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LEGISLATIVE SUMMARY

Bill C-31:

An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act

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Legislative Summary of Bill C-31

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-31: AN ACT TO AMEND THE IMMIGRATION AND REFUGEE PROTECTION ACT, THE BALANCED REFUGEE REFORM ACT, THE MARINE TRANSPORTATION SECURITY ACT AND THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION ACT*

1 BACKGROUND

Bill C-31, An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act (short title: Protecting Canada's Immigration System Act), was introduced in the House of Commons on 16 February 2012. **The bill was referred to the House of Commons Standing Committee on Citizenship and Immigration on 23 April 2012, and the committee reported the bill back to the House of Commons with 15 amendments on 14 May 2012.**

The bill makes a number of changes to Canada's inland refugee determination system by amending the *Balanced Refugee Reform Act*[1] (not yet fully in force) and by introducing changes that are entirely new. It also amends the inland refugee determination process with respect to "irregular arrivals" of refugee claimants, through provisions substantively similar to those previously introduced in Bill C-4, An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act[2] (currently at second reading in the House of Commons). Third, the bill amends other areas of immigration law, notably by providing for the collection of biometrics from temporary resident visa applicants and expanding opportunities to sponsor immigrants.

1.1 CHANGES TO CANADA'S INLAND REFUGEE DETERMINATION SYSTEM

As a signatory to the 1951 United Nations *Convention Relating to the Status of Refugees* and its protocol, Canada cannot return people to territories where they face persecution on the basis of their race, religion, nationality, membership in a particular social group or political opinion. These persons are known as Convention refugees.

Canada is also signatory to the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the implementation of Canada's commitment to this international instrument is reflected in its domestic law and practice. As a result, in Canada, refugee protection is also conferred on "persons in need of protection" who face individualized risk of death, torture, or cruel and unusual treatment or punishment.

The United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air* and its parent convention, the *Convention against Transnational Organized Crime*, provide a broad legal framework for countering these activities. Canada's efforts to prevent and combat migrant smuggling are guided by this convention and its

protocol, which Canada helped to draft. These were ratified by Canada in 2002. Migrant smuggling became an internationally recognized crime in 2004, when these instruments came into force.

The *Canadian Charter of Rights and Freedoms* is also an important part of the legal framework for those seeking asylum in Canada.[3] In 1985, the Supreme Court of Canada decided in *Singh* v. *Minister of Employment and Immigration* that the Charter protects refugee claimants;[4] this decision has been instrumental in setting the standards for procedural fairness that must be met in such cases.

Asylum seekers or refugee claimants whose claims for protection are deemed eligible are offered the opportunity of a hearing by the Immigration and Refugee Board of Canada (IRB), a quasi-judicial federal body. Following an initial interview with an immigration officer, claimants for refugee protection proceed to a hearing before a panel of the IRB's Refugee Protection Division (RPD). Unsuccessful claimants are removed from Canada; however, they may apply to the Federal Court of Canada for a judicial review and a stay of their removal order.

The government has indicated that the proposed changes to the inland refugee determination system under Bill C-31 are intended to make the system faster and fairer and to address the problem of human smuggling.[5] In order to meet these goals, the bill allows for differentiation between groups of refugee claimants, who are then subject to different treatment. The important designations are described below, while the corresponding differences within the refugee determination system are summarized in Table 1.

- Claimants from *designated countries of origin*: nationals from countries designated by the Minister of Citizenship and Immigration for having low refugee claim success rates, high claim withdrawal and abandonment rates, or meeting certain criteria concerning protections available. (Bill C-31, clause 58)
- Claimants whose claims are *manifestly unfounded*: foreign nationals whose claims for protection were rejected by the Refugee Protection Division because it is of the opinion that they were clearly fraudulent. (Bill C-31, clause 57)
- Claimants whose claims have *no credible basis*: foreign nationals whose claims for protection were rejected by the Refugee Protection Division because there was no credible or trustworthy evidence on which the claim could have been accepted. (*Immigration and Refugee Protection Act* (IRPA), section 107(2))
- *Designated foreign nationals*: claimants who arrive in Canada as members of a group that is designated by the Minister of Public Safety as an "irregular arrival." (Bill C-31, clause 10)
- Claimants who make a claim under an *exception to Safe Third Country Agreements*. (IRPA, section 102)

