Double Jeopardy:

Deportation of the Criminalized Mentally Ill

A Discussion Paper

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SCHIZOPHRENIA SOCIETY OF ONTARIO
SOCIÉTÉ ONTARIENNE DE LA SCHIZOPHRÉNIE
UNE SOURCE D'ESPOIR · DE SOUTIEN ET D'ENTRAIDE

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Executive Summary

Evidence shows that people with mental illness are coming into contact with the law at an increasing and disproportionate rate. While the criminalization of mental illness has been the subject of great study and collaborative effort within the mental health and justice sectors, what has not been addressed are the immigration consequences of this criminalization. The *Immigration and Refugee Protection Act* (*IRPA*) renders any non-citizen convicted of a certain level of offence inadmissible on the grounds of criminality or serious criminality, meaning they can be involuntarily removed from Canada and barred from returning. Additionally, non-citizens who are sentenced to a term of imprisonment of two years or more are denied the right to appeal their case to the Immigration and Refugee Board. Given the recognized criminalization of mental illness, these inadmissibility provisions have had a disproportionately harsh impact on the mentally ill.

The Schizophrenia Society of Ontario's research on this topic, which included input from those with direct experience working with this population, led us to identify four key issues:

1. **Access to justice for people with mental illness going through the deportation process:** Individuals with mental illness face several barriers in obtaining adequate legal representation. There also appears to be an inconsistent and insufficient use of existing mechanisms to serve and protect vulnerable persons, such as the use of Designated Representatives and the Vulnerable Persons Guideline. Limitations in obtaining psychiatric assessments and seeing a health professional to design treatment plans also impacts access to justice for individuals with mental illness. Also significant is the restriction on the right to appeal for those sentenced to two years or more, which in many cases is triggered by an offence that is directly related to the individual's mental illness and where humanitarian and compassionate considerations may apply.

2. **Mental health needs of appellants:** Aspects of the immigration process itself can have detrimental effects on the mental health state of appellants. The mental health of those in detention is further compromised as detention facilities do not have the staff capacity or training to address their needs. Those who are deported may be sent to countries where there are limited mental health services, where people with mental illness are at increased risk of victimization, and where they have no remaining family who could support them in their recovery.

3. **Lack of acknowledgement of special needs and challenges of persons with mental illness within current structure and process:** Overall, the current removal process is "one size fits all" as it fails to adequately acknowledge, address and accommodate the needs and challenges of persons with mental illness. Conditions of detention release and stays of deportation reflect a lack of understanding about the limitations imposed by mental illness as well as the non-linear nature of the recovery process. In addition, a "two strikes, you're out" policy which automatically deports people who are convicted of another offence of serious criminality does not provide the flexibility that should be afforded to this population.

4. **Professional knowledge and practice gaps:** Limited knowledge about the complexities of mental illness amongst Immigration and Refugee Board (IRB) Members may impact their perceptions regarding when a Designated Representative should be appointed or the Vulnerable Persons Guideline used, and when humanitarian and compassionate considerations are warranted. Criminal lawyers may not have the information necessary to consider the immigration consequences of their case outcome. Mental health, settlement and immigration workers have similar knowledge gaps, and may be unprepared to advise their clients of the risk of deportation and guide them accordingly.

To help address these issues, the Schizophrenia Society of Ontario has identified seven key recommendations in the domains of policy, education and legislation:

Policy:

1. Create and enforce substantive and procedural guidelines for IRB members with respect to persons with mental illness;
2. Provide additional protections to ensure access to justice, specifically, the right to counsel;
3. Expand access to community-based mental health services to support people on detention releases and stays.

Education:

4. Provide in-depth training on mental health to Canada Border Service Agency (CBSA) officers, IRB Members, Minister's Counsel and Designated Representatives;
5. Provide educational opportunities to criminal lawyers, community mental health workers and immigration/settlement workers about the immigration consequences of criminalization of mental illness and how to support and advise their clients accordingly.

Legislation:

6. Reform section 64(2) of the *Immigration and Refugee Protection Act*, which currently denies the right to appeal for individuals sentenced to two years or more;
7. Repeal section 68(4) of the *Immigration and Refugee Protection Act*, which currently terminates the appeal of persons on stays who are convicted of another section 36(1) offence.

The ultimate goal of this paper is to surface this issue for discussion and to provide possible directions for positive system change. In order to make this paper accessible to a wider audience, including policy-makers, organizations and professionals working with this population, an overview of the legislation and the removal process have been provided, as well as a glossary of terms.

A Committee on Mental Illness, Criminalization and Immigration has been struck to continue work on this issue. For more information, please visit our website at www.schizophrenia.on.ca.

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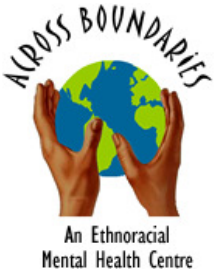
Endorsements

This discussion paper has been endorsed by the following organizations:



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Introduction

Over the past several decades, people with mental illness in Canada have been coming into contact with the law at an increasing and disproportionate rate. While the criminalization of mental illness has been the subject of great study and collaborative effort within the mental health and justice sectors, what has not been adequately addressed are the immigration consequences of this criminalization. The *Immigration and Refugee Protection Act (IRPA)* renders any non-citizen convicted of a certain level of offence inadmissible in Canada on the grounds of criminality[i], meaning they can be removed from Canada if they are convicted of a crime and barred from returning. Given the evidence of criminalization of mental illness, which is discussed below, these inadmissibility provisions can be said to have had a disproportionate impact on the mentally ill, putting such people at even greater risk of deportation.

The current process for the determination and appeal of criminal inadmissibility does not acknowledge and address the unique needs and challenges of persons with mental illness; even existing mechanisms to serve and protect vulnerable persons are not consistently applied. As a result, people with mental illness are being deported to countries where they have no support networks or access to mental health services, and many of those who are allowed to stay are subject to onerous conditions on their detention release or stays of deportation. The system, as it exists, is unjust for persons with complex mental health issues.

The Schizophrenia Society of Ontario (SSO) has a long history of advocating on behalf of people with mental illness who are at risk of deportation due to involvement with the criminal justice system on an individual and case-by-case basis. However, a review of this issue[ii], including its scope, nature and impact, has demonstrated a need for system-level changes to address this problem more broadly. In the meantime, there must be increased understanding of this issue to ensure better outcomes for persons with mental illness across the sectors.

The purpose of this discussion paper is to provide an introductory analysis of the issues affecting persons with mental illness who are at risk of deportation on the basis of criminality. The intention is not to unduly criticize those who work in immigration, but rather to highlight systemic and policy issues which prevent appropriate accommodation of people with mental illness who are at risk of deportation. Recommendations which could address these issues, both in current practice and through system-level change, are introduced. In order to make this paper accessible to a wider audience, including policy-makers, organizations and

[i] Note: use of the term "criminality" in this paper refers to both "criminality" and "serious criminality" as defined in s.36 of the *Immigration and Refugee Protection Act (IRPA)*

[ii] See Appendix B for research description.

professionals working with this population, an overview of the legislation and the removal process have been provided, as well as a glossary of terms.

Scope

Due to the mandate of the Schizophrenia Society of Ontario and limitations in obtaining information from other provinces, the issues discussed in this paper apply primarily to the province of Ontario.

The population of focus in this paper is individuals with mental illness. This term as it is applied here is not restricted to any one diagnosis, but can include illnesses such as schizophrenia, bipolar disorder and major depression, as well as anxiety disorders. While this paper does not specifically address individuals with intellectual or developmental disabilities, dual diagnoses, brain injury, substance abuse disorders or concurrent disorders, it should be noted that many of the issues these individuals face are the same and that these populations likely encounter similar obstacles in relation to the removal process.

Finally, the focus of this paper is people with mental illness who have been charged with a criminal offence in Canada. While many refugees and refugee claimants also experience mental health problems and likely face similar challenges in the removal process, this paper does not specifically address their experience.

Background

The entry point of this discussion is the notion that for various reasons, certain populations are more likely to come in contact with the criminal justice system, and are therefore disproportionately impacted by immigration policies which allow their removal from Canada. Having a mental illness and being a person of colour are factors examined below that can increase the likelihood of criminal contact and conviction and subsequently make one a target for removal from Canada.

The term "criminalization" has been used to refer to a criminal, legal response overtaking a medical response to behaviours related to mental illness[1]. This is evident in the disproportionate number of inmates suffering from mental illness in our prisons[2] as well as the increased interaction of police officers with mentally ill individuals on our streets[3,4]. For example, a recent Correctional Services Canada review panel noted that the number of male offenders with mental health problems jumped by 71 per cent between 1997 and 2006, with one in eight now suffering from psychiatric disorders[5]. This dramatic increase occurred despite the fact that the overall incarceration rate steadily declined during the same period[6].

