children, and youth, with respect to immigration detention. Canada has fallen behind normative international standards, which specify that the detention of children is always a violation of their rights. Furthermore, while the Federal Court remains a bona fide option for recourse to immigration proceedings, Canadian case law in the immigration context has failed to reinforce the principle of the best interests of the child as the robust protection that international law defines it to be (see *Baker v MCI*, [1999] 2 SCR 817; *Legault v MCI*, [2011] 3 FC 277; *MCI v Hawthorne*, [2003] 2 FC 555; *Owusu v MCI*, [2004] 2 FC 635; *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61).

In light of recent policy developments and following public consultations, regulatory amendments are currently underway to ensure that the best interests of the child are accounted for in immigration detention decisions. These regulatory amendments are expected to proceed by early 2019.

Recommendation: The Government of Canada is acknowledged and congratulated for undertaking regulatory amendments, and encouraged to swiftly introduce legislation to bring Canada in line with normative international standards to end the immigration detention of children.

Processing 19/26

The [Ministerial Direction to the Canada Border Services Agency: Minors in Canada's Immigration Detention System](#) in conjunction with the CBSA's [National Directive for the Detention or Housing of Minors](#) provide for a systematic operational approach to children in the context of immigration detention. Canada has also updated its [Enforcement Manual on Detention](#) (ENF 20) and introduced a new [Enforcement Manual on Alternatives to Detention](#) (ENF34). However, the safeguards introduced through these policies are yet to be reinforced by accompanying regulatory and legislative changes.

The Canadian government is commended for undertaking Best Interest of the Child (BIOC) Assessments in detention-related decisions that impact children, as per A60 of the *Immigration and Refugee Protection Act* and R249 of the *Immigration and Refugee Protection Regulations*. Acknowledging that children should never be detained, and that immigration detention is always a violation of children's best interests under international law, CBSA is commended for conducting ongoing BIOC assessments in instances when a child is detained or housed, in conjunction with the parent and Child Services to find alternatives to detention as soon as possible. Furthermore, CBSA is acknowledged for creating space in detention facilities that allow for families to remain united and for children to access important services, in keeping with the best interests of the child.

Key areas for improvement under the National Directive for the Detention or Housing of Minors:

- The concept of the best interests of the child (BIOC) is set out in policy as "a primary consideration [that] may only be outweighed by other significant considerations, such as public safety (i.e. R245 Flight Risk (a) (f) and R246 Danger to the Public), or national security" (section 6). This is concerning as the *UN*

Convention on the Rights of the Child and guidance documents from UNICEF & UNHCR on Best Interest Determinations are clear that security concerns cannot supersede the rights of the child. It is particularly alarming that flight risk is equated with public safety in this context.

- CBSA officers conduct BIOC assessments, including consideration of personal information, case synopsis, measures taken to mitigate detention and all alternatives to detention considered. While these are important procedures to ensure that the best interests of the child are respected, it remains unclear what training (if any) CBSA officers receive specifically with respect to the BIOC, and whether CBSA are optimally positioned to conduct these assessments.

Recommendation: The Government of Canada is acknowledged and congratulated on its efforts to coordinate a systematic approach to protect children while their migration or asylum cases are being resolved. The Canadian Next Gen Committee supports the development of a BIOC assessment form to promote national consistency in the application of the BIOC. The Committee encourages Canada to revisit the primacy of the BIOC as per international law, particularly as it is weighed against flight risk, and the Committee encourages Canada to ensure that authorities conducting BIOC assessments are adequately trained and appropriately positioned to do so.

Placement 11/12

The Canada Border Services Agency's (CBSA) [National Directive for the Detention or Housing of Minors](#) outlines placement options outside of detention that are in line with normative standards. The fourth quarter of fiscal year 2017/2018 saw 12 children housed or detained – a significant drop from the previous quarter, where 38 children were housed or detained – and a positive reflection on the implementation of this recent policy. In July 2018, CBSA also released a policy that expands on existing alternatives to detention, with more details on specific placements and accommodations in the community designed to avoid and release individuals from detention.

