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The *MV Sun Sea*: A Case Study on the Need for Greater Accountability Mechanisms at Canada Border Services Agency

In August 2010 the MV Sun Sea *arrived off the coast of British Columbia, with 492 Tamils fleeing Sri Lanka and seeking protection in Canada. The author looks at the Canada Border Services Agency's (CBSA) approach to their individual legal claims for protection, including CBSA's investigation and positions taken with regard to their detention, admissibility, and refugee claims. The paper argues the aggressive approach used by CBSA with respect to the legal claims of the* Sun Sea *refugee claimants, pre-determined prior to an assessment of the merits of the individuals' claims, threatened basic principles of the rule of law. Further, it is argued that the* Sun Sea *case study highlights the systemic need for reform in CBSA design to ensure meaningful access to accountability reviews and checks on undue political influence in the adjudicative process. Proposals for reform in CBSA design are explored.*

En août 2010, le MV Sun Sea *est arrivé au large des côtes de la Colombie-Britannique avec à son bord 492 Tamouls qui fuyaient le Sri Lanka pour se réfugier au Canada. L'auteure examine l'approche de l'Agence des services frontaliers du Canada (ASFC) à l'égard de leurs demandes individuelles de protection, y compris les enquêtes de l'ASFC et les positions prises à l'égard de leur détention, de leur admissibilité et de leur demande d'asile. L'article démontre l'approche agressive adoptée par l'ASFC à l'égard des demandes d'asile présentées par les demandeurs du statut de réfugié de Sun Sea, déterminée avant l'évaluation du bien-fondé des demandes individuelles et qui fait fi des principes fondamentaux de la règle de droit. De plus, l'auteure soutient que l'étude de cas de Sun Sea souligne la nécessité impérieuse de réformer la l'approche de l'ASFC afin d'assurer un accès significatif aux examens de la responsabilisation et de contrer l'influence politique indue dans le processus décisionnel. Des propositions de réforme de l'approche de l'ASFC sont examinées.*

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Introduction

In the summer of 2010, the human rights record of Sri Lanka in the aftermath of its civil war remained dismal.[1] In Canada, the Immigration and Refugee Board's acceptance rates for refugee claims made by Tamils fleeing Sri Lanka was at approximately 84 percent.[2] On 13 August 2010, a cargo ship, the *MV Sun Sea* (*Sun Sea*), arrived off the coast of British Columbia carrying 492 Tamil men, women, and children who were fleeing Sri Lanka. Their voyage took just over two months, under horrible conditions. One passenger had died at sea. Most, if not all, had paid tens of thousands of dollars to board the ship to take this dangerous voyage. All made claims for refugee protection on arrival.[3]

This was the second ship in the space of a year to arrive in Canada with Tamil refugee claimants aboard. The *MV Ocean Lady* (*Ocean Lady*) had arrived in British Columbia ten months earlier, in October 2009. There

1. See, e.g., Amnesty International, "Amnesty International Report 2010—Sri Lanka" (28 May 2010), online: *Amnesty International* <www.refworld.org/docid/4dce153c44.html> [perma.cc/2S99-NRJN] (documenting the extensive human rights abuses in the country).
2. CBSA, "Marine Migrants: Program Strategy for the Next Arrival," online (pdf): <ccrweb.ca/en/sun-sea-cbsa-strategy> [perma.cc/Y4UP-LV6C] (obtained by the Canadian Council for Refugees through Access to Information) [*CBSA Arrivals memo*].
3. For a comprehensive review of the MV *Sun Sea*'s arrival to Canada, see Canadian Council of Refugees, "Sun Sea: Five years later" (2015), online (pdf): *Canadian Council of Refugees* <http://ccrweb.ca/en/sun-sea-five-years-later> [perma.cc/VT7A-GSF6].

were 76 Tamil refugee claimants, 75 men and 1 child, from Sri Lanka aboard. They also all made claims for refugee protection upon arrival.[4]

When the *Sun Sea* arrived, the Canadian government had already prepared its response.[5] As the ship was escorted into the naval base in Esquimalt, the then-Minister of Public Safety, Vic Toews, held a press conference branding some of those inside the ship as members of terrorist and human smuggling groups and announcing that there would be an aggressive response to their arrival in Canada.[6] This first government press conference, held within hours of the boat docking, set the stage for the use of the image of the arrival of 492 refugee claimants on the *Sun Sea* as a pretext for a broad legislative and political campaign centred on refugees.[7]

At the time of the ship's arrival, I had been practicing refugee law for approximately four years. I was working in Vancouver, where the vast majority of the claims were heard and acted as counsel for some of the claimants. In this paper, I draw heavily upon my own observations and experiences with how the political campaign and the publicly-stated goal of deterring future claimants from arriving by boats played out on the individual legal claims of the *Sun Sea* passengers. The experience left an indelible mark on me. These refugee claimants were uniformly subjected to a heightened level of scrutiny and opposition. While the hearing process at the Immigration and Refugee Board (IRB) generally remained the same, the intense level of involvement of the Canada Border Services Agency (CBSA) in uniformly opposing these claims was not usual.

My focus is not on the tribunal and court decisions concerning the individual refugee, detention and/or inadmissibility cases of the *Sun Sea*

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4. For a review of the way *Ocean Lady* claimants were treated in the context of Canada's historic treatment of marine arrivals, see Alexandera Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the Refugee Convention: A Discursive Analysis" (2009) 26:2 Refuge 191.

5. Unlike the *Ocean Lady*, which the Canadian Government had only been monitoring for approximately 20 hours prior to its arrival in Canadian waters (see *ibid* at 198), the Government was monitoring the *Sun Sea* for weeks and planning a detailed response. See Chad Skelton: "CBSA directive on Tamil migrants: Detain, detain, detain," *Vancouver Sun* (4 August 2011), online: <https://vancouversun.com/news/staff-blogs/cbsa-directive-on-tamil-migrants-detain-detain-detain> [perma.cc/37UC-XCKG]; and "Canada Monitors Suspicious Vessel; May be carrying migrants to B.C. Coast: Report," *National Post* (16 July 2010), (ProQuest—Canadian Newsstand); "RCMP seize vessel on human smuggling tip; 'Security partners' raise alert to ship found off B.C. coast," *The Ottawa Citizen* (18 October 2009), (ProQuest—Canadian Newsstand).

6. Petti Fong, "Canadian officials board Tamil ship," *Toronto Star* (13 August 2010), online: <www.thestar.com/news/canada/2010/08/13/canadian_officials_board_tamil_ship.html> [perma.cc/2TSK-FX57].

7. As Professor Jennifer Bond has written, "the government clearly viewed its 'tough on smuggling' messaging as politically advantageous and thus worthy of loud publication." Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act" (2014) 51:2 Osgoode Hall LJ 377 at 407-408.

passengers. Rather, I concentrate on CBSA's conduct in relation to these 492 legal claims. There was a coordinated and unwavering approach taken with respect to the legal claims of the *Sun Sea* passengers. A significant amount of government resources and funds were invested in opposing these cases.[8] Tactics included: lengthier investigations of claimants, a high number of CBSA Ministerial interventions in the refugee hearings, claimants were kept in detention for lengthier periods, and there was a greater number of challenges in Federal Court to try to quash determinations made in favour of the claimants.

It is not unusual for refugee claims to be the subject of heated political contention. Canada's approach to refugees has been a political issue in the last two Federal general elections. The *Sun Sea* claimants featured prominently in the 2011 election where a platform was built on a federal party's commitment to preventing 'bogus' claimants from abusing the asylum system.[9]

The arrival of the *Ocean Lady* and the *Sun Sea* also served as a pretext for legislative reform[10] and a change in Canada's strategy abroad to try to deter overseas asylum seekers from using boats to make the journey to

8. By February 2011, CBSA estimates put the cost of detention of the *Sun Sea* claimants at approximately $18 million. See Tim Naumetz, "Mass detention of 300 Tamil migrants cost $18 million says Canada Border Services Agency," *The Hill Times* (14 February 2011), online: < www.hilltimes.com/2011/02/14/mass-detention-of-300-tamil-migrants-cost-18-million-says-canada-border-services-agency/15475> [perma.cc/E5X3-SF4P]. This amount did not include government costs incurred through lengthier investigations, litigating the claimants' continued detention, arguing against their refugee claims, and seeking judicial reviews and stay orders of favourable determinations.