Individuals with mental illness who lack access to services and supports come into contact with the law in several ways. Some are simply more visible in the community exhibiting nuisance or strange behaviour. Due to negative stereotypes and misperceptions about their risk of violence[7], these individuals may be inappropriately charged with a criminal offence. Others are arrested for non-violent crimes which are directly or indirectly related to their mental illness, such as causing a disturbance, mischief, or minor theft[8]. Others still may be charged with violent crimes that can be linked back to their lack of treatment, such as assault.

The overuse of criminal justice mechanisms to respond to such actions has resulted in increased contact with the law for this population[9,10]. Although some individuals are appropriately diverted out of the criminal justice system, such as through mental health court diversion or the Not Criminally Responsible provisions of the *Criminal Code of Canada,* not all persons with mental illness are eligible for such mechanisms. Those who are ineligible can be criminally convicted, even if their mental illness played a role in the offence.

Alongside the issue of criminalizing the mentally ill, there is also the issue of the criminalization of race, as evidenced by the over-representation of people of colour in the criminal justice system in Canada. For example, African Canadians have an incarceration rate that is three times higher than that for whites[11]. Moreover, compared to white males, black males are more likely to be stopped, detained, and imprisoned on conviction[12].

Criminalization through systemic racism[13], over-policing[14] and racial profiling[15,16] in the law enforcement and judicial system is prevalent amongst many ethno-racial groups, however immigrants may be at an even greater risk. Increasingly portrayed as "dangerous outsiders" who threaten the moral stability and security of society, immigrants are often perceived as persons who do not belong, and who encroach upon the rights of those who are entitled to the territorial benefits bestowed by citizenship[17].

Compounding these systemic issues, ethno-racial communities are also uniquely impacted by mental illness. Some studies have shown immigrant and newcomer groups to demonstrate higher rates of mental illness than the general population, due to the extreme stress and isolation arising from the migration and settlement process[18]. Those who have come to Canada from war-affected countries and have experienced significant trauma may be at an increased risk of experiencing mental illness. The tendency to normalize or minimize experiences related to mental illness and deal with them privately, as a result of stigma or cultural practice, is marked within immigrant groups[19,20]. This combined with the lack of culturally competent

treatment and a general mistrust of mainstream organizations may further prevent individuals from these communities from accessing appropriate treatment for mental illness[21,22].

The relationship between race, mental illness and crime is complex, and an in-depth analysis of these issues is beyond the scope of this paper. This brief description is intended to provide some background on why this population is adversely impacted by immigration law and policy, as discussed below.

Overview of Legislation

On June 28, 2002, the *Immigration Act*, 1976 was replaced with the *Immigration and Refugee Protection Act*, 2001 (*IRPA*). This new Act included several changes intended to respond to criminality among non-citizens of Canada which were first introduced in 1995 in Bill C-44[23]. Popularly referred to as the "Just Desserts Bill", Bill C-44 was largely a response to the well-publicized shooting at a restaurant called Just Desserts, allegedly perpetrated by men of Jamaican citizenship. The resulting moral panic and public outcry from this event helped spur a "danger to the public" provision in the *Immigration Act* which allowed the deportation, without a right of appeal, of permanent residents convicted of a criminal offence for which a maximum term of imprisonment of ten years or more could be imposed.

The "danger to the public" provision was a sign of the convergence between criminal and immigration law, and the influence of the logic of criminality in the governance of immigration enforcement[24]. Indeed, it has been stated explicitly that Parliament's intention in drafting *IRPA* was to make security a top priority for immigration law enforcement officials and that the objective of this legislation and its implementation is to "protect the health and safety of Canadians and maintain the security of Canadian society" [25]**.** The shift in focus of *IRPA* from the earlier *Immigration Act* is perhaps best described by Chief Justice McLachlin in *Medovarski*:

> *The objectives as expressed in IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security*[26].

In line with this shift of focus from integration to security, even humanitarian discretion allowed within *IRPA* is much narrower than within the former *Immigration Act*. As such, *IRPA* has had a tremendous

impact on individuals with mental illness who have found themselves in contact with the law. Of particular relevance are sections 36 and 64, which deal with inadmissibility on the grounds of criminality and the right to appeal in such cases. These sections are based on a rigid set of criteria which have distinct ramifications for permanent residents and foreign nationals with mental illness.

Section 36 of the Immigration and Refugee Protection Act:

Section 36(1) of *IRPA* allows for non-citizens to be deported from Canada if they are convicted of a certain level of offence. Both permanent residents and foreign nationals are deemed inadmissible on grounds of serious criminality if they have been convicted of an offence **punishable by a maximum term of imprisonment of ten years or more**, or of an offence for which a **term of imprisonment of more than six months has been imposed**[27].

Of greatest concern for persons with mental illness is the fact that **this provision does not distinguish between the maximum term of imprisonment for the offence and the actual sentence imposed** on the individual. Consequently, even if a judge imposed a very light sentence, such as probation, the individual could still be subject to a removal order. This provision ignores the judge's interpretation of the severity of the offence in question and what constitutes an appropriate punishment. Thus, while in criminal case proceedings the court may acknowledge a mental health issue and treat the offence as a minor matter, the individual could still face severe immigration consequences.

Of additional concern is the **wide range of offences punishable by a maximum term of imprisonment of ten years or more that persons suffering from mental illness may be charged with because of behaviour related to their illness.** For example, if an individual acting on a delusion breaks into a building at night, he or she may be charged with commercial break and enter under section 348 of the *Criminal Code*[28]. This offence is punishable at up to ten years imprisonment, along with many other non-violent offences such as robbery, dangerous or impaired driving, and theft of a credit card.

Foreign nationals are subject to **additional grounds for criminal inadmissibility** under section 36(2). This section states that a foreign national is inadmissible if convicted of an offence that is **punishable by way of indictment**[iii], or of two offences not arising out of a single occurrence[29]. Section 36(3) goes on to specify that a hybrid offence is deemed to be an indictable offence for immigration purposes even if it has

[iii] Summary offences are considered to be less serious than indictable offence and carry lesser maximum punishments. In the case of hybrid offences, the Crown has discretion on whether to proceed "summarily" (i.e. prosecuting the charge as a more minor summary conviction offence) or "by way of indictment" (i.e. prosecuting the charge as a more serious indictable offence).

been prosecuted summarily. Therefore, even if the Crown decides to prosecute a hybrid offence as a lesser summary conviction offence, *IRPA* does not make a distinction and automatically views the offence as indictable, thereby providing grounds for inadmissibility.

This provision also places persons with mental illness at significant risk. The majority of offences in the Criminal Code are hybrid offences, which allow the Crown discretion as to whether to proceed by way of indictment or to prosecute the matter summarily. *IRPA,* however, ignores the Crown's prosecutorial discretion and **deems even minor offences to be serious for immigration law purposes**. For example, an individual acting on paranoid delusions may be charged with "uttering threats". As an indictable offence, this is punishable at a term of up to five years. Prosecuted summarily, the maximum sentence is only 18 months in jail or a fine. Taking into account mental illness as a factor in the offence, the Crown may decide to proceed summarily. However if a conviction is rendered, a foreign national would be considered criminally inadmissible under s.36(2) of *IRPA* because the offence is considered indictable..

Section 64 of the Immigration and Refugee Protection Act:

Another significant policy change enacted through *IRPA* is the removal of the right to appeal under certain circumstances. Permanent residents of Canada **lose their right to appeal the deportation order to the Immigration and Refugee Board if they are sentenced to a term of imprisonment of two years or more**[30]. Foreign nationals are subject to an even lower standard, and lose any right to appeal unless they hold a permanent resident visa or have the status of protected persons (which include refugees)[31].This provision eliminates the possibility of their deportation order being set aside by an independent tribunal on humanitarian and compassionate grounds[iv], and while the right to request leave for Federal Court review of the deportation is still available, this is limited to matters of legal or procedural error and only occurs under unique circumstances.

The removal of the right to appeal in these circumstances has a tremendous impact on persons suffering from mental illness. Vulnerable people who have fallen through the cracks of our mental health and justice systems may be deported without consideration of the circumstances of their case. This includes the factors that are otherwise to be considered in an appeal, as outlined in *Ribic*[32]. These factors, such as the seriousness of the offence, the possibility of the appellant's rehabilitation, the length of time the appellant has spent in Canada and the degree of hardship that would be faced as a consequence of their removal from Canada are vital considerations that cannot be made if the individual has no right to appeal.