Table 1 – Differences in the Refugee Determination Process by Claimant Group

Claimant Group	Refugee Protection Hearing Timeline[a]	Refugee Appeal Division	Detention Review Regime	Stay on Removal for Judicial Review[b]	Other Restrictions
Most claimants (standard)	60 days	Yes	Within 48 hours of initial detention; within the following 7 days; at least once every 30-day period thereafter	Yes	
Designated countries of origin	30 days for inland claims; 45 days for port-of-entry claims	No	Standard	No	Failed claimants not eligible for pre-removal risk assessment until 36 months have passed since the negative Refugee Protection Division decision Ineligible for work permit for 180 days[b]
Manifestly unfounded	60 days	No	Standard	No	
No credible basis	60 days	No	Standard	No	
Designated foreign nationals		No	Within 14 days after initial detention; 6 months after the conclusion of the first review; 6 months after any subsequent review	No	5-year wait for applications for permanent residence on humanitarian and compassionate grounds 5-year wait for eligibility for permanent resident status No access to travel documents until permanent resident status
Exception to Safe Third Country Agreements	60 days	No	Standard	No	

a. The timelines in this table are those the government has stated it intends to implement. They are not included in the bill, which provides only that timelines for the refugee protection hearing and refugee appeal decision may be established in regulations.

b. This change is not included in the bill, as it can be accomplished through regulations.

2 DESCRIPTION AND ANALYSIS

As introduced, Bill C-31 consists of 85 clauses. This description and analysis examines the following aspects of the proposed legislation:

- changes to the *Balanced Refugee Reform Act*, not yet fully in force;
- provisions dealing with "irregular arrivals" of refugee claimants (Bill C-4);
- other changes to refugee protection in Canada; and
- changes to other aspects of immigration law, notably biometrics and sponsorships.

The following discussion highlights selected aspects of the bill and does not review every clause.

2.1 CHANGES TO THE *BALANCED REFUGEE REFORM ACT*, 2010

The *Balanced Refugee Reform Act* (BRRA) was introduced as Bill C-11 in the 40th Parliament and received Royal Assent on 29 June 2010. The BRRA makes changes to the inland refugee determination process that are intended to accelerate it as well as dissuade non-genuine refugees from applying for protection. Differentiating between refugee claimant groups is an important feature of the legislation, as, under Bill C-11 as amended, different groups are subject to different timelines in the refugee determination and appeals process. With the exception of a few provisions,[6] most of the BRRA is to come into force on 29 June 2012.

Bill C-31 amends the BRRA and the inland refugee determination process in significant ways; some of these resemble Bill C-11 as introduced, while other elements are entirely new. The bill makes the following significant changes: it replaces the interview that had been introduced into the refugee determination process by the BRRA with a different procedure; bars certain groups of refugee claimants from appealing refugee protection decisions; changes the process and criteria for designating countries; and expands the restrictions on applications to remain in Canada after a negative refugee determination decision. The bill also specifies that the BRRA will come into force at a date to be fixed by order of the Governor in Council, rather than on 29 June 2012.

2.1.1 INITIAL STEPS: BASIS OF CLAIM DOCUMENT AND HEARING (CLAUSES 33, 49, 56, 59, 61 AND 84)

Under the BRRA, the previous method of gathering information on an individual's refugee claim, the Personal Information Form (PIF), is to be replaced by an interview with a public servant at the IRB. Previously, claimants had 28 days to submit a complete PIF; under the BRRA, however, the interview may be held as soon as 15 days after the refugee claim is referred. The IRB has indicated that such interviews will be held as close to 15 days after referral as possible.[7]

Bill C-31 replaces the interview with a Basis of Claim document. It also introduces a distinction between the process for refugee claims made at a port of entry, whereby

claimants are directed to provide the necessary documentation to the Refugee Protection Division (clause 56), and claims made elsewhere in Canada, whereby claimants are directed to provide necessary documentation to an immigration officer (clause 33). The bill does not specify time limits for submitting the Basis of Claim document, which will be established in regulations (clause 59). Clause 49 stipulates that the IRB rules may distinguish between claimants who make their claims at a port of entry and those who make their claims elsewhere. Further, once the relevant sections of the BRRA and the relevant clauses of Bill C-31 are in force, the IRB rules may distinguish among claimants on the basis of whether they are nationals of a designated country of origin (clause 84(5)).

One of the functions of the interview introduced by the BRRA was to set the date for the hearing before the Refugee Protection Division. As Bill C-31 removes the interview step, it provides in clause 56 that the *referring officer* must, "in accordance with the regulations, the rules of the Board and any directions of the Chairperson," fix the hearing date before the RPD. Factors to be taken into account in fixing or changing the hearing date may be stipulated in IRB rules (clause 61).