9. The image of the *Sun Sea* was on television screens again during the 2011 election; the ship's image was in the background of an English-language Conservative Party of Canada commercial, with a voiceover stating, "Stephen Harper has a plan to crack down on human smugglers and bogus claimants who jump the queue." A French-language ad stated that "Clandestine immigrants are abusing our hospitality and generosity" and criticizing the opposition parties for being "against the temporary detention of clandestine immigrants" before concluding that "happily, we have Stephen Harper's Conservatives." See Conservative Party of Canada "Illegal Immigration Ad—Conservative Party of Canada—2011 Election Campaign" (29 March 2011) at 00h:00m:25s, online (video): *YouTube* <https://youtu.be/bcptS3RSvyY?t=25> [perma.cc/RE2D-3WL5] (French) https://www.youtube.com/watch?v=NdY0Wci2c0Y (English).

10. CTV News Staff, "Bill targets human smugglers, 'irregular migrants,'" *CTV News* (21 October 2010), online: <www.ctvnews.ca/bill-targets-human-smugglers-irregular-migrants-1.565638> [perma.cc/G5DE-MS8W]. Approximately three months after the boat's arrival, Jason Kenney, the Minister of Immigration at the time, and Vic Toews, returned to the coast to hold a press conference in front of the *Ocean Lady*, announcing new legislation, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. This bill included measures that punished asylum seekers for the manner in which they came to Canada, including, if designated by the Minister, mandatory detention for one year. See Bill C-49, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 3rd Sess, 40th Parl, 2010 (first reading 21 October 2010).

Canada in the first place.[11] In the past two years, the increase in refugee claimants entering Canada from the United States at irregular border crossings has also become a more prominent political issue.[12] Based on the past ten years, it is reasonable to assume that the politicization of refugee flows will continue.[13] The ongoing politicization can provide incentive for governments of all political stripes to bend the process of refugee determination to their ends, and for CBSA to attempt to meet what it considers to be the political imperatives emanating from the government, even when they are not under explicit direction to do so. In light of this, examining CBSA's conduct in the context of a series of claims that were highly politicized is useful in considering whether there are the appropriate checks to ensure fairness.

I will argue that the *Sun Sea* provides a case study that highlights the dearth of accountability checks on CBSA's conduct. This conduct has been challenging to raise within judicial or adjudicative processes. This is because the judicial scrutiny focuses on reviewing a specific tribunal's decision in an individual's refugee, detention or admissibility case, and not usually systemic issues. It is my position that the CBSA's approach to the *Sun Sea* claims demonstrates inherent systemic and structural problems in CBSA's design. These, in turn, allowed the government's political goals to unduly infect the handling of individual claims for protection. I suggest that significant rule of law concerns, in particular concerns about arbitrariness, arise from the way the *Sun Sea* legal claims were approached and conducted by the CBSA. This supports the conclusion that structural reforms are required to provide accountability for CBSA's law enforcement

11. For example, soon after the boat's arrival, a former CSIS chief headed to Asia to discuss further co-operation between Canada and intelligence and police forces abroad with the goal of deterring future boats from making the journey to Canada. See Campbell Clark, "Former CSIS Chief Tasked with Cracking Down on Migrant Smuggling," *Globe and Mail* (9 September 2010), online: <www.theglobeandmail.com/news/politics/ottawa-notebook/former-csis-chief-tasked-with-cracking-down-on-migrant-smuggling/article1369343/> [perma.cc/W9EK-J67L]; Colin Freeze, "Tamil arrests send warning to people smugglers, Ottawa says," *The Globe and Mail* (29 October 2010, updated 2 May 2018), online: <www.theglobeandmail.com/news/politics/tamil-arrests-send-warning-to-people-smugglers-ottawa-says/article1215834/> [perma.cc/3BXM-2G9Z]; Stewart Bell, "On the smugglers' trail: The unlucky ones," *National Post* (29 March 2011), online: <https://nationalpost.com/news/on-the-smugglers-trail-the-unlucky-ones> [perma.cc/A6D8-D3YA].

12. See, for example, the Conservative Party of Canada website which, at time of writing, highlights this "Illegal Border Crossers" as a political issue, and has a pledge page calling on the government to "fix this mess" which it claims will cost $1.1 billion. Conservative Party of Canada, "Illegal Border Crossers" (accessed on 3 March 2019), online: <www.conservative.ca/cpc/illegal-border-crossers/> [perma.cc/HBE5-7RPE].

13. For further discussion, see the description of the political rhetoric surrounding refugee reforms described in Emily Bates, Jennifer Bond & David Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" (2016) 47:1 Ottawa L Rev 1 at 29; Bond, *supra* note 8.

and refugee processing functions, and to ensure the accountability and independence of hearing officers who represent the government's interest before the IRB.

I propose two reforms. First, the creation of an independent accountability mechanism to enable the review of CBSA law enforcement conduct and exercises of discretion. Second, the creation of a structural separation between the CBSA officers who are assigned to act as representatives of the Crown at IRB hearings, and those officers who perform refugee intake, investigative, and enforcement functions.

Below I first describe the roles which CBSA play in the refugee determination process. I then turn to the *Sun Sea* cases and present evidence concerning the unusual instructions that CBSA officers received, and how they were encouraged to treat all the claims, before providing examples of how those instructions affected individual claimants, from detention decisions to arguments that were pursued at the hearing and judicial review stages. This evidence is then drawn upon to illustrate rule of law implications, before I canvass the efforts that were made to challenge the rule of law issues and why it is structurally difficult to bring such challenges. I conclude with my proposals for reforms to support accountability.

I. *Canada Border Services Agency: Roles in the refugee determination process*

The CBSA is a relatively young agency. It was formed in 2003 by an Order in Council to amalgamate responsibilities which to that point had been spread across a number of different agencies, including Canada Customs, Citizenship and Immigration Canada, and the Canadian Food Inspection Agency. CBSA's enabling statute describes its mandate as "providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods…"[14]

While CBSA is a large, national border police force, it is unique among Canada's law enforcement agencies in that it lacks any kind of independent accountability mechanism.[15] This is despite the wide range of powers possessed by the agency. These powers include: preventing entry to Canada; detaining people; conducting inland enforcement including carrying out raids and arrests; enforcing customs laws; and (as described

14. *Canada Border Services Agency Act,* SC 2005, c 38.

15. Laura Track & Josh Paterson, "Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency" (June 2017), online (pdf): *British Columbia Civil Liberties Association* <qweri.lexum.com/w/canlii/2017CanLIIDocs199.pdf> [perma.cc/6EJ5-EUAL] at 13 [*BCCLA*].

further below) conducting many aspects of the refugee intake process.[16] Instead, CBSA has an internal process for dealing with complaints, the Recourse Directorate, which reports directly and only to the president of CBSA. This internal process has been criticized for its lack of independence, its limited scope (as it is complaint driven), its inability to conduct systemic reviews, and its lack of transparency.[17]

In the refugee context, CBSA is involved from initial intake through to the removal of failed refugee claimants. In broad terms, there are four areas where CBSA officers primarily interact with refugee claimants: initial intake, admissibility proceedings, refugee determination, and removal. Within these broad categories, CBSA officers hold vast and varied powers that include enforcement and investigation, and acting as representatives of the Crown at IRB hearings. All of these roles are elaborated upon below.

When a person makes a refugee claim upon arrival at a port of entry (airport, marine, or land), a CBSA enforcement officer will likely conduct the first examination to determine whether they meet the criteria for admissibility, and whether they are eligible to make a claim for asylum.[18] In conducting this examination, the claimant is obligated to answer questions truthfully.[19] In this initial screening, the CBSA will conduct a preliminary security screening. This will involve activities including seizing identity documents, taking fingerprints, and running checks through shared databases with a number of countries. If eligible, a refugee claim will be referred to the IRB.[20] In my experience, for most cases, barring security and identity issues, this initial processing, even for port of entry cases,[21] does not normally take longer than a few hours.

16. *Ibid* at 11-13.
17. Track, *supra* note 16 at 27-29.
18. *Immigration and Refugee Protection Act*, ss 15-16, 100-101 (examination process for determining eligibility and the grounds of ineligibility) [*IRPA*].
19. *Ibid* s 16.
20. *Ibid* s 100.
21. Eligibility screening of refugee claims initiated inland tend to be conducted by Immigration Refugee and Citizenship Canada (IRCC) officers. In a recent independent review of the IRB conducted by Neil Yeates, he noted that stakeholders expressed concern that "the port of entry examination by CBSA is more exhaustive than the intake interview of IRCC, giving rise to the concern that one process is too detailed and invasive for vulnerable persons presenting claims at the port and the other less rigorous and value-added.".Neil Yates, "Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum" (10 April 2018) at 61, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/irb-report-en.pdf> [perma.cc/ESH6-6WHM].