[iv] See Appendix A for definition

Overview of the Immigration System and the Deportation Process

Canada's immigration and refugee system consists of three bodies, each with different responsibilities: Citizenship and Immigration Canada (CIC), the Canada Border Services Agency (CBSA), and the Immigration and Refugee Board of Canada (IRB).

- CIC is the federal Ministry with the overall responsibility for immigration and refugee matters, such as selecting who can immigrate to Canada and granting Canadian citizenship.
- The CBSA is an agency of the Ministry of Public Safety and Emergency Preparedness Canada (PSEP), another federal ministry. The CBSA has the responsibility of managing and controlling Canada's borders, including removing people who are inadmissible to Canada and detaining people who pose a danger to the public, are considered a flight risk or have unconfirmed identity.
- The IRB is an administrative tribunal which makes decisions on immigration and refugee matters. The Immigration Division (ID) of the IRB conducts admissibility hearings and detention reviews. The Immigration Appeal Division (IAD) hears appeals on immigration matters, including removal orders and decisions made by the ID. The Refugee Protection Division (RPD), which is not within the scope of this paper, decides refugee claims.

Once an individual has been convicted of a crime that falls within the parameter of s.36, a CBSA officer may prepare a report, also known as a "section 44(1) report", which states the relevant facts supporting this individual's inadmissibility and initiates the deportation process[33]. At this stage, the individual of concern has the right to provide information to the CBSA officer in defence of their case through either an interview or a written submission, and potentially avoid an admissibility hearing. While in most cases CBSA officers have some limited discretion in whether or not to write this report, in cases of criminal inadmissibility the scope of this discretion is greatly diminished. The instances in which an officer would choose not to write a section 44(1) report for someone who is criminally inadmissible are considered to be "rare"[34].

If the CBSA officer proceeds with writing the report, it is sent to the Minister of Public Safety and Emergency Preparedness for review. At this stage, the individual may make a submission to the Minister stating their case on humanitarian and compassionate grounds. For individuals who have received sentences of two years or more and would be denied the right to appeal at later stages, this is the only point at which these types of considerations can be made. In some cases, the Minister may exercise discretion and decide not to initiate removal proceedings. More commonly, if the report is well-founded, the Minister will refer the case to the Immigration Division (ID) of the IRB for an admissibility hearing[35].

The ID does not have the same discretion as the CBSA officer and the Minister. If it is clear that the individual is criminally inadmissible according the provisions of *IRPA,* a removal order **must** be issued. Other relevant factors will not be considered unless the individual is eligible for appeal through the Immigration Appeal Division (IAD).

At any time after the sentence has been served, CBSA may put the individual into detention if they believe he or she is a danger to the public or unlikely to appear at a hearing. If so, the ID must hold a detention review within 48 hours of the detention. If the person is not released, the adjudicator must review the case again in seven days and then every 30 days thereafter[36].

If the individual appeals the removal order issued by the ID, a hearing will be scheduled before the IAD. The IAD may consider humanitarian and compassionate grounds for the appeal, if they believe such considerations are sufficient and warrant special relief in light of all the circumstances of the case[37].

At the end of the hearing, the IAD can make one of three dispositions, or decisions:

(a) They may **allow** the appeal: this means the individual will be allowed to remain in Canada without conditions;

(b) They may **stay** the removal order: this means the individual will be allowed to remain in Canada, but under certain conditions;

(c) They may **dismiss** the appeal: this means that the removal order stands and the individual will be deported from Canada.

If the appeal is stayed, the IAD will impose "any condition that it considers necessary"[38]. This includes not committing any other criminal offences[39] as well as additional discretionary conditions used in criminal inadmissibility cases[40]. At any time the board may, on its own initiative, review its decision and alter the terms and conditions. If the individual breaks any of the imposed stay conditions, the IAD may reconsider the appeal. A hearing will typically be held during which the IAD will make another disposition. If the individual is convicted of another offence that meets the definition of "serious criminality", the stay is cancelled by operation of law and the individual is deported **with no right to appeal**.

At the end of the stay period, the IAD can decide to allow the appeal, extend the stay period, or, if the individual has not complied with the stay conditions, dismiss the appeal and deport the individual[41].

If the appeal was dismissed and the removal order still stands, the individual can make an application for leave to seek judicial review by the Federal Court (Trial Division), but such applications can be refused. The only other way that an individual whose appeal was dismissed can remain in Canada is if they are successful in making their Humanitarian & Compassionate (H&C) application or Pre-Removal Risk Assessment (PRRA) application. These mechanisms are discussed in greater detail later in this paper.

Issues

There are several factors that illustrate how the current system has a disproportionately negative impact on persons with mental illness. Beyond the legislative framework described above, the practical application of *IRPA* and its associated policies and guidelines has resulted in a process which does not justly serve those with mental illness. Quite the opposite: the current removal process poses particular challenges for persons with mental illness and has exceptionally negative consequences for this population.

The concerns discussed in this paper are not based on the notion that persons with mental illness should not be held accountable for their actions. Rather, it is that the process by which people are held accountable should be fair and just. The laws and policies related to *IRPA* which appear neutral on their face have an adverse impact on persons with mental illness. It is these concerns which are the focus of the issues discussed below.

1. Access to Justice for Persons with Mental Illness Going Through the Deportation Process

Adequate Representation

While individuals going through the removal process technically have the right to retain counsel, there are many practical barriers which prevent persons with mental illness from having adequate representation during their case proceedings. First, this right to counsel is not unqualified, nor is it always protected. For example, at a section 44(1) interview the CBSA officer can ask counsel to leave at any time, as presence of counsel at the interview is seen as a privilege rather than a right[42]. Also, while the applicant is allowed to have counsel present at their IRB hearing, the process does not have to adjourn if counsel is not present[43]. Of additional concern is that individuals who are being detained in non-immigration facilities face significant difficulties in obtaining counsel, as some lawyers may not travel to detention centres[44].

Second, persons with serious mental illness may not be adequately, explicitly informed of their right to obtain counsel, thereby preventing them from exercising that right[45]. Though the importance of informing individuals of this right at various stages of this process is stated in the IRB guidelines[46], limitations imposed by serious mental illness may prevent mentally ill individuals from fully comprehending this right.

For example, individuals are first notified of their right to counsel within their notice to appear. Cognitive impairments that are a symptom of schizophrenia and other mental illnesses, as well as literacy issues, may prevent these individuals from fully understanding this point. Even at later stages of the removal process, individuals with mental illness may not fully appreciate the gravity of the situation and the need to obtain counsel and may even be prevented by their symptoms from exercising this right.

Poverty can present another barrier to obtaining adequate representation, as the IRB guidelines clearly state that an individual's financial inability to exercise his or her right to counsel does not warrant an adjournment of the hearing[47]. While there are services in place that provide financial assistance for individuals to obtain legal representation, namely Legal Aid Ontario[v], some individuals with low income levels who are unable to afford a lawyer may still not meet the income requirements to qualify for this program, thereby leaving them without representation[48]. Those who do qualify for assistance through Legal Aid still face challenges due to the limitations of the program. First, Legal Aid is only able to issue certificates to individuals who are appealing a deportation order, and not any earlier in the process. This means that individuals cannot access representation for their section 44(1) report interview or to make a submission to the Minister – stages at which the removal order could perhaps be prevented altogether if a convincing argument was presented. Second, Legal Aid certificates are only issued for a limited number of hours: sixteen hours to prepare for IRB hearings and three hours to prepare for detention reviews[49]. Cases of clients with serious mental illness frequently require extensive research, documentation and professional evidence, tracking and follow-up. Thus, even lawyers who accept certificates may be reluctant to take on these cases because the amount they are paid does not match the actual number of hours spent on the case.

Finally, even when the individual does obtain counsel, this representation is not always adequate[50]. Immigration lawyers who do not have training or experience in representing a client with serious mental illness or disability may not be able to present their case in a compelling way. Inexperienced immigration lawyers may also make ill-informed choices about how best to prepare for immigration proceedings, and may not spend enough time preparing for the admissibility hearing, after which point there may not be an opportunity for discretionary relief.

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[v] Legal Aid Ontario is a government-funded service which gives low-income people access to a range of legal services. Individuals who meet the financial eligibility requirement may obtain counsel in one of two ways. First, they can obtain a legal aid certificate, which allows them to hire any lawyer who accepts these certificates. Second, they can go to any community legal clinic funded by Legal Aid Ontario to obtain service. Community legal clinics typically have more discretion in what cases they can take on, where legal aid certificates are only issued if the person meets the financial eligibility criteria. Eligibility is decided by an asset and income test. Individuals with a yearly income greater than $7212 may not meet the financial eligibility requirements. Individuals may also be expected, in some cases, to liquidate assets in order to contribute to the cost of legal services.