The latest alternatives to detention policy provides for general conditions, issuance of a deposit or guarantee, in-person reporting, community case management and supervision, voice reporting, and a pilot project involving electronic monitoring. In light of the significant limitations on residual liberty involved in some of these programs, it is crucial that they are implemented as alternatives to detention, rather than alternatives to unconditional release from detention. Analysis would be further strengthened by publicly available statistics with respect to the use of alternatives to detention. For example, when bonds and guarantees are imposed, they tend to be exceedingly expensive, and in some cases even prohibitive.

Recommendation: The Government of Canada is acknowledged and congratulated on the placement options outlined in the National Directive for the Detention or Housing of Minors, and the latest policy on alternatives to detention, especially measures that provide for unconditional placement in the community. It is recommended that publicly available statistics on the use of alternatives to detention are made available to effectively assess the impact of these latest policies.

Rights 15/20

Many of the programs that support rights – including access to housing, social assistance, education, healthcare, and employment – are under provincial jurisdiction. As such, significant variations exist across provinces. All children on Canadian soil, whether they are asylum seekers, refugees or migrants, should be able to have access to the same rights as Canadian citizen children. More needs to be undertaken in Canada to achieve this aim. In particular, there is currently no firewall legislation to ensure the police are not involved in migration control.

Recommendation: The Government of Canada is acknowledged on providing general access to housing, social assistance, education, healthcare, and employment for non-citizen children. It is also recommended that the government reduce discrepancies across provinces, and introduce firewall legislation to ensure police services do not become involved in migration control activities.

Oversight 9/12

A recent external audit, commissioned by the Chair of the Immigration and Refugee Board, indicates that a significant and substantive reform of detention review system is necessary. The Immigration Division of the Immigration and Refugee Board, a quasi-judicial tribunal undertakes detention review hearings. Although these reviews are scheduled regularly, the process does not provide adequate legal safeguards against arbitrary detention. Tribunal adjudicators are not bound by legal or technical rules of evidence, and the burden of proof is set up so that immigration detainees are effectively required to prove that detention is no longer warranted. This is particularly difficult given that many immigration detainees do not have legal representation at their detention review hearings. The external audit found “notable discrepancies between the expectations articulated by the courts and the practices of the [Immigration Division].”

Judicial oversight for Immigration Division decisions regarding immigration detention is available in law. However, it is resource intensive and remains inaccessible to the majority of immigration detainees. Even where judicial reviews are successful, the case is generally only sent back to the systemically flawed Immigration Division.

Finally, the National Directive for the Detention or Housing of Minors provides internal reporting mechanisms that provide oversight for child detention. Furthermore, CBSA has partnered with the Canadian Red Cross Society to provide detention monitoring. However, the CBSA is the only police force in Canada that has no civilian oversight.

Recommendation: The Government of Canada is acknowledged and congratulated for CBSA’s commitment to internal reporting and monitoring mechanisms to provide oversight for child detention. The government is encouraged to swiftly introduce legislation for comprehensive civilian oversight for CBSA, and to strengthen legal safeguards in the detention review process in order to avoid indefinite and arbitrary detention.

Points off -11/-15

In fiscal year 2017-2018, a total of 151 children were in an immigration detention facility, including children who were foreign nationals, permanent residents and Canadian citizens. During this period, the average length of time that children were detained or housed in a detention facility was 15 days, and the median length was 5 days. Unaccompanied minors spent an average of 3 days in a detention facility. While the vast majority of children were in Immigration Holding Centres, which are dedicated immigration detention facilities resembling medium-security jails, 6 children were housed in the Burnaby Youth Custody Services Centre with their detained parents. Since the launch of the National Directive for the Detention or Housing of Minors in November 2017, the number of children housed or detained has decreased by 68%: in the fourth quarter of 2017-2018, 12 children were housed or detained, compared to 38 in the previous quarter.

Recommendation: The Government of Canada is Canada is to be commended for providing comprehensive statistics on children, disaggregated by regional province, age, gender and migration status. The government is encouraged to swiftly legislate a time limit to the length of detention, and CBSA is encouraged to publish statistics regarding the use of alternatives to detention.