A CBSA officer can also decide if there is a basis to detain the claimant.[22] The basis for detaining a foreign national on immigration grounds is limited to concerns relating to being a flight risk or to establishing identity, being a danger to the public, and/or being the subject of a security or criminality investigation.[23] If the officer believes that there are grounds to detain, this is set out in a report, which is passed on to a CBSA hearing officer. The hearing officer is responsible for representing the Minister of Public Safety and Emergency Preparedness at any detention review hearings before the Immigration Division at the IRB.[24] The CBSA hearing officer may decide to release the claimant on identified conditions prior to the first detention review,[25] or may choose to refer the case to the Immigration Division and present arguments before the tribunal that release should only be on conditions, or for continued detention.

In the refugee determination process, CBSA officers are notified that a refugee hearing will be held, and have access to the initiating refugee documents in all files.[26] The Minister of Public Safety and Emergency Preparedness can intervene in a number of ways at a refugee hearing: filing documentary evidence, being present at the hearing and conducting an oral examination of the claimant, and/or making written or oral submissions to the tribunal about any or all aspects of the claim. Prior to the creation of CBSA, when there was an enforcement branch of Citizenship and Immigration Canada, the Federal Court of Appeal described Minister's interventions as "primarily oriented towards detecting and opposing claims that the Minister or her officials believe should not allowed."[27] In my experience, this is an apt description for CBSA hearing officers' orientation in refugee interventions as well. Generally, the CBSA will only

22. The decision to detain a foreign national can happen at any time throughout their time in Canada. In my experience as duty counsel, we tend to see claimants being detained either at the front end of their process because of identity or security concerns, or at the back end if they are failed claimants, when they are facing removal from Canada and there are flight risk allegations.

23. For grounds of detention see *IRPA, supra* note 19 s 58; *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 244.

24. *IRPA, supra* note 19 s 57. Detention review hearings must occur 48 hours after a person is taken into detention "or without delay afterward." Subsequent reviews occur at least once in seven days following the initial review and every 30 days thereafter.

25. *Ibid* s 56.

26. *Ibid* s 100(4), 170(d). Part of the initiating package of documents includes the Basis of Claim form that sets out the claimant's reason for seeking protection.

27. *Ahumada v Canada (MCI),* 2001 FCA 97 at para 33. The Federal Court of Appeal characterized an officer from the enforcement branch of CIC (a role that was later taken on by CBSA hearing officers) as having an "enforcement perspective" at para 54.

intervene where it expects to oppose some aspect of the claimant's case.[28] While a CBSA hearing officer may decide to withdraw the intervention when further information is provided, or not provide submissions opposing the claim after hearing from the claimant at the hearing, the rationale for filing an intervention is to be in a position to oppose some aspect of the claim if necessary. The CBSA can also appeal a positive refugee decision to the Refugee Appeal Division even if they have not intervened at the first hearing.[29] At the time of the *Sun Sea*'s arrival, the Refugee Appeal Division had not yet been implemented and therefore none of the claimants' cases were appealed there. Instead, the Minister applied for leave to have a number of positive refugee determinations judicially reviewed by the Federal Court.

Where a CBSA officer is concerned that a claimant may be inadmissible on security or criminality grounds, they may decide to write a report setting out the allegations which is sent to a Minister's Delegate for review. If a Minister's Delegate at CBSA then refers the inadmissibility report to the IRB, an admissibility hearing will be scheduled at the Immigration Division.[30] A CBSA hearing officer will represent CBSA at that hearing. They will have the onus to demonstrate that there are reasonable grounds to believe that the person concerned is inadmissible.[31] As soon as an inadmissibility proceeding is initiated at the IRB, *IRPA* requires an automatic suspension of the refugee hearing at the Refugee Protection Division.[32]

CBSA also handles the removal arrangements for foreign nationals, including failed refugee claimants. If a person has an enforceable removal order, it is a CBSA officer's job to make arrangements to remove the individual from Canada as soon as possible.[33] Requests to defer a removal are made to and tend to be decided by CBSA enforcement officers.

As the agency charged with processing refugee claimants upon arrival, determining whether claimants are eligible to make refugee claims, assessing whether a claimant might be inadmissible, and intervening in

28. CBSA's guidelines for Ministerial Interventions make clear that the priority for interventions are cases involving security and criminality exclusions, cases of possibly large-scale misrepresentation and fraud, and certain other exclusions or credibility issues. See Immigration Refugees and Citizenship Canada, *ENF 24: Ministerial Interventions* (2016) at 12-13, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf24-eng.pdf> [perma.cc/R8F3-PMNR] [*ENF 24*].
29. *IRPA, supra* note 19 s 110(1).
30. *Ibid* ss 44(1)-(2).
31. *Ibid* s 33.
32. *Ibid* s 103(a).
33. *Ibid* s 48(2).

refugee hearings on behalf of the government, CBSA was deeply involved as the lead government agency in every aspect of the *Sun Sea* cases.

II. *Pre-arrival: A coordinated and aggressive approach*

We now know that before the *Sun Sea* arrived in Canada, the CBSA was planning its approach, not only in terms of public messaging, but also the approach the agency should take with respect to the handling of the individual legal claims of the *Sun Sea* passengers. An undated memo was written by CBSA's Director General of Post-Border Programs to the Vice President of the CBSA setting out a "program strategy" to deal with its eminent arrival. The memo was obtained approximately three years after the ship arrived through an access to information request filed by the Canadian Council for Refugees (CCR).[34] At the time the memo was obtained, there was already a general sense among refugee lawyers who had been working on these files that the CBSA had a coordinated approach that was far more aggressive than in other similar refugee cases. The memo confirmed that such a strategy had been planned.

The rationale underlying the proposed strategy was framed in this way in the memo:

> It appears that the CBSA's approach for dealing with the last marine arrivals in October 2009 may have been less effective than it could have been. For the next arrivals, the CBSA is proposing a more aggressive approach to create a deterrent for future arrivals.[35]

The "more aggressive approach" focused on how the individual legal claims of the passengers on the *Sun Sea* would be treated through investigation and litigation processes. The proposal identified a strategy of extensive interrogations, lengthy detentions, aggressive attempts to build evidence to argue claimants were inadmissible, and aggressive interventions by the Minister at every refugee hearing:

a. **Extensive interrogation**: There would be extensive interrogations in which the "CBSA will gather as much information and evidence as possible to build cases that demonstrate that the marine people smuggling is serious and poses a significant threat to the health and safety of those in Canada."
b. **Detain as long as possible**: There was a plan to detain claimants as long as was possible, with recognition that this plan *may* be

34. *CBSA Arrivals memo*, *supra* note 3; Tobi Cohen, "Internal memo details tough treatment of would be refugees," *Vancouver Sun* (27 September 2013), online: <o.canada.com/news/internal-memo-details-tough-treatment-of-would-be-refugees> [perma.cc/MJX9-4JZW].
35. *CBSA Arrivals memo*, *supra* note 3 at 2.

limited where there were no legal grounds to detain: "Detention is an effective tool against those who circumvent immigration processes. The CBSA will take maximum advantage of this tool recognizing that there may be limitations if no legal grounds to detain exist."

c. **Aggressive in building evidence alleging inadmissibility**: Where there was a possibility that a claimant might be inadmissible on some ground, the CBSA would be aggressive in building evidence to argue that a claimant was inadmissible: "The IRB will hold inadmissibility hearings on cases where the examination reveals additional, more serious, inadmissibility grounds. In these cases, the CBSA will be aggressive in building evidence arguing for inadmissibility."
d. **Aggressive interventions in *every* refugee hearing**: There was a pre-determined plan to intervene and argue in each refugee hearing that the person was not a refugee: "In terms of the approach for refugee determination hearings, they will be dealt with aggressively as well. The CBSA will advise the IRB that it intends to intervene in each case, however, the IRB's current 84 [percent] acceptance rate will be a challenge. Nonetheless, the CBSA plans to build standard evidence packages that would be used for each case to show why the person is **not** a refugee. The evidence package would also be useful tools for detention reviews."

From the outset, the direction provided from CBSA management was that an "aggressive approach" should be used in relation to individual claims in order "to create a deterrent for future arrivals." While the concept of deterrence is an integral part of the criminal justice system and principles of sentencing,[36] its place here, in deciding how the CBSA should approach an individual's refugee claim, is problematic.