Use of Designated Representatives and Vulnerable Person's Guidelines

The IRB has undertaken two main initiatives in cases involving persons with mental illness. The first is the use of Designated Representatives**,** which are to be used for persons who are unable to appreciate the nature of the proceedings[51]. The role of the Designate Representative is to act as litigation guardian, by helping the individual make decisions that are in their best interests. The second provision is the Vulnerable Persons Guideline, which is meant to provide procedural accommodations for individuals whose ability to present their cases before the IRB is severely impaired or who have severe difficulty in going through the IRB process[52]. While both these provisions do present an opportunity to accommodate individuals with mental illness who come before the IRB, there are several issues with how they are applied which limit their efficacy in providing such accommodations in practice.

First, in both cases, it is up to IRB Members to decide whether one (or both) of these provisions should be used. This use of discretion may result in inconsistency in how and when these measures are applied. The IRB Members' opinion is based on testimony or medical or psychological professional reports as well as subjective measures such as their observed behaviour of the person in question or the "credibility of the underlying facts"[53]. The challenge here is that negative and cognitive symptoms associated with schizophrenia and other serious mental illnesses, such as depression, social withdrawal and thought disorder, are not always readily visible, nor are necessarily positive symptoms such as hallucinations and delusions. Consequently, the Board could choose not to employ the Vulnerable Persons Guideline or Designated Representative protocol in cases where they do not perceive a need – even when these provisions are strongly recommended by the individual's counsel and may truly be required.

Second, in the case of Designated Representatives, even when one is appointed they may not be adequately equipped to represent someone with complex mental health concerns. The Board will usually designate a family member or friend as the representative, however if there is no such person qualified, a professional may be designated[54]. Even family members who have the individual's best interests at heart may not possess the expertise to provide them with guidance necessary. And, when professionals are appointed, there is no guarantee that they will have experience representing persons with mental health challenges.

Access to Psychiatric Assessments and Treatment Plan

Two of the most important success factors in an appeal are an expert opinion respecting the appellant's illness and a comprehensive treatment plan[55]. However, there exist significant barriers in accessing both of these.

First, the IAD often requires an extensive psychiatric report – sometimes even a forensic risk assessment[56] – in order to consider the evidence regarding mental illness to be meaningful. One issue is that this type of assessment can cost upwards of $2000, which most appellants cannot afford[57], and the standard amount covered by Legal Aid Ontario is only $300[58]. Another issue is that many psychiatrists do not travel to detention centres to conduct assessments[59], or are not permitted to enter the detention centre, thus putting individuals being held in detention at a clear disadvantage. Even community mental health programs that can provide free reports, such as Assertive Community Treatment (ACT) teams, can be reluctant to visit clients in detention or may not be permitted entry[60].

The requirement for an extensive community treatment and support plan is also difficult to meet in many cases. The individual's counsel is often put in the position of coordinating the development and implementation of this plan; however, because immigration lawyers are not typically integrated with the community mental health sector, they may not be able to do this efficiently. In addition, people with mental illness and involvement with the justice system face barriers when transitioning on to community services due to lack of capacity and negative stigma amongst service providers[61], further impeding access to a community treatment plan.

Right to appeal or make final attempts to stay in Canada

In order for someone to truly access justice, they must have the opportunity to make an appeal in the event that the first judgment was unjust. This accessibility is not protected under the current legislation, a fact that has particularly negative consequences for persons with mental illness. In addition, mechanisms at the end stages of the deportation process, which are meant to provide an opportunity to appeal based on exceptional humanitarian concerns, do not always work as they are intended.

As illustrated above, denying the right to appeal for persons sentenced to two years or more is particularly unjust for people with mental illness. Symptoms of untreated mental illness are often a major factor in the commission of the offence, as are compounding issues of homelessness, addiction and psychosocial distress. Yet a Not Criminally Responsible on account of Mental Disorder (NCR) finding, which precludes a criminal conviction, can only be rendered under the narrow legal criteria that the person was incapable of understanding the nature and consequences of their actions at the time of the offence[62]. Further, during criminal proceedings, defence lawyers may refrain from requesting a psychiatric assessment to determine criminal responsibility because an NCR finding might render their client in a forensic hospital for longer than the corresponding jail sentence. Thus, a sentence of two years or more for someone whose mental illness played a part in their offence is not out of the ordinary. Such a sentence denies these individuals the

right to appear before an independent tribunal to explain the circumstances of their case, such as the role of mental illness.

Even when the individual is eligible for appeal, the introduction of s.64 within *IRPA* has had significant influence on perceptions of dangerousness by IRB Members when assessing deportation cases. Under the prior *Immigration Act*, major offences such as kidnapping and homicide were eligible for appeal. However, since the implementation of *IRPA,* the scope of cases being seen by the IRB has been limited. This may have had an impact on IRB Members' sense of what constitutes humanitarian and compassionate grounds and under what circumstances such considerations should be applied[63].

Other mechanisms, such as the Humanitarian and Compassionate (H&C) application and the Pre-Removal Risk Assessment (PRRA) are also fraught with issues. First, an H&C application costs $550 to file, a fee not covered by Legal Aid Ontario and which cannot be waived in cases of economic need[64], leaving this process out of reach for appellants who live in poverty. Even if the person concerned is financially able to initiate the H&C application, they can still be removed from Canada while the application is being processed. Even successful applicants are not granted full rights to remain in Canada: in the case of H&C applications, a stay is granted rather than having the deportation order repealed altogether, and successful PRRA applicants cannot become permanent residents while they still meet the criteria for criminal inadmissibility. Finally, these types of appeals are rarely successful (H&C applications only twenty percent of the time[65] and PRRAs only two to three percent of the time[66]), and when they are the Minister can still issue a "danger opinion" that overrides them. Such a danger opinion allows the execution of the deportation order and the removal of the person concerned to the country of origin despite the individual's risk of harm. Thus, these two mechanisms which are meant to protect the most vulnerable fail to provide access to justice in practice.

2) Mental Health Needs of Appellants

Another concern is the health needs of individuals with mental illness going through the immigration or deportation process. This includes their access to mental health care throughout the process as well as the impact of both deportation and the removal process on their health and well-being. The process as it currently stands can have detrimental effects on the mental health state of appellants, and in cases where deportation does occur it can literally be a threat to their personal safety and security.

Access to Mental Health Care for Detainees

Under the current legislation, any individual who may be criminally inadmissible can be lawfully arrested or detained if they are perceived to be a danger to the public or if they are deemed unlikely to appear for an examination or admissibility hearing[67]. This provision has a particular impact on individuals with mental illness, whose mental health needs would likely be unmet or even exacerbated simply by virtue of being detained. This is evidenced by the plethora of research from the corrections and immigration fields documenting the negative impact of detention on the mental health of detainees[68,69,70,71]. Indeed, detention centres are not adequately equipped to address the needs of persons with mental illness. Medical staff is limited, and correctional staff often do not have mental health training and are unqualified to address individuals with complex mental health needs. Even provincial correctional facilities, where many detainees are held, do not have the capacity to address individuals with complex mental health issues or concurrent disorders[72]. Often, individuals on immigration holds are placed in maximum security units or in solitary confinement, further limiting their access to treatment - a practice which is considered to be neither safe nor humane[73].

Access to mental health care is further compromised by policies and procedures which make it difficult for individuals to access health services. CBSA has the authority to confiscate health cards and other official identification documents as a security measure, without which one cannot access free health care in this province. Individuals in detention face additional barriers in obtaining new identification as this would require them to leave the detention facility.

The aforementioned concerns are compounded by the possible overuse of detention for persons with mental illness, as enforcement policies put persons with mental illness at greater likelihood of being detained. The CIC Enforcement Guidelines state that when determining whether an individual is a danger to the public, "the instability of the person associated with mental imbalance at the time of the examination may be a very important indicator in the assessment of the danger, and may point to future violent behaviour"[74]. While this guideline also stipulates that detention is to be avoided or considered as a last resort for vulnerable groups, including persons with behavioural or mental health problems[75], this provision is said only to apply when safety or security is not deemed an issue. Thus, while medical professionals and service providers agree that detention should not be used for mentally ill persons and that all other options must be exhausted before one is confined[76], this position is contradicted by an enforcement philosophy which prioritizes security over health and well-being. The conflicting messages within this guideline results in a policy which overall does little to protect persons with mental illness and in fact, often does the opposite.