Bonus points +11/+15


Despite the newly introduced policy that aims to reduce child detention, the *Immigration and Refugee Protection Act* (IRPA) still allows child detention to take place. Canada is to be commended for defining in policy the best interests of the child as “a primary consideration,” although it may be outweighed by “significant considerations” (such as flight risk) that are not supported by international law. Canada is also to be commended for including in policy a time limit for the detention of unaccompanied children, although children should not be detained at all.

Finally, Canada is also commended for partnering with community-based organizations and child protection services across Canada in order to place children in the community rather than in detention and avoid family separation, and for including civil society in policy consultation processes. The new policy allows community-based partners to provide case management and support.

The Government of Canada is to be commended for improving its commitment to transparency and accountability by improving its statistics reporting during 2017-2018.

Although children should not be detained, in instances where a minor is housed or detained, the CBSA ensures that they remain united with their parents, and have access to programs and services within the facilities.

Recommendation: The Government of Canada is acknowledged and congratulated for highlighting the best interests of the child in CBSA's policy, and embarking on developing an assessment tool for the best interests of the child. Additionally, the government is commended for reducing the number of children in detention and the average length of time that children spend in detention. The government is encouraged to strengthen this commitment and take steps to become a world leader on child migration and detention issues.



This scorecard has been assessed by the Canada NextGen Index Committee:

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- Professor François Crépeau, McGill University
- Dr. Rachel Kronick, McGill University
- Dr. Stephanie Silverman, University of Toronto
- Hanna Gros, University of Toronto

For further information regarding how this score was measured visit <http://next-gen-index.org/>

If you have any questions, please contact the Global Campaign:
media@endchilddetention.org

Additional Resources & Information

Treaties & National Laws

- [List of ratified Conventions](#)
 - [Canada to sign UN's anti-torture protocol after years of delay](#)
 - [Six steps Canada must take after long redress](#)
- [Canada and the New York Declaration](#)
- [Immigration and Refugee Protection Act \(IRPA\)](#)

Directives & Services

- [Canada Border Services Agency Directives](#)
- National Directive for the Detention or Housing of Minors
 - [Arrest and Detention of a Minor](#)
 - [Child Protective Services \(CPS\)](#)
 - [Unaccompanied Minors](#)
- Ministerial Direction to the Canada Border Services Agency
 - [Minors in Canada's Immigration Detention System](#)
- Immigration and Refugee Board of Canada
 - [Interpreter Handbook](#)
 - [List of Legal Aid Offices](#)
- Legal Aid Services
 - Ontario: [Legal Aid Ontario](#)
 - British Columbia: [Legal Services Society](#)
 - Alberta: [Legal Aid Alberta](#)
 - Manitoba: [Legal Aid Manitoba](#)
 - Quebec: [Commission of Legal Services](#)
 - Newfoundland & Labrador: [Legal Aid Commission](#)

Community Integration & Support

- Federal-Provincial Fiscal Arrangements Act, RSC 1985
 - [Minimum Residency Requirements for Social Assistance](#)
- Ontario Ministry of Community and Social Services
 - [Ontario Works Directive, Residency Requirements](#)
- Government of Canada
 - [Financial Help – Refugees: Resettlement Assistance Program](#)
 - [Canada Health Act, RSC 1985](#)
 - [Interim Federal Health Program – Information for Individuals](#)
- School Districts
 - [Toronto: Memo - Students Without Immigration Status](#)
 - [Quebec: Activists day undocumented children need right to education](#)
 - [Quebec: Undocumented students need right to free education](#)
 - [British Columbia: Sanctuary schools policy](#)
- Sanctuary Cities
 - [Sanctuary trend grows across Canada](#)
 - [Montreal becomes 4th Canadian sanctuary city](#)

Infrastructure & Oversight

- Government of Canada
 - [Minister Goodale issues new direction on keeping children out of immigration detention](#)
 - [CBSA Annual Detention Statistics 2012 - 2018](#)
 - [New initiatives for a better, fairer immigration detention system](#)
 - [Canada-US Safe Third Country Agreement](#)
 - [Immigration Refugee Board Audit on Long Term Detention](#)
- [Red Cross to monitor Canada's immigration detention centres](#)