The manner in which a claimant travels is not relevant to determining the merits of their refugee claims, but here it was nonetheless used as a determining factor in how their cases were approached by the CBSA. There is a recognition in refugee law that asylum claimants may have to use irregular means to arrive in a country where they can seek asylum, and that fleeing for one's safety may necessitate this. As a result, both international law and domestic law prohibit penalizing refugee claimants

36. Clayton Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis Canada, 2017) at 10 (§1.27).

for the manner in which they have entered Canada.[37] However, the CBSA decided to treat these particular claimants in a more aggressive fashion for the very purpose of deterring other claimants from travelling to Canada in the same manner. In effect, the claimants were explicitly penalized for the manner in which they travelled, violating the spirit of a basic tenet of the *Refugee Convention*.

Three elements in the CBSA's memo stand out. First, instead of determining the right approach for each claim based on the claimant's circumstances, a uniform strategy was adopted *before* the first claim was even assessed—indeed, before the *Sun Sea* even arrived in Canadian waters. Regardless of the *prima facie* strength of an individual claim, whether a person was an unaccompanied minor, whether they had been detained by the Sri Lankan authorities, or whether they had evidence they were wanted by the authorities, the approach to each refugee claim would be the same—it would be opposed. Second, the word "aggressive" is used multiple times to describe the strategy to be used. Again, no matter the circumstances of an individual's case, the CBSA had pre-determined it would use strong oppositional tactics. Third, there was no separation between how the CBSA would approach its investigative/law enforcement functions, and its "Crown counsel" functions at detention, refugee and admissibility hearings before the IRB. The strategy for CBSA officers would be uniform, with CBSA enforcement officers working in tandem with the CBSA hearing officers representing the Minister before the IRB. There was a pre-determined approach to extensively interrogate, build the evidence and then use "aggressive" arguments at the tribunal in each case.

III. *CBSA approach to the individual* Sun Sea *claims*

The proposed investigation and litigation strategy was implemented when *Sun Sea* and its passengers arrived in Canada. In this section I set out some of the features of how these claims were handled. I draw upon on my own knowledge and experience as a refugee lawyer working on *Sun Sea* claims, extensive communications with fellow counsel, a review of caselaw, and observations arising from the general monitoring of refugee lawyers' listserve communications.

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37. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 31(1) (entered into force 22 April 1954, accession by Canada 4 June 1969): "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."; *IRPA, supra* note 19 s 133 provides that where a person has claimed refugee protection, they cannot be charged with an offence relating to the manner in each they entered pending the resolution of their refugee claim.

All of the passengers made refugee claims upon arrival and were ordered detained.[38] They were given alphanumeric codenames called "B numbers"—that is to say, each passenger was identified in their IRB proceedings by a unique number such as "B001" or "B145," instead of by their name. The *Sun Sea* claimants were extensively interrogated. Many of the claimants were detained for a number of months[39] and were subjected to repeated and intensive interrogations throughout the course of their detention. For example, some claimants were falsely accused of lying and falsely told that there was other information on file about them that had been elicited by interrogating other passengers on the ship. CBSA also made phone calls to family members who were living abroad to question them about some of the claims.

The nature of these interrogations and inquiries was not typical. For example, when the ship first arrived, I was one of the lawyers who represented the unaccompanied minors. I had previously represented unaccompanied minors who were making refugee claims. The unaccompanied children from the *Sun Sea* were subjected to lengthy examinations not only relating to the conditions on the ship, and the manner in which they made their way to Canada, but also about their family members in Sri Lanka and the details of their refugee claim. In my experience, other child refugee claimants were not subjected to similarly lengthy or involved interrogations.

As had been set out in the memo prior to arrival, CBSA hearing officers were "aggressive" in arguing for continued detention. Soon after arrival, a memo from CBSA National Headquarters was delivered which outlined strategies for arguing for continued detention.[40] The memo noted that officers should be assured that they had the support of senior management of CBSA and partner agencies in making arguments for continued detention.

Where claimants did not have identity documents, the first step for CBSA hearing officers was to argue that identity was not established. This was not unusual in and of itself; in my experience, it is not uncommon for refugee claimants to be held in detention when they have no identity

38. *IRPA, supra* note 19 s 55(3)(a) provides that a foreign national can be detained upon entry into Canada if an officer "considers it necessary for the examination to be completed." The unaccompanied minors, ranging in age from 13 to 16 were quickly released into the care of the child welfare authorities, the BC Ministry of Children and Family Development.

39. Approximately six months after arrival, 107 *Sun Sea* claimants remained in detention. See Naumetz, *supra* note 9.

40. Memorandum from CBSA (accessed 13 May 2019), *NHQ Direction to the Pacific Region concerning the detention reviews in the case of the Sun Sea migrants*, online: <www.scribd.com/embeds/61628703/content?start_page=1&view_mode=list&access_key=key-gqtrmdz4g8tfai3zpe9> [perma.cc/LYW6-P3P4] [*CBSA Detention Memo*].

documents. The memo went on to say that where the identity documents were produced, hearing officers would then argue that the documents may be fraudulent. There was a suggestion in the memo that fraudulent documents may have been used because it was a smuggling operation. Typical identity verification procedures were treated as insufficient in some of the cases. Unlike cases involving other refugee claimants, there were additional steps taken above and beyond the ordinary identify verification checks. In these cases, identity documents were being sent to a Migration Integrity Office (MIO) in Sri Lanka, a process that had no set timeline.[41] One Member of the Immigration Division commented on the unusual approach taken on establishing identity in these cases:

> I have about 14 years of experience as an immigration adjudicator and I would say that in this case—in these cases—the Minister has raised the bar on what will satisfy him with respect to the identity of persons on the MV *Sun Sea*…the method of arrival—that is by ship—seems to have struck a nerve and led to the Minister requiring or setting this higher standard.[42]

As identified by this Member at the Immigration Division, the Minister appeared to be requiring a higher standard to demonstrate identity, simply because of the manner in which the claimants travelled to Canada. There was not any correlation established between this method of travel and a heighted concern about identity, particularly after the claimants produced identity documents that were verified through the standard procedures.

If there were no longer grounds to argue that identity was not established, the memo from CBSA National Headquarters instructed that "CBSA is to argue for continued detention on any other applicable ground."[43] In a number of the cases, CBSA argued that the claimant was a flight risk because they had an outstanding debt owed to smugglers. To respond to this argument, claimants had to produce proof that their families had paid the amount owing to smugglers overseas. In making these arguments, government representatives were essentially requiring claimants to pay criminal smuggling operators in order to satisfy the officers that there was no basis for continued detention.[44] This pattern of conduct exemplifies the problem of "tunnel vision" that is discussed later

41. See, e.g., *Canada (Citizenship and Immigration) v B232*, 2011 FC 257 at para 38; *Canada (Citizenship and Immigration) v B046*, 2011 FC 877 at para 56 [*B046*].
42. *B046, supra* note 42 at para 40.
43. *CBSA Detention Memo*, *supra* note 41.
44. Jon Woodward, "Gov't to Tamils: pay smugglers or stay in jail," *CTV News* (30 March 2011, last updated 27 November 2015), online: <bc.ctvnews.ca/gov-t-to-tamils-pay-smugglers-or-stay-in-jail-1.625138> [perma.cc/CXP6-SJ68].

in the paper; the CBSA was so focused on the singular route of seeking continued detention that it became blind to the absurd consequences of its demands and actions.

In some cases, where claimants were ordered released by the Immigration Division, the government filed motions in Federal Court, requesting a stay of the claimant's release. In my experience, while it happens on occasion, it is certainly not a common practice for the government to seek stays of release orders. The CBSA detention strategy memo contemplates seeking stays as a litigation strategy, advising that where a release was ordered by the Immigration Division, CBSA was to "immediately consult with Litigation Management and Department of Justice to determine whether there are any grounds to seek a stay of release while an application for leave and judicial review is considered."[45] In some instances, there were multiple successive motions filed seeking stay orders of multiple successive release orders of the Immigration Division in respect of the same detainee. As set out in the section on legal challenges to CBSA conduct, the Federal Court did have this systemic practice brought to its attention, and ultimately found this type of tactic to be abusive.[46]

A number of the refugee hearings of the *Sun Sea* claimants were delayed while CBSA pursued allegations that the claimants were inadmissible to Canada. As noted above, such allegations suspend the refugee claim determination process, pending the decision by the Immigration Division on the question of inadmissibility.[47] Two principal grounds of inadmissibility were argued by the CBSA against *Sun Sea* claimants. These were involvement in people smuggling by assisting with work on the *Sun Sea* and/or alleged membership in the Liberation Tigers of Tamil Eelam (LTTE).[48]

Regarding the people smuggling allegations, the CBSA argued that an individual need not be motivated by profit, nor did they require any connection to a criminal organization in order to be found criminally inadmissible for people smuggling. These arguments were successful

45. *CBSA Detention Memo*, *supra* note 41.