Stress of Legal Proceedings

Often, the stress of the removal process itself can have a negative impact on an individual's mental health. For example, written correspondence from CIC is often framed in highly formal language and may be perceived as threatening for someone with a mental illness. Further, the precariousness of status drawn from the removal process can cause serious stress, which has been shown to have a direct impact on symptoms of paranoia[77]. Particularly for those who have sought asylum in Canada, the threat of being sent back to a country from which they have fled can increase the symptoms of post-traumatic stress disorder (PTSD)[78]. These impairments not only impact the appellants' ability to respond to the demands of the CBSA, but can also have an extremely negative impact on their daily living and social functioning.

Access to Mental Health Services and Supports in Countries of Origin

Individuals with mental illness subject to removal orders are often being sent to countries where they have no access to treatment or supports. For example, the number one ranking country of origin for criminal inadmissibility cases in 2006, 2007 and 2008 was Jamaica[79], a country which is noted to have extremely poor access to supports for people with mental illness, notably housing[80]. The impact of deportation on an individual with mental illness has been described in no uncertain terms:

> *[It is] devastating …. The clients I've seen are being deported to countries with poorly developed mental health systems and a higher degree of stigma against people with mental health challenges … clients will be at risk of homelessness, will not be able to access proper care, and in some cases will be at risk of police brutality and/or cruel and unusual treatment in prisons*[81]

> *Generally there will be negative impact for the following reasons: lack of family in country of origin who can provide necessities of life, pay for medication, advocate for person to get access to limited services; lack of mental health services in country of origin, especially where the person is returning to a country where the development of specialized and appropriate services for the mentally ill are in their infancy; where there are civil war conditions (Somalia, Sri Lanka, Democratic Republic of Congo); even if medications are available, there is no real access because of shortages and costs*[82]

Unfortunately, the onus is on the appellant to establish that their deportation would be of significant threat to their well-being. Moreover, even when the issue of access to mental health care and supports in the receiving country is raised, it is not always considered to be sufficient to grant an appeal or stay on humanitarian and compassionate grounds.

In addition, lack of knowledge about mental illness amongst IRB Members may contribute to an underestimation of the importance of social networks in recovery. Though the evidence is clear that support from family and friends is crucial to the well-being of persons with mental illness[83], the absence of such support in the country of origin may be overlooked as a consideration by IRB Members. Yet without the help of family members - who play an important role is monitoring symptoms and supporting adherence to treatment plans, providing crisis intervention, identifying and securing housing and advocating on behalf of their ill relative[84] – the individual's risk of harm in the country of origin increases dramatically.

3) Acknowledgement of special needs and challenges of persons with mental illness within the current structure and process

Overall, it is clear that the current removal process is a "one size fits all" system that fails to adequately acknowledge, address and accommodate the needs and challenges of persons with mental illness or disability. Unlike the criminal justice system, which has made great strides to address persons with mental illness in a more appropriate way through measures such as the Not Criminally Responsible (NCR) and Unfit to Stand Trial provisions in the *Criminal Code of Canada*, mental health court diversion policies, and the increased training on mental illness for police officers, there have been no parallel responses in the immigration system – even though the needs and challenges of the mentally ill persons are comparable.

Moreover, decisions by the IRB disclose a lack of understanding of the limitations imposed by mental illness. Failure to adhere to treatment or to seek psychiatric help may be seen by IRB Members as being conscious, moral decisions[85] rather than influenced by complex issues such as stigma, medication side effects and their impact on quality of life, or anosognosia – lack of insight caused by damage to the brain. The result is a system which has rules and expectations that are beyond the actual capabilities of many individuals with serious mental illness or disability.

Detention Release Conditions

Persons with mental illness in detention can face barriers to gaining their freedom and receiving treatment in the community. For example, individuals with mental illness and compounding issues of poverty may have difficulties in paying the bail amount that would allow their release from detention.

Most significant, however, is the disconnect between the ID's expectations for release and the policies of most mental health agencies. In order to ensure public safety is protected and/or that the individual will appear at their examination or hearing, the ID typically requires that the detainee be extensively monitored while in the community – a requirement which is incompatible with the philosophy and capacity of most

community mental health agencies. These agencies offer their services on a voluntary basis; as such, they are disinclined to take on a supervisory or monitoring role and to report if the individual withdraws from services. In addition, many community mental health organizations are incapable, due to intake protocols, of taking on clients who are currently in detention, yet the ID will not release the individual until they are formally accepted into a program[86]. The notable exception is the Toronto Bail Program-Immigration Division, which provides community-based supervision for individuals who are detained and cannot be released under the traditional forms of release.

Stay Conditions

Appellants who receive a stay on their deportation order may be faced with a myriad of conditions imposed upon them - conditions which are often stringent, inflexible and fail to account for the challenges faced by persons with complex mental health problems. For example, some of the common provisions within the stay conditions include: keep the peace and be of good behaviour; refrain from use of alcohol or illegal drugs, including marijuana; and, not knowingly associate with anyone who has a criminal record[87]. Such provisions do not account for the realities of mental illness, including the likelihood of relapse, nor does it address complexities of co-morbidities such as addictions, poverty, and unstable environment. Some flexibility is necessary with regards to people with mental illness, who may face cognitive challenges in understanding the consequences of their actions, and for whom relapse is a natural part of the recovery process. Yet the consequences of breaching stay conditions are severe: If the conditions are violated, the CBSA can apply to have the stay lifted and carry out the deportation**[88].**

Mandatory compliance with treatment and medications is another condition often imposed as a part of a stay. This condition does not accommodate the reality that treatment and medication is a trial and error process, usually involving a number of attempts and adjustments before the right treatment is found. It also fails to acknowledge that treatment adherence is influenced by a number of complex factors, such as side effects of medication, relationship with the clinician, patient and family knowledge about the illness, and understanding of the risks of non-adherence to medication[89]. Even when the right combination of therapy and medication is determined, individuals with mental illness need extensive supports to adhere to the treatment plan. Yet, this context is often ignored, and the behaviour is still considered a violation of stay conditions.

Similarly, reporting requirements, including frequency and location, do not take into account access to transportation issues or cognitive impairments which may impede the mentally ill individual from attending these appointments. For instance, the Toronto office of the CBSA, the Greater Toronto Enforcement Centre

(G-TEC) cannot be easily accessed by public transit. This may pose a great barrier for someone with mental illness who has no access to transportation and supports.

Frequent changes of address associated with unstable housing pose another problem for the mentally ill individual on a deportation stay. The IRB requires individuals to notify them of any change of address prior to a move and holds individuals accountable for responding to letters sent to an address which IRB has on file for them, even if they no longer reside there. Failure to comply with these conditions can result in detention or deportation – a particularly harsh consequence for behaviour which may be related to the complexity of mental illness. This rule can also affect those who have completed their stay without any violations. For example, once an individual's stay period is complete, they will receive a notice to appear before the IAD. If the individual moved and did not receive the notice, and subsequently fails to appear at the hearing at the end of their stay, the IAD may declare the appeal abandoned[90]. The individual could then be automatically deported despite the fact that they had completed their stay period successfully[91]. Though the removal order may be repealed under extenuating circumstances, these circumstances are quite limited.

"Two Strikes, You're Out" Policy

Another issue is the tremendous consequences associated with committing another offence while on a stay. Under the current legislation, if an individual is convicted of another offence meeting the "serious criminality" criteria under s. 36(1), their stay is cancelled by operation of law and their appeal is terminated[92]. In effect, CBSA may automatically deport the individual without the right to appeal. If the individual commits even a very minor offence it is still considered a breach of their stay conditions, and the CBSA may still deport the individual.

In both these scenarios, there is little recognition of the episodic nature of mental illness and the complexities surrounding criminalization. While it is not to say that persons with mental illness should not be held appropriately accountable for their actions, a certain amount of leniency should be employed when looking at the type of offence and the circumstances surrounding the offence. Yet too often this is not the case. The ENF Guidelines specifically states that "officers should not be concerned with the actual sentence imposed by the court – only with the maximum imposable sentence".[93] Moreover, the officers making removal decisions are advised not to consider the circumstances of the offence: "officers may not always need to look at the circumstances surrounding the commission of the offence but only at the actual offence for which the person was convicted"[94]. Accordingly, individuals whose mental illness is the root cause of their offence may still be deported without consideration of the particular circumstances of the case.

4) Professional knowledge and practice gaps

The fourth issue of concern is the gaps in knowledge amongst people who make key decisions affecting immigration outcomes. Limited information about the immigration consequences of criminalization and an inadequate understanding of the complexities of mental illness can prevent people in these crucial roles from acting in the best interest of the individual with the mental illness.