46. See the text accompanying note 64 for discussion on *Canada v Canada (MCI) v B386,* 2011 FC 175 [*B386*].

47. *IRPA*, *supra* note 19 s 103(1)(a).

48. The CBSA had referred 64 *Sun Sea* cases to an admissibility hearing. As of January 2017, 16 of those referrals were withdrawn; the Minister was not able to establish inadmissibility in 24 of the cases (15 of these cases were appealed by the Minister and in 8 of the appeals, the Minister lost and in 4, the Minister was successful in establishing the inadmissibility). As of January 2017, 18 of the *Sun Sea* claimants were issued a deportation order. This number would include those claimants who were found inadmissible based on the "people smuggling" definition that was later overturned by the Supreme Court of Canada in *B010 v Canada (MCI)*, 2015 SCC 58 [*B010*]*;* See IRB, *Report: Marine Arrivals at the IRB As of January 1st, 2017*, emailed to author 1 March 2019.

before a number of the adjudicators at the Immigration Division, judges at the Federal Court, and the Federal Court of Appeal.[49] Thus claimants, who had not only received no profit, but in fact had *paid* money themselves to take the voyage to seek asylum, were being found inadmissible for people smuggling. It was considered legally irrelevant that those on the ship who offered their assistance during the voyage were also fleeing to seek asylum like the other passengers and were motivated by self-preservation and the protection of their families and others on board the dilapidated vessel. Ultimately, the Supreme Court of Canada held that this was the wrong interpretation of the statute. The Supreme Court found that people smuggling had to, at the very least, include a financial profit motive and a connection to a criminal organization, and that those who engaged in mutual assistance in a "collective flight for safety" could not be found to be inadmissible on this ground.[50]

The CBSA intervened in every, or virtually every, refugee hearing of a *Sun Sea* claimant. Ordinarily, CBSA intervenes in cases involving criminality, possible exclusion from the refugee definition, program integrity or credibility of an individual claimant.[51] In the *Sun Sea* cases, it was decided in advance of the boat arriving, and without any evidence of a security threat, criminality, or doubt as to a particular claimant's credibility, that the Minister would intervene and oppose the claims. This was decided before the hearing officers had read the basis of the claimants' refugee claims and made an initial assessment of whether there were any issues to support the need for an intervention.[52] In general, the sense among practitioners was that no matter the case, CBSA intervened, and, no matter the case, they opposed. CBSA even intervened and opposed the claims of unaccompanied minors on the boat.

A standard argument made by the CBSA hearing officers was that the war was over in Sri Lanka and therefore there no longer was a risk to the claimants. Generally, the same standard disclosure package was used in the refugee claims by CBSA. CBSA hearing officers also appeared at the refugee hearings and questioned claimants and argued that their allegations were not credible. Later, it became apparent that the hearing officers intervening in the cases had not disclosed critical information in their possession about how *Sun Sea* deportees had been treated upon return

49. See, e.g., *Canada (Public Safety and Emergency Preparedness) v JP*, 2013 FCA 262.
50. *B010, supra* note 49 at paras 63, 72, 76.
51. *ENF 24, supra* note 29 at 12-13.
52. The government's current policy is that intervention decisions will be taken based on review of the Basis of Claim form, interview notes, and other documents submitted, and the policy at the time was similar. See *ENF 24, supra* note 29 at 7.

to Sri Lanka. The Federal Court held that hearing officers were Crown representatives and had a duty of candour to provide all the relevant disclosure if they had already disclosed some material in the proceeding.[53]

There was an unusually high number of judicial reviews filed by the government against positive determinations made by the Refugee Protection Division on their refugee claims. In my experience, it is rare for the Department of Justice to file an application for leave and judicial review against a positive refugee determination; in the overwhelming majority of cases challenging Refugee Protection Division decisions that are brought to Federal Court, the Minister is the Respondent and not the Applicant.

IV. *Rule of law implications of CBSA conduct in relation to* Sun Sea *claims*

The approach to these cases was unusual in that there was a pre-determined uniform approach that required an incredible amount of state resources. There can be no doubt that these individual claimants faced greater than normal scrutiny of their claims. The level of attention paid to these claims was not based on any inherent characteristics relating to the merits of the claimants' refugee claims—the only difference between them and the many other Tamil refugee claimants accepted by Canada was their method of travel. Even other Tamil claimants who had travelled via ship to Canada, the *Ocean Lady* claimants, arguably fared better than these claimants. For example, while the *Ocean Lady* adult claimants were also all detained upon arrival, they were generally released after approximately three months of detention.[54]

A core concept of the rule of law is the need to "prevent and constrain arbitrariness within the exercise of public authority by political and legal officials in terms of process, jurisdiction and substance."[55] In the context of international refugee law, "'[a]rbitrariness' includes elements of

53. See text accompanying note 63 for discussion on *B135 v Canada (MCI),* 2013 FC 871 [*B135*].

54. Gordon Maynard, "Arrest and Detention" (Paper delivered at CBA National Immigration and Citizenship Continuing Legal Education Conference, Montreal, 9-11 May 2013), online (pdf): <www.cba.org/CBA/cle/PDF/IMM13_paper_maynard.pdf> [perma.cc/C4TQ-DGQH].

55. Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Sossin & Colleen Flood, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 39 at 41.

inappropriateness, injustice, lack of predictability, or without due process of law."[56]

As documented above, CBSA decided in advance of the *Sun Sea*'s arrival that it would take an aggressive approach in order to deter future refugee claimants from coming by boat. This approach was untethered to the merits of any individual's refugee claim.[57]

While the determination of the *Sun Sea* passengers' refugee claims took place within a tribunal system that arguably afforded a fair hearing process, that alone is not sufficient to ensure that the rule of law was observed. As in other areas of law in which individuals are in an adversarial position relative to the state, the conduct of the state is also relevant for assessing whether the process tends towards or away from the rule of law.

Both the general instructions under which CBSA officers are required to operate and the individual actions and decisions of CBSA officers are relevant. The direction given by CBSA management to its officers was to act in a way which would deter future claimants from arriving by boat. To this end, the instructions were to work aggressively to establish that the claimants were inadmissible to Canada, and they were not refugees. The overarching stance of the agency, under which individual officers had to operate, was that the claims should be resisted. This optic was established before any of the claims has been presented, much less assessed on their merits. From the perspective of *Sun Sea* claimants, the aggressiveness of the government's resistance to their claims and its arguments in favour of their detention were arbitrary and unjust because the approach—not a general approach to all refugees but an approach specific to them—was taken without regard to the merits of their refugee claims, was not predictable based on the government's usual approach to handling refugee claims, and was arbitrary.

While the claims themselves would be determined by the IRB, the over-arching approach to the claims by CBSA was reminiscent of "tunnel vision." The phenomenon of tunnel vision has been defined, by the Morin Inquiry on Wrongful Convictions, as a "single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's

56. *We Have No Rights: Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada* (Toronto: University of Toronto Faculty of Law—International Human Rights Program, 2015) at 88, (citing *A v Australia*, *UNHRC Communication No 560/1993*, UN Doc CCPR/C/59/D/560/1993 (1997) at para 9.2; *Gorji-Dinka v Cameroon*, *UNHRC Communication No 1134/2002*, UN Doc CCPR/C/83/D/1134/2002 (2005) at para 5.1).

57. *CBSA Arrivals memo*, *supra* note 3.

conduct in response to that information."[58] In the criminal justice context, "tunnel vision" on the part of police and/or prosecutors has contributed to miscarriages of justice, even when the final decision remains with the courts.[59] As explained above, the phenomenon of CBSA hearing officers demanding proof that the family members of the *Sun Sea* claimants had paid their outstanding debts to the smugglers, is a kind of "tunnel vision" on the part of a government authority. Arguably, deciding to intervene in every case to oppose the claim before knowing anything about the facts of the particular claim for protection could be characterized as "tunnel vision."

V. *Legal challenges to CBSA conduct in* Sun Sea *claims*

There were several legal challenges concerning the substantive arguments raised in these cases relating to admissibility, refugee determination and detention. As noted above, the definition of people smuggling, in the context of refugees collectively fleeing for safety and providing one another with mutual aid, went to the Supreme Court of Canada.[60] There were also a number of cases where the government challenged Refugee Protection Division decisions to grant asylum, where the decision identified having been a passenger on the *Sun Sea* as placing the claimant at risk of being persecuted by Sri Lanka if returned.[61]

In conversations with fellow refugee lawyers working on the *Sun Sea* cases at the time, there was a general sense that there was no venue in which to effectively challenge the structural systemic unfairness we were seeing in how these claimants were treated by CBSA. We observed that there was a general pattern in which these cases were approached differently than others. We could see the aggressive and intensive amount of state resources used to fight these cases, on the whole, but in any given individual case it was hard to find ways to effectively challenge this conduct. There were a few cases where the Federal Court specifically addressed the conduct of CBSA in handling *Sun Sea* cases: *B135, B386* and *B006.*

B135 was a challenge to the failure of the CBSA hearing officer to disclose all of relevant evidence in their possession when intervening in a refugee claim. Justice Harrington held that by providing incomplete

58. Public Prosecution Service of Canada, "2.4 Prevention of Wrongful Convictions" in *Public Prosecution Service of Canada Deskbook* (1 March 2014), online (pdf): < https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> [perma.cc/2AWM-THM2] at 68 citing recommendation 74 in Ontario Ministry of the Attorney General, Report of the Commission on Proceedings Involving Guy Paul Morin, (Toronto: Queen's Printer, 1998) at 1136 [*PPSC Deskbook*].

59. *Ibid*.

60. *B010, supra* note 49.

61. See, e.g., *YS v Canada (MCI)*, 2014 FC 324 [*YS*] and *Canada (MCI) v A032*, 2013 FC 322.

evidence, Minister's Counsel had misled the Refugee Protection Division. The Minister only provided some of the information in their possession relating to the return of *Sun Sea* claimants who had been deported back to Sri Lanka. They failed to provide an affidavit from one of the deportees asserting that he was beaten and tortured upon return.[62]

B386 was a challenge to the pattern of the government seeking a chain of stays in response to release orders being issued by the Immigration Division. In this case, a release order was granted (release decision #1), and the Minister then sought a stay of the release order while it pursued a judicial review of the release. While awaiting the judicial review of release decision #1, the individual had two more detention review hearings (release decisions #2 and #3). In each instance, the Immigration Division found no grounds for continuing detention and ordered him released. The Minister sought then to overturn both release decisions #2 and #3 by applying for judicial review. The Minister obtained stays of the person's release pending the judicial review hearings. The Minister lost the judicial review of release #1. The Minister then argued that the individual should nevertheless *not* be released because the stays of release decisions #2 and #3 meant he had to remain detained. Such a cycle could have carried on, trapping the individual in detention despite repeated decisions to release him, and despite court orders upholding the decisions to release. The Federal Court, however, put a stop to the cycle. The court ruled that to allow this to continue would be an abuse of process.[63]

B006 was, in part, a challenge to the conduct of the CBSA enforcement officer and CBSA hearing officer in the context of an admissibility hearing.[64] It was argued that when the conduct of the two officers was taken together, it amounted to an abuse of process that required a stay of proceedings. The enforcement officer's interrogations included trickery, false inducements, and threatening to interview the claimant's seven year old son about his activities. The Member of the Immigration Division held that the tone and method of the interrogations were "unlike anything…[she] had previously observed from a CBSA officer," finding he "overstated the strength of the information" that he had about the claimant and "proceeded in a far more aggressive manner than the Member had so far observed being taken in interviews with refugee claimants." The hearing officer, who represented the government at the admissibility hearing, also failed to

62. *B135, supra* note 54.
63. *B386, supra* note 47.
64. I acted as co-counsel for B006 at his inadmissibility where the abuse of process argument was raised.

disclose interviews, provided incomplete transcripts of some interviews, and misstated the evidence. The Member held "the Minister's comments about the nature of their evidence against B006 were 'not credible' and 'highly irresponsible.'" Despite these findings, the Member declined to find there was an abuse of process, holding that the client was not prejudiced because he did not give in to the officer's tricks and that she had already dealt with the hearing officer's misconduct through her various orders to allow for disclosure and to exclude certain evidence.

On judicial review, the Federal Court agreed, finding that the conduct had not shaken the public's confidence in the integrity of the justice system. The Court placed weight on the context of the claimant having arrived on the *Sun Sea* and the "large and complex" investigation involved when considering the propriety of CBSA's conduct. While part of what the case sought to address was the overzealous manner in which the cases of these claimants were pursued on the part of the CBSA, the overall cumulative impact of the aggressive conduct of CBSA was unfortunately not addressed.[65]

Even where the Court addressed CBSA misconduct, each judge was limited to considering the specific conduct that was placed before the court in that case. The court had no basis on which to examine or regulate the broad and deliberate pattern of conduct across the sweep of the *Sun Sea* cases. The courts' supervision of CBSA conduct, while an important tool, is arguably not the ideal tool, and certainly not the most accessible tool, to deal with systemic problems connected with CBSA conduct. Change is needed to bring independent supervision for CBSA, and to restructure and create a healthy separation in the relationship between CBSA law enforcement officers and the CBSA hearings officers who represent the government before the Immigration and Refugee Board.

VI. *Building accountability at the CBSA*

The *Sun Sea* cases highlight systemic structural design problems within (and surrounding) CBSA. There was no straightforward way to complain about CBSA enforcement officers who crossed the line in their interrogations of a claimant. The Immigration Division member who heard *B006*'s case held she did not have the jurisdiction to police the conduct of the enforcement officer. While there was limited relief from the Federal Court in addressing particular hearing officers' misstatement of facts and failures to fully disclose the record, judicial admonishment and specific remedies given in individual cases did not address the larger issues identified in this paper.

65. *B006 v Canada (MCI)*, 2013 FC 1033.

Even if one were successful in challenging the conduct of a particular enforcement officer or hearing officer at the Board or the Federal Court, it was not possible to get at the pattern of conduct—the pre-determined uniform and aggressive approach that was specifically planned to fight the legal claims of these 492 individuals. Moreover, such litigation strategies are difficult to mount, particularly with limited resources and when the primary focus is arguing for the client's underlying claim for refugee protection and status in Canada.

The handling of the *Sun Sea* claims point to at least two potentially beneficial fundamental reforms at CBSA that could enhance fairness. First, the federal government should follow through with its commitment to build an independent review mechanism to respond to complaints about CBSA conduct. Second, there needs to be a structural separation between the officers doing enforcement/investigation work and those representing the Crown before the tribunal, and an organizational culture needs to be developed that values the rationale for the separation of these roles.

1. *Meaningful independent review mechanism of CBSA law enforcement conduct*

It has become a fairly common refrain in border policy discussions and the media in recent years that there must be an independent accountability mechanism for the law enforcement conduct of CBSA.[66] While CBSA officers possess greater powers than other police, they are unlike every other significant law enforcement agency in Canada in that they lack any independent complaint and review mechanism. In March 2016, the federal government first committed to establishing such a body, but three years later, as of the time of writing, it is clear that the government has insufficient time to follow through with legislation during the current

66. See, e.g., "Model for CBSA Accountability Mechanism Recommended" (17 March 2016), online: *Canadian Council for Refugees* <ccrweb.ca/en/release-model-cbsa-accountability-mechanism> [perma.cc/Z9NF-TZEP]; Kim Pemberton, "Death in CBSA custody sparks calls for accountability," *Vancouver Sun* (1 January 2014), online: <www.vancouversun.com/life/death+cbsa+custody+sparks+calls+accountability/9451549/story.html > [perma.cc/AWU7-WLV2]; Meghan Potkins, "Calls for more oversight of border agents following death at Calgary airport," *Calgary Herald* (10 August 2018), online: <calgaryherald.com/news/local-news/calls-for-more-oversight-of-cbsa-following-death-at-calgary-airport> [perma.cc/MBM4-A4CR]; Senate of Canada, Report of the Standing Committee on National Security and Defence, *Vigilance, Accountability and Security at Canada's Borders* (June 2015) (Chair: The Honourable Daniel Lang), online (pdf): <sencanada.ca/content/sen/Committee/412/secd/rep/rep16jun15a-e.pdf> [perma.cc/R8Y3-FFEY].