Lack of knowledge about immigration consequences of criminalization

A criminal conviction is the first step in the deportation process. Thus, preventing a criminal conviction is the most proactive way of preventing persons with mental illness from being unjustly deported. Yet many of those practicing in the area of criminal law are not sufficiently aware of the potential immigration consequences of the outcome of their case[95]. This has a particular impact on clients with mental illness, many of whom may be advised by their lawyers to plead guilty to a lesser charge as a way of avoiding longer sentences or undefined lengths of time in custody of a forensic institution. What these lawyers may not take into account is that a criminal conviction, even if it results in a shorter sentence and thereby greater "freedom" for their client in the short term, could have dire immigration consequences.

Likewise, community workers in the mental health, immigration and settlement sectors often do not have enough information about the immigration consequences of criminalization to be able to act proactively on behalf of their clients. Increased knowledge amongst professionals working with persons with mental illness who are at risk of being criminalized is necessary, so that they can advise their clients accordingly.

Lack of knowledge about mental illness

Throughout the immigration process, there are many people who act on behalf of, advise, or make decisions about persons with mental illness. However, many of these individuals have little or no training in mental health issues and as such may be ill-equipped to act in this capacity. For example, as described in other sections of this paper, IRB Members must often make decisions about the types of accommodations needed based on an individual's mental status. Yet, the formal training they receive in the area of mental health is minimal. IRB Members cannot be expected to be able to ascertain the extent of a mentally ill individual's ability and/or vulnerability, and subsequently the special accommodations they require, unless they receive proper training to do so.

Limited understanding about mental illness also impacts how IRB Members may interpret the actions of the individual in question. As described above, failing to appear at a hearing or taking illegal drugs may be interpreted by the IRB Members as a blatant violation of conditions. Yet, in individuals with complex

mental illness and concurrent issues of addiction, this type of behaviour is often symptomatic of their condition and should be treated as such.

Inadequate knowledge about mental illness is also an issue amongst immigration lawyers and consultants. Lack of information about the special needs of persons with mental illness and whether these needs will be met if the individual is deported can prevent immigration lawyers from effectively arguing their client's case on humanitarian and compassionate grounds. Likewise, lack of knowledge about the recovery process and the normalcy of relapse can prevent these same lawyers from being able to advocate for their clients if their stay conditions are violated.

Recommendations

The issues identified in this paper are ones that are of great concern to many of those working with this population firsthand. Through our interviews and consultation with stakeholders, the Schizophrenia Society of Ontario has identified seven actions under the themes of policy, education and legislation which could serve to address these issues:

Policy:

1. **Create and enforce substantive and procedural guidelines for IRB members with respect to persons with mental illness.**

   Currently, the IRB relies on two main guidelines that may be used with respect to persons with mental illness or disability: *Guideline 8: Guideline on procedures with respect to vulnerable persons appearing before the IRB* and *Guide to Proceedings Before the Immigration Division, Chapter 7: Designated Representative.* While these guidelines do provide some degree of protection and accommodation for people with serious mental illness, their effectiveness is limited by aforementioned factors. In order to truly accommodate members of this population, more substantive guidelines that are specific to persons with mental illness need to be created and enforced.

   Specific guidelines with respect to mental illness would be similar to the current Vulnerable Persons Guidelines in that they would describe any procedural accommodations that may be implemented, including the possible use of a Designated Representative. However, these new guidelines would go beyond what is currently in place to describe other limitations that persons with mental illness might face and how these may be accommodated. This includes, but is not limited to, appearance at or

tardiness to hearings, requirements for detention release, appropriate conditions of detention release or stay, and repercussions for any violation of conditions. They would also outline what could be regarded as a basis for an appeal on humanitarian and compassionate grounds, such as lack of access to treatment and family support in the country of origin.

These guidelines could come into force at the request of the appellant or their counsel, an IRB member, or Minister's Counsel. CBSA officers should also have the ability to recommend use of these guidelines based on their experience with or observations of the appellant; concrete mechanisms to allow this information to be shared with the IRB should be established. External requests should also be considered, such as from psychiatrists, social workers or other professionals working directly with the appellant in the community.

Any type of expert medical, psychological or psychiatric assessment that is required by the IRB to justify the use of such guidelines should be paid for by the IRB to ensure that financial limitations do not impose a barrier to justice. If requests to implement these guidelines in the appellant's case are rejected by IRB Members, the onus should be on these Members to provide reasons why the guidelines should not be used, and these reasons should not be limited to their subjective observations of the appellant.

2. Provide additional protections to ensure access to justice, specifically, the right to counsel.

Issues in obtaining adequate representation were discussed earlier in this paper in light of financial barriers, limitations imposed by mental illness in understanding the right to counsel, and certain exceptions to this right. Recognizing that persons with mental illness are particularly vulnerable in this process and may not be able to appreciate the nature of the proceedings, efforts beyond what is already stated in the IRB guidelines on Right to Counsel are necessary.

These guidelines currently state that IRB Members should proceed with the hearing if the person says that he or she does not want to be represented by counsel. This point had been validated in *Pierre,* in which it was noted: "In any proceeding, the person concerned, being aware or having been properly informed of his right to counsel, chooses to act on his or her own behalf, he or she cannot later attack the regularity of the proceedings because he was not represented by counsel. If his choice is to proceed personally, and he has rejected the opportunity to secure counsel, he has not been denied counsel" [96].

Given the impairments that exist with serious mental illness, such as cognitive issues and delusional thinking, one cannot assume that simply informing the individual of the right to counsel is sufficient to ensure that they fully comprehend the importance of obtaining counsel. Individuals who do not retain counsel on their own should automatically be appointed a Designated Representative, who as stated under the IRB guidelines, would "help the person make decisions concerning the proceedings of which he or she is to be the subject, especially to retain and instruct counsel"[97].

In addition, given the gravity of the consequences involved with a removal order, any financial barriers to obtaining counsel for the proceedings should be removed. Individuals who are known to the IRB Members to have mental illness and who are not financially able to retain their own counsel should have counsel appointed to them, potentially via the existing Designated Representative program.

3. **Expand access to community-based mental health services to support people on detention releases and stays.**

Currently, limitations exist which prevent many community-based mental health agencies from taking on clients who are at risk of deportation. Efforts should be made within the community mental health sector to recognize the needs of this vulnerable population and remove barriers which impede the provision of service. For example, intake protocols which require a face-to-face meeting before a client is accepted into a program should be reconsidered. Some flexibility should be given with regards to individuals who are in detention, including allowing intake to occur by phone or through referral by another mental health worker that the individual may have worked with. Program mandates of Assertive Community Treatment (ACT) Teams and other successful models of service should be re-examined with a view to expanding access to individuals on immigration detention releases and stays.

Likewise, there should also be some flexibility on the part of IRB members in their requirements to have individuals linked with a community mental health agency as a condition of detention release or stay of deportation. As discussed above, this sector predominantly operates on a philosophy of non-coercion, and is prevented from forcing treatment by legislation such as the *Health Care Consent Act*. Requirements set by IRB members, such as a letter from the community agency committing to providing service to the individual, should be reconsidered given that these agencies cannot force an individual into services. Likewise, community agencies should not be expected to take on a monitoring or supervisory role which they may not have the jurisdiction to do.

Finally, programs which meet both the needs of individuals with mental illness at risk of deportation and the requirements of the IRB should be funded. Such programs should be modelled against ones that already exist within the criminal justice system, where the needs and circumstances are similar. One example is Mental Health Court Support programs, which were created to help facilitate court diversion for people with mental illness. Staff in these programs are mandated to develop and implement court diversion plans and connect clients with the necessary resources to support their success in the community. These staff have a responsibility to work closely with clients to help them abide by their diversion plans, and can alert the court if they have concerns about the individual. This program could be paralleled in the immigration context, with mental health support programs being created for individuals on detention releases and stays.

Another approach to expand upon is community bail programs. These programs play both an enforcement and rehabilitative role by providing community-based supervision to individuals who would otherwise be detained in custody. Toronto Bail Program has an Immigration Division which provides this service to clients with mental illness; however it is the only program of its kind in Canada. Such a program should also be expanded to include individuals with mental illness who are on stays of deportation.

Education:

4. Provide in-depth training on mental health to CBSA officers, IRB members, Minister's Counsel and Designated Representatives.

Currently, IRB Members do receive a minimal amount of training related to mental illness. However, this training is usually limited to specific topics, and is not comprehensive enough to enable Members to make decisions about persons with mental illness. In order to ensure that persons with mental illness are treated with sensitivity and appropriately accommodated and dealt with throughout the removal process, IRB Members must be provided with adequate training. This training should be expanded to include those in positions relating to this process, such as CBSA officers and Minister's Counsel, both of whom have important roles that involve interaction with persons with mental illness.