Parliament (though the government reiterated publicly as recently as February 2019 that it intended to establish an oversight mechanism).[67]

Much has been written about the need for an independent accountability mechanism and the possible design of such a body, so I will not belabour those points here.[68] I will simply underline a few ways in which the need for an independent review body is especially acute in relation to refugee claims, and the *Sun Sea* cases make this starkly evident.

One procedural feature of Canadian refugee law particularly underscores the need for an independent accountability mechanism. Refugee claimants are required by section 16 of the *Immigration and Refugee Protection Act* to answer CBSA's questions truthfully. Instead of having a right to remain silent in the face of an adversarial interrogation, the claimant has an obligation to answer. As claimants are making a request of Canada, an obligation to answer questions is not problematic in itself, but it does make claimants uniquely vulnerable in relation to their interrogators. While a claimant is detained, as the *Sun Sea* claimants were, a failure to cooperate and to answer questions could be invoked to justify more lengthy detention, or be used as the basis of an adverse inference against the claimant in their hearing. As the claimants have no choice but to answer, it is especially important that the conduct of the officers carrying out the questioning be fair and act in line with appropriate standards – but there is no independent review body to review and verify this. By contrast, in other kinds of police questioning in which suspects have the right to remain silent and witnesses have no obligation to speak and are free to walk away, each of them could complain to an independent body if they felt they were treated unfairly in those interactions. There is simply no principled or practical justification for CBSA's status as the only law enforcement agency in Canada that lacks an external accountability mechanism.

As noted above, it is often difficult to raise systemic issues in individual cases—particularly since refugee claimants are understandably

67. Michelle Zilio, "Ottawa mulls greater scrutiny of border agency after detainee deaths," *The Globe and Mail* (March 15, 2016), online: <www.theglobeandmail.com/news/politics/liberals-mull-improved-scrutiny-of-border-agency-amid-criticism-over-deaths/article29252389/> [perma.cc/WSF2-GEP5]; Canada Border Services Agency, "Minister Goodale announces roll-out of expanded Alternatives to Detention Program through the National Immigration Detention Framework" (24 July 2018), online: *Government of Canada* <www.canada.ca/en/border-services-agency/news/2018/07/minister-goodale-announces-roll-out-of-expanded-alternatives-to-detention-program-through-the-national-immigration-detention-framework.html> [perma.cc/KKC6-JN6M]; "National security committee to probe Border Services activities," *CBC News* (5 February 2019), online: <www.cbc.ca/news/politics/nsicop-reviews-cbsa-1.5006772> [perma.cc/KQ5G-UJMU].

68. *BCCLA*, *supra* note 16.

focused on securing their status in Canada, and it may not be in their direct best interest to pursue a broader complaint about their treatment by CBSA. For this reason, and because many of the people with whom CBSA deals are vulnerable persons and may be outside of Canada, the ability to receive complaints from third parties is a critical feature of any potential independent review mechanism.[69]

In the *Sun Sea* cases, while the ability to make individual complaints would have certainly made a difference, it would have been especially useful for third parties to be able to make such complaints. Unlike individual claimants, organizations working with refugees or human rights organizations could have filed comprehensive complaints about CBSA's approach to the *Sun Sea* cases, based on information shared with them from multiple individuals' cases, in order to help shed light on whether CBSA officers, and CBSA as an organization, conducted itself fairly and appropriately. Had such a review determined that there were shortcomings in CBSA's conduct—as I argue there were—that may have produced useful recommendations to guide future conduct, and training, and would have informed the public and Parliament about CBSA's activities. If such a mechanism had been available and used early on as the *Sun Sea* cases began to be determined, the external scrutiny itself, along with any findings or decisions from such a body, might have had a positive effect on CBSA conduct throughout the years of dealing with the *Sun Sea* claimants in ensuring that claimants were both treated fairly and experienced the process as a fair one.

2. *Separation between the roles of enforcement officers and hearings officers*

As noted above, hearing officers act as Crown representatives. They represent the Minister of Public Safety and Emergency Preparedness and/or the Minister of Immigration, Refugees and Citizenship at hearings at the Immigration and Refugee Board, including at detention reviews, admissibility hearings, appeals of admissibility determinations, and refugee hearings.[70] The Federal Court has held that hearing officers, as Crown representatives, like Crown counsel, owe the tribunal a duty of candour.[71]

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69. "Proposed CCR Model for a CBSA Accountability Mechanism" (March 2016), online (pdf): *Canadian Council for Refugees* <ccrweb.ca/sites/ccrweb.ca/files/ccr-cbsa-accountability-model.pdf> [perma.cc/7DST-QEC8] at 2 ; *BCCLA*, *supra* note 16 at 46-47.

70. The Honourable Ralph Goodale, "CBSA 2017-2018 Departmental Plan," online (pdf): *Canada Border Services Agency* <www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2017-2018/report-rapport-eng.pdf> [perma.cc/U97Q-7MRY] at 23.

71. *Shen v Canada (Citizenship and Immigration),* 2016 FC 70.

Section 6(1) of the *Immigration and Refugee Protection Act* allows the Minister of Public Safety and Emergency Preparedness to delegate his authorities set out in the *Act* and *Regulations* to CBSA officers. While, in general, the principal function that hearing officers perform is to represent the government at the tribunal, they are, in fact, authorized to do much more. Many of the powers conferred on them by the delegated authority can also and are typically used by enforcement officers. These include the power to arrest and detain certain foreign nationals without a warrant, the power to conduct an examination of a person seeking entry into Canada, the authority to determine what evidence and documents are necessary to complete the examination of the foreign national, including photographic and fingerprint evidence, and the power to search any person seeking to enter Canada.[72]

While hearing officers do not typically perform these purely investigative and enforcement roles, the fact that they have been assigned the legal authority to do so demonstrates that a separation between the investigative and hearing officer roles was not built into the design of the system. The lack of formal separation suggests a lack of attention to the danger of mixing investigative/enforcement roles with the responsibilities of representing the Crown when appearing at the tribunal.

The CBSA memo that was written in anticipation of the *Sun Sea's* arrival provides a snapshot of an agency in which investigation/enforcement work and the arguments to be presented at the tribunal in individual claims were thought of as one uniform strategy. The strategy mapped out an aggressive approach in which detention would be sought as long as possible, and where hearing officers would apply to intervene, appear and oppose each refugee hearing.[73] It raises a question as to whether, in this context, hearing officers would have been more susceptible to pre-judge the individual cases of *Sun Sea* claimants. We expect criminal Crown counsel to exercise a duty of impartiality and objectivity. We expect this as a matter of fairness, but also in order to avoid undue political control over prosecutions and to avoid law enforcement acting as the driving force in prosecutions.

The CBSA structure is not built to ensure hearings officers are independent from the law enforcement side. Hearings officers and inland enforcement officers work in the same agency; despite having different

72. The Honourable Ralph Goodale, "Delegation of Authority and Designations of Officers by the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations," online: *Canada Border Services Agency* <www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/delegation/irpa-lipr-2016-07-eng.html> [perma.cc/9TQN-KUD8].

73. *CBSA Arrivals memo*, *supra* note 3.

direct managers, they often work together in the same physical space. Moreover, as set out above, hearing officers are legally delegated the power to conduct investigative and law enforcement functions.

In the criminal context, it is beyond debate that this conflation of roles would be unacceptable. Criminal prosecution and law enforcement, while they work in collaboration and consultation with each other, are meant to operate entirely independent of each other. The need for this independence and separation has been referred to repeatedly by the courts and inquiries in relation to wrongful convictions.[74] The Ontario *Crown Policy Manual* states: "Although Crown counsel work closely with the police, the separation between police and Crown roles is of fundamental importance to the proper administration of justice."[75] The police and prosecutorial functions are housed in separate ministries (if not separate levels of government all together). They have completely different mandates.

In addition to their formal separation from law enforcement, Crown prosecutors also have an important measure of independence from political direction. While the Attorney General sets broad policy and direction, Crown counsel are generally given significant latitude to make decisions in individual cases based on the merits of the case.[76] Their duty is to represent the public interest in seeking the prosecution of the guilty and the protection of the innocent[77]—evaluating and seeking a just outcome in each individual case, and not simply seeking convictions. As the Supreme Court of Canada stated in *Boucher*, "[i]t cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction. […] The role of prosecutor excludes any notion of winning or losing."[78]

While the role of the hearing officer in a refugee or immigration proceeding may not be perfectly analogous to that of a Crown prosecutor in a criminal proceeding, hearing officers—like Crown attorneys—deal with

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74. Jeremy Tatum, "Re-Evaluating Independence: The Emerging Problem of Crown-Police Alignment" (2012) 30:2 Windsor YB Access Just 225 at 226; *PPSC Deskbook*, *supra* note 59 s 2.1 "Independence and Accountability in Decision Making"; Newfoundland and Labrador, Attorney General, "Crown Attorney's Independence and Accountability in Decision Making" (1 October 2007) at 2-4, online (pdf): *Newfoundland and Labrador Department of Justice and Public Safety* <www.justice.gov.nl.ca/just/prosect/guidebook/002.pdf> [perma.cc/6JGP-DECY]; Ontario, Attorney General, "Crown Prosecution Manual: D.31 Professionalism," online: *Government of Ontario* <www.ontario.ca/document/crown-prosecution-manual/d-31-professionalism> [perma.cc/YXS9-3U8Q].

75. Ontario, Attorney General, "Role of the Crown—Preamble to the Crown Policy Manual" (21 March 2005) at 3, online (pdf): *Attorney General of Ontario* <www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf> [perma.cc/49ET-UEDA] (citing *R v Regan,* 2002 SCC 12).

76. *Ibid* at 2.

77. *Ibid*; See also *R v Boucher*, [1955] SCR 16 at paras 23-24, [1954] SCJ 54 [*Boucher*].

78. *Boucher, ibid* at para 26.

cases in which there are significant rights and interests at stake, including life or death questions, questions of liberty and family separation. The Supreme Court of Canada has recognized that in certain cases, the stakes for the individual refugee claimant can be even more serious than that of an accused person in a criminal trial.[79] While the Minister of Public Safety, for whom the hearing officers work, does not have the same non-partisan and independent role in relation to the justice system as does the Attorney General, the government nevertheless has a duty under the *IRPA* to uphold the *Refugee Convention*, to fairly assess claims and to protect refugees, while also protecting the integrity of the refugee protection system and public safety. This is not unlike the balanced role of the Crown attorney in seeking to prosecute the guilty while protecting a fair process and protecting innocent, in the public interest.[80]

The question of structural separation between CBSA officers representing Canada in hearings on the one hand, and CBSA law enforcement activities on the other has, to my knowledge, not been the

79. Canadian law has also evolved to recognize the severity of the potential immigration consequences of criminal convictions. The Supreme Court of Canada has recently considered three cases dealing with the impact of immigration consequences that flow from criminal convictions on non-citizens. In *R v Pham*, 2013 SCC 15, the Court considered these consequences to be so significant that it decided that appellate courts may set aside or vary criminal sentences in instances in which the collateral immigration consequences were not considered by the sentencing court. In *Tran v Canada (PSEP)*, 2017 SCC 50, there was recognition that an individual can experience the immigration consequences of a crime more severely than the criminal consequences. The Court accepted evidence that the individual concerned had sought a prison sentence, a harsher criminal penalty, rather than a longer conditional sentence, in order to avoid deportation. In *Wong v Her Majesty the Queen*, 2018 SCC 25, the Court held that a guilty plea was uninformed if an accused was not aware of the collateral immigration consequences of a conviction. Taken together, these cases demonstrate an elevated concern in the law for the uniquely serious nature of immigration consequences for an individual.

80. A change of this nature suggests the need to change the training and perhaps the required qualifications for CBSA hearings officers. In fact, that need is already suggested in the CBSA's own evaluation of its hearings program. CBSA's evaluation report states that hearings officers "are highly specialized and require strong technical and legal knowledge with which to prepare cases and arguments for presentation in front of the IRB," but notes that the "feeder groups" of candidates coming to the positions "represent a wide range of backgrounds and levels of experience within the immigration and legal streams." The evaluation concluded, in relation to training: "Key Finding: National Training Standards for HOs [hearings officers] exist. However, the delivery and timing of the training provided by the CBSA to Hearings Program staff does not align with the need for specialized training (such as, the preparation of legal arguments) and the unique requirements of the various feeder groups." The report also identified a need to re-evaluate recruitment strategies for the hearings officer positions "to account for the specialized and technical job functions of Hearings Officers." See: CBSA Internal Audit and Program Evaluation Directorate, "Evaluation of the CBSA Hearings Program" (December 2018), online: *Canada Border Services Agency* <www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2018/imp-pa-eng.html> [perma.cc/5VEV-CQJV]. CBSA recognizes that its current program does not adequately train hearings officers to make legal arguments, despite that function being at the core of their work. Under any structural model, whether hearings officers are made more independent or not, this clearly needs to be remedied in order to ensure that the system works properly and fairly.

subject of any serious consideration by the government of Canada in recent years. The *Sun Sea* cases demonstrate how the lack of separation can have an impact on the rights and interests of refugee claimants. This same lack of independence from CBSA's law enforcement functions is likely to affect the conduct of thousands of other cases.

My observations and recommendations are consistent with those from a July 2018 IRB ordered External Audit of 300 longer-term detention cases.[81] While CBSA was not the focus of the audit's findings (as it was directed at evaluating the work of the Immigration Division), the auditor made a number of a findings relating to the conduct of CBSA hearing officers appearing before the Immigration Division in detention cases. These include hearing officers sometimes overstated the evidence or drew conclusions based on speculation rather than proven fact, there was evidence that hearing officers provided inaccurate information to the tribunal, hearing officers failed to disclose relevant materials to the tribunal and the detained party, and in some instances, hearing officers appeared to intimidate tribunal members. The auditor compared the role of hearing officers to that of Crown counsel, and noted their failure to take an "officer of the court" approach:

> While outside the scope of this audit, it is clear that a more nationally consistent approach on the part of CBSA that reflected its role as an "officer of the court" could greatly assist the ID in meeting the expectations of the courts and Charter standards. This can be done without compromising CBSA's legitimate interests as a party before the ID in the same manner that Crown Attorneys function in the criminal courts across this country every day.[82]

In my view, therein lies the fundamental problem in how CBSA hearing officers perform their role—hearing officers do not consistently view the role they are playing before the tribunal as one that is more akin to criminal Crown counsel than to that of their colleagues who conduct investigations and enforcement actions. Structurally separating the hearing officer and law enforcement functions of the CBSA would improve the integrity of the refugee, detention and admissibility determination systems. It may be

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81. "Report of the 2017/2018 External Audit (Detention Review)" (20 July 2018), online: *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx> [perma.cc/GGA3-7DT] [*Detention Audit*]; See also Brendan Kennedy, "'What if we rattle his f—n' cages?' Government officials overheard discussing how to cross-examine mentally ill detainee," *The Toronto Star* (28 June 2018), online: <www.thestar.com/news/gta/2018/06/28/star-reporter-overhears-government-officials-discuss-how-to-cross-examine-mentally-ill-immigration-detainee.html> [perma.cc/59G2-DKG6].

82. *Detention Audit*, *ibid* "Role and Mandate of CBSA."

that this separation would involve locating their roles in different agencies and under different ministers; or it could be that hearing officers are not delegated with the power to perform investigative and enforcement functions and the two types of officers do not share the same physical space. While hearing officers and law enforcement will often, and quite properly, communicate and collaborate with each other, they should be separate in fact, and in appearance. At the very least, dialogue must begin about the proper role of hearing officers before the Immigration and Refugee Board with a plan to address the findings about their misconduct before the tribunal.

Conclusion

It has been almost nine years since the *MV Sun Sea* landed on the coast of British Columbia. Four hundred and ninety-two refugee claimants were subjected to an intense amount of scrutiny and an overwhelming amount of state resources mounted to oppose their claims and to seek their continued detention. Despite the aggressive fight against their claims for protection, many of these claimants have been recognized as refugees and live in Canada.[83] Some of those found to qualify as protected persons continue to wait to be reunited with their immediate family members, whom they left behind. Some still await a hearing on their claim or a determination of their risk of return.[84] Others were found inadmissible based on an interpretation of "people smuggling" that has now been overturned by the Supreme Court of Canada.

The handling of the *Sun Sea* claims should serve as a lesson to government. I have argued in this paper that the pre-determined, aggressive approach used by CBSA to fight their legal claims threatened basic principles of the rule of law. The CBSA's approach to the legal claims of the *Sun Sea* passengers highlights the systemic need for reform in CBSA design to ensure meaningful access to accountability reviews and checks on undue political influence in the adjudicative process.

83. As of February 2019, of 492 *Sun Sea* refugee claims filed, 335 were accepted, 107 were refused, and 37 were abandoned or withdrawn. Source: Email to author from IRB, 1 March 2019.

84. Thirteen claims remain to be determined. Source: Email to author from IRB, 1 March 2019.