Training should include interactive presentations from experts in the mental health field and individuals with mental illness themselves. A wide range of topics should be covered, such as symptoms of mental illness and their impact on behaviour, signs that an individual may have a mental health problem, ways

to interact with someone who is in mental health crisis, evidence regarding the link between mental illness and violence and community-based mental health programming. This training should be modelled against similar training done in the criminal justice sector with police officers and Crown Attorneys. Comprehensive written guides should also be developed, and should be targeted to the specific role that IRB members, CBSA officers and Minister's Counsel play.

Professionals taking on the role of Designated Representative should also be adequately trained. While some of those called upon do have a background in this area through past experience representing clients with mental illness or in working with this population in another capacity, others do not. Efforts should be made to either match clients with mental illness with Designated Representatives with adequate experience in this area, or to provide mental health training to Designated Representatives across the board.

5. **Provide educational opportunities to criminal lawyers, community mental health workers and immigration/settlement workers about the immigration consequences of criminalization of persons with mental illness and how to support and advise their clients accordingly.**

The most effective way to keep members of this vulnerable population from being deported is prevention. Efforts need to be made at the early stages – while the individual is in the criminal justice system or even prior to that – to ensure that people are aware of the severe immigration consequences of criminal convictions.

Community workers in the mental health and immigration/settlement sectors should be aware of this issue so that they can inform their clients of any potential risk deportation and advise them accordingly. Training for these sectors should be approached from a capacity-building perspective, using workshop formats complemented by short written guides that provide these professionals with the essential information to provide assistance to their clients. Information about this issue should also be readily available to all clientele in the form of posters and notices.

Additionally, internal agency or organization policies which limit information gathering about a client's immigration status should be re-examined in this context of this issue. These policies have been implemented across many sectors to ensure that non-status persons are not denied vital services. While this is an important policy which has removed barriers for many non-status persons who fear being reported to immigration authorities, it prevents the gathering of information that might be useful for the

client's worker in providing guidance regarding the risk of deportation. Limited information about whether a client is simply a citizen of Canada or not may be extremely valuable and relevant, and should be gathered where appropriate.

Education for criminal lawyers is also extremely important, as there currently exists a significant disconnect between these two areas of practice. Information about the immigration consequences of criminal convictions, and ways to best support and advise one's client accordingly, should be readily available. Immigration "tips" for criminal lawyers such as ascertaining the immigration status of the accused, avoiding convictions for s.36 offences, avoiding terms of imprisonment of two years or more, and raising immigration consequences as an issue at sentencing[98] are strategies which should be shared with all criminal defence lawyers. This information could be imparted through continuing legal education courses, workshops and events through the Law Society of Upper Canada, conferences, and even informal knowledge exchange mechanisms such as electronic listservs.

Legislation:

6. **Reform section 64(2) of the *Immigration and Refugee Protection Act*, which currently denies the right to appeal for individuals sentenced to two years or more.**

Denying the right to any form of appeal is a denial of justice. This is particularly true for persons with mental illness, who are adversely impacted by a law which appears neutral on its face. As mentioned earlier, our prisons are full of people with mental illness who have been given a sentence of two years or more, many of whom for crimes that are related to their illness, and which could have been prevented through better access to treatment and supports. To deny the right to appeal for this entire group of people, without any exceptions, has resulted and will continue to result in the unjust deportations of people with mental illness.

Section 64 of *IRPA* should therefore be repealed altogether to allow the right to appeal for all individuals found inadmissible on the grounds of criminality or serious criminality. This would allow all permanent residents and foreign nationals to present their case to the IAD, and allow IRB Members to consider the validity of the appeal on humanitarian and compassionate grounds.

At the very minimum, section 64 of *IRPA* should be reformed to allow more discretion on who can and cannot appeal, based on the circumstances of their case. Currently, serious criminality is defined simply

as a crime that was punished in Canada by a term of imprisonment of at least two years; however, there are numerous crimes that could receive a sentence of two years or more, many of which may not be considered "serious". IAD members should be given the discretion to hear certain appeals, such as in cases involving persons with mental illness.

These legislative changes could be made possible directly through Parliament. They could also be made through legal challenges which bring forward the issue of unequal application of the law under the *Canadian Charter of Rights and Freedoms.* Section 15 of the *Charter* states that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination"[99], including discrimination based on mental disability. The fact that persons with mental illness are uniquely impacted by s. 64 of *IRPA* may provide the basis for test case litigation on *Charter* grounds.

7. Repeal section 68(4) of the *Immigration and Refugee Protection Act*, which currently terminates the appeal of persons on stays who are convicted of another section 36(1) offence.

Section 68(4) of *IRPA* currently states: "if the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated"[100]. This means that anyone who is convicted of an offence punishable at a maximum term of imprisonment of ten years or more or is given an actual sentence of more than six months imprisonment for any federal offence would automatically be deported, with no right to appeal.

Section 68(4) should be repealed altogether. As a result, further convictions for persons on stays would be treated the same as other violations of conditions, and the consequences of this violation would be at the discretion of the CBSA officer and the IRB Members.

Conclusion

The issues discussed in this paper raise important concerns about how we understand and accommodate mental illness within our current immigration system. Public safety is an important consideration for the well-being of all Canadians. However, we must be aware of the impact that legislation and policy which is focused primarily on security has on some of the most vulnerable members of our society. The laws and

policies related to *IRPA,* which appear neutral on their face, clearly have an adverse impact on persons with mental illness.

To further examine and address these issues, the Schizophrenia Society of Ontario has struck a Committee on Mental Illness, Immigration and Criminalization. For more information or to join this Committee, please visit our website at www.schizophrenia.on.ca.

APPENDIX A

Appeal – In the immigration context, these are proceedings or applications on behalf of the appellant to dispute a decision made by immigration authorities. Appeals are either made to the Immigration Appeal Division, or in certain types of cases, the Federal Court of Canada.

Appellant - A person who is appealing a decision. In the context of this paper, an appellant is someone appealing a removal order at the IAD.

Assertive Community Treatment (ACT) Team - A multi-disciplinary team that applies a treatment approach designed to provide comprehensive, community-based psychiatric treatment, rehabilitation, and support to persons living in the community with serious and persistent mental illness.

Bill C-44/"Just Desserts Bill" - This bill was enacted in July 1995. It restricted access to appeal for permanent residents facing deportation, among other measures aimed against criminality.

Canada Border Service Agency (CBSA) – The CBSA is an agency of the federal Ministry of Public Safety and Emergency Preparedness Canada (PSEP). The CBSA has the responsibility of managing and controlling Canada's borders, including removing people who are inadmissible to Canada and detaining people who pose a danger to the public, are considered a flight risk or have unconfirmed identity.

Chairperson's Guidelines – These have been developed to guide decision makers in adjudicating and managing cases and to provide overall strategic objectives for the IRB. They are not mandatory but are expected to be applied by decision makers of the IRB.

Citizen - A person who was born in Canada or who has been granted Canadian citizenship under the *Citizenship Act.*

Citizenship and Immigration Canada (CIC) - The federal ministry with the overall responsibility for immigration and refugee matters, such as selecting who can immigrate to Canada and granting Canadian citizenship.

Concurrent disorder – This refers to when an individual experiences a mental illness and a substance use disorder. In this context, a substance use disorder involves the dependence or abuse of a legal or illegal substance as well as alcohol, but generally excludes nicotine.

Counsel - Someone who represents and provides advice to a person appearing before the IRB, usually a lawyer.

Criminality - The state, quality, or fact of being criminal. In the immigration context, these are grounds for removal/deportation of a non-citizen.

Criminalization – This refers to the process by which certain behaviours are interpreted as 'crime' or individuals are transformed into 'criminals'.

Danger opinion - Also called a "ministerial danger opinion" which is used to remove from Canada those who are considered to be, in the Minister's opinion, a danger to the public.

Deportation – The removal of a non-citizen from Canada under immigration laws, to the country with which they hold citizenship.

Designated Representative (DR) - A person appointed by the IRB to act and make decisions on behalf of someone who is appearing before the IRB and considered not capable of making decisions.

Detainee – A person who is detained in custody or confinement in a prison, penitentiary or immigration detention centre.

Detention - The act of physically constraining or holding/detaining an individual within a secure facility. This is a term used interchangeably with 'custody', 'hold' or 'confinement'.

Dual diagnosis - This refers to when an individual experiences a mental illness and a developmental or intellectual disability.

Enforcement (ENF) guidelines – These are guidelines provided by Citizenship and Immigration Canada in an operating manual that pertains to the deportation process.

Foreign National - A person from a country other than Canada who is not a Canadian citizen, a permanent resident or a protected person. This includes persons in Canada on work or student visas.

Forensic Psychiatric Hospital – These are secure facilities operate by the province for individuals considered Unfit to Stand Trial or for those found by the court to be Not Criminally Responsible on Account of Mental Disorder (NCR).

Humanitarian and Compassionate (H&C) application – These are the forms, documents and arguments you present to an immigration officer to convince them to exempt you from removal/deportation on Humanitarian and Compassionate grounds.

Humanitarian and Compassionate grounds – These are circumstances in which a person can be exempted from a removal order in Canada. There right to appeal on humanitarian and compassionate grounds is not unequivocal. The onus is on a person to prove (a) Hardship – that forcing you to return to your home country would result in hardship that is unusual, underserved, or disproportionate, or (b) Risk – that there is a serious possibility of persecution, torture, a risk to your life, or a risk of cruel or unusual treatment or punishment if you return to your home country.

Hybrid Offence - Hybrid offences can either be summary offences (minor crimes) or indictable offences (major crimes). The power to choose under which class a hybrid offence will be tried rests with the Crown counsel.

Immigration and Refugee Protection Act (IRPA) – This legislation governs matters concerning immigration and refugee protection in Canada, including much of the work of the Immigration and Refugee Board (IRB). It came into force on June 28, 2002, replacing the previous *Immigration Act.*

Immigration and Refugee Board (IRB) - An administrative tribunal which makes decisions on immigration and refugee matters. The Immigration Division (ID) of the IRB conducts admissibility hearings and detention reviews. The Immigration Appeal Division (IAD) hears appeals on immigration matters, including removal orders against Permanent Residents and decisions made by the ID. The Refugee Protection Division (RPD) decides refugee claims. May be referred to as **Board** in this paper.

IRB Member - A person who makes decisions on cases in one of the divisions of the IRB. The IRB Chairperson is accountable for the selection of qualified candidates as recommended to the Minister to be considered for appointment to the IRB.

Inadmissible/inadmissibility - A term that refers to a person who, under the rules of *IRPA*, may not enter or remain in Canada.

Indictment/Indictable – In Canada, an indictable offence is a serious offence, such as murder or theft, which carries a much harsher penalty than summary offences. A person may be charged with an indictable offence, or prosecuted by way of indictment, which means the person elects to have his or her trial in the superior court (either with a jury or judge-alone) and a preliminary inquiry is held by a provincial court judge to determine if there is enough evidence to support the charge.

Legal Aid – Organized legal assistance provided to those who are financially disadvantaged. Legal aid is provided primarily for criminal, family, immigration and refugee matters, for a few specific other types of proceedings, and for duty counsel support.

Mental Health Court Diversion – Where appropriate, Mental Health Court Diversion re-directs people with a mental illness from the criminal justice system to mental health services. Diversion is eligible for persons whose alleged offence is considered to be low risk and whose mental health needs can be met through services in the community.

Mental Illness – Mental illness is a broad term with no one clear definition. The working definition we are providing comes from the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV): "A clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g. a painful symptom) or disability (i.e. impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom"[101].

Minister's Counsel - A person employed by Citizenship and Immigration Canada or Public Safety and Emergency Preparedness Canada to represent the interests of these Ministries in matters before the IRB.

Not Criminally Responsible (NCR) – A provision by section 16 of the *Criminal Code of Canada* which states that no person is criminally responsible for an act committed while suffering from a mental disorder

that rendered the person incapable of appreciating the nature and quality of the act or knowing that it was wrong.

Notice to appear – A document issued by a court or by an administrative agency of government for various purposes. In the context of immigration, this document notifies the detainee of the day, time and location of their hearing.

Permanent Resident - A person who has been granted permission by Citizenship and Immigration Canada to settle in Canada permanently, and who may later apply to become a Canadian citizen. The previous term was "landed immigrant".

Post-Traumatic Stress Disorder (PTSD) – This is a type of anxiety disorder that is severe and can develop after exposure to any event which results in psychological trauma.

Pre-Removal Risk Assessment (PRRA) - A review conducted by CIC to determine the risk posed to someone if he or she were returned to their home country. This is an application made by the individual after they have been denied their appeal.

Recovery – Recovery is a fluid term used most often to describe the ability to have a good quality of life even with the presence of a mental illness. It is based on the notion that mental illnesses often have no cure, and that persons living with a mental illness may go through ups and downs in their illness over the course of their lifetime.

Removal order – An order from the Government of Canada requiring a person to leave Canada. A deportation order is a type of removal order.

Section 36(1) – Under S.36 (1) of *IRPA*, a permanent resident of Canada may become the subject of a deportation order if convicted of an offence in Canada that is punishable under an act of Parliament by a potential penalty of at least ten years of imprisonment (regardless of the actual sentence), or if sentenced to more than six months of imprisonment for any federal offence.

Section 44(1) report – Section 44 (1) of *IRPA* permits an immigration officer to write a report when of the opinion that someone is admissible. This report is sent to the Minister and may be referred to during an inadmissible hearing.

Stay - A temporary suspension, or putting aside, of an order. During a removal order, instead of allowing or dismissing the appeal, the IRB may 'stay' the order which enables the individual to remain in the country so long as they commit to certain conditions, as outlined by the IRB.

Substance use disorder - Substance use disorders include the misuse, dependence, and addiction to alcohol and/or legal or illegal drugs. The term encompasses a range of severity levels, from problem use to dependence and addiction.

Summary/Summarily – In Canada, a summary offence is a minor offence which is punishable by shorter sentences and small fines. These criminal offences are prosecuted 'summarily' which does not involve a jury trial.

Unfit to Stand Trial – If a person is unfit to stand trial, this means that they are unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings or (c) communicate with counsel.

Vulnerable Persons Guidelines – This is a guideline used by the IRB to provide procedural accommodation to vulnerable persons and carry out consistent decision making at the IRB. Vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.

APPENDIX B

Research Description:

At the start of our research process, there was anecdotal evidence to demonstrate that people with mental illness were being unjustly deported on the basis of criminality. However, there were serious gaps in information about the scope and extent of this problem. There was also a complete absence of empirical and statistical data about the prevalence of mental illness within the cases that come before Citizenship and Immigration Canada (CIC). Likewise, no prior research had examined the immigration consequences of the criminalization of mental illness within a Canadian context.

In order to gain better understanding of the scope, nature and impact of immigration consequences for the criminalized mentally ill and inform our advocacy strategy, SSO initiated *Criminalization, Mental Heath and Immigration Law: A Research, Education and Advocacy Initiative*. Within this project, SSO conducted a thorough review of literature and relevant Canadian legislation and consulted with a number of key stakeholders.

The population of interest was individuals with pre-existing mental health concerns, whether diagnosed or not, who were deemed inadmissible on the grounds of criminality or serious criminality rendering them subject to removal orders. The research focused on individuals who are Permanent Residents and Foreign Nationals. Particular impact on persons without status in Canada was beyond the scope of this project.

This research consisted of a review of *Immigration and Refugee Protection Act (IRPA)* and all relevant Citizenship and Immigration (CIC) policies and procedures pertaining to deportation process. A review of academic literature examining the immigration consequences of criminalization of mental illness and any related factors was executed as well.

The stakeholder input was obtained through three different focused surveys, titled "Mental Health, Criminalization and Immigration Law", which were targeted at individuals working in the mental health, legal, and settlement/immigration sectors respectively. The potential contacts for the surveys were chosen from a pool of community mental health agencies, settlement providers and community legal clinics listed on the 211 Toronto website based on whether they worked with or represented the population of interest. Immigration and criminal lawyers were located through an internet search and word-of-mouth referrals and chosen based on the same criteria. Individuals were also given the option of forwarding the survey to their colleagues and other interested parties. Surveys were electronically administered using "Survey Monkey". Overall, 28 surveys were completed: 18 legal, 9 mental health and 1 settlement.

24 follow-up interviews with representatives from the above sectors were conducted. Potential interviewees were identified amongst survey respondents who indicated that they were willing to be contacted for more information. Those who provided answers for which greater detail was sought were contacted for a follow-up interview. A number of interviewees were also chosen based on recommendations by previously interviewed parties, indicating them as vital sources of information. Of the 24 interviews conducted, 14 were from the legal field, 6 were from the mental health field, 2 were from the settlement/immigration field, and one was person with lived experience, and one was identified as "other".

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