As was the case with the BRRA, Bill C-31 allows for time limits to be established by way of regulations for the RPD hearing (clause 59). However, the government has signalled its intentions to set the hearing dates sooner than those proposed in draft regulations to implement the BRRA.[8] According to a backgrounder issued by Citizenship and Immigration Canada (CIC), hearings will be scheduled for inland claims from individuals from designated countries of origin within 30 days, for port-of-entry claims from individuals from designated countries of origin within 45 days (as opposed to 60 days for designated country of origin claimants in the proposed regulations) and within 60 days for all other claimants (as opposed to 90 days in the proposed regulations).[9]

2.1.2 Changes to the Refugee Appeal Division

2.1.2.1 No Access for Certain Groups (Clauses 36, 59 and 84)

The *Immigration and Refugee Protection Act* created a new division within the IRB: the Refugee Appeal Division (RAD), where refugee determinations made by the RPD could be appealed. The RAD provides claimants with an opportunity to introduce new evidence about their claim and to do so in an oral hearing, if necessary. The RAD-related provisions of the IRPA have not yet entered into force.

The BRRA makes the proposed RAD more robust and sets 29 June 2012 as the date on which the relevant provisions will come into force. Under the BRRA, all refugee claimants will have access to the RAD, although decisions on claims made by people from designated countries of origin and those whose claims are found to be manifestly unfounded are subject to different (accelerated) timelines.

Bill C-31 bars access to the RAD for RPD decisions concerning five groups of refugee claimants. Specifically, clause 36 states that RPD decisions concerning the following four refugee claimant groups may not be appealed: designated foreign nationals (a restriction originally proposed in Bill C-4); those whose claims are found

to have no credible basis; those whose claims are found to be manifestly unfounded; and those whose claims are heard as exceptions to Safe Third Country Agreements.[10] The regulations may provide exceptions to the bar for the last-named group of claimants (clause 59). When the relevant sections of the BRRA and the relevant clauses of Bill C-31 come into force, the fifth group, claimants from designated countries of origin, will also be unable to appeal RPD decisions to the RAD (clause 84(2)).

Although RPD decisions for these groups cannot be appealed to the RAD, claimants or the Minister may apply to the Federal Court seeking judicial review of any decision, pursuant to section 72 of the IRPA.

2.1.2.2 Certain Decisions Not Eligible for Appeal (Clause 36)

Bill C-31 expands the list of decisions that are not eligible for appeal to the RAD from what was envisioned in section 13(1) of the BRRA. Clause 36 of Bill C-31 indicates that a determination that a refugee claim has been withdrawn or abandoned may not be appealed. It also indicates that the Minister may not appeal to the RAD in relation to decisions made by the RPD on cessation of refugee protection or the vacation of claims for refugee protection.

Cessation occurs when the reasons for which the protection was granted no longer appear to exist (IRPA, section 108) – for instance, if the person has returned to the country from which he or she sought protection, or the conditions in the country have changed. Vacation of a decision will occur when the original RPD decision was obtained through omission or misrepresentation (IRPA, section 109).

2.1.2.3 Time Limits for Refugee Appeal Division Decisions (Clause 59)

As was the case with the BRRA, Bill C-31 provides that time limits for filing and perfecting an appeal and rendering RAD decisions will be established by way of regulations (clause 59). The draft regulations published after the BRRA received Royal Assent provide that the RAD would have 120 days to render a decision in cases when no oral hearing is held.[11] The government intends to shorten this period to 90 days,[12] and may do so through future regulations.

2.1.2.4 Coming into Force of the Refugee Appeal Division (Clause 55)

Finally, whereas the BRRA states that the provisions enacting the RAD will come into force no later than 29 June 2012, Bill C-31 provides that they will come into force on a day to be fixed by order of the Governor in Council (clause 55).

2.1.3 Designated Countries of Origin (Clauses 58 and 84)

The BRRA introduced a new power for the Minister of Citizenship and Immigration to designate by order nationals of a country or a part of a country, or a class of nationals of a country, who would face accelerated timelines in the refugee process. The Minister could make a designation only if the threshold established in the

regulations for claim volume and claim rejections was reached, and had to take into account certain factors in making a designation, such as the human rights record of the country in question and the availability of mechanisms for seeking protection and redress. The draft regulations also required recommendation from an advisory panel of experts for designation.[13]

The purpose of this new power to designate countries, parts of countries, or classes of nationals within a country, was to provide a means of accelerating the refugee determination and appeals processes for claimants in situations that normally would not require protection. Recognizing that a country might not be "safe" in all regions or for all groups, designation under the BRRA could also be specific to a part of a country or class of nationals.

Bill C-31 changes the process for designation and the impact on claimants of being from a designated country of origin. First, in Bill C-31, designation applies to entire countries only. Second, in clause 58, Bill C-31 changes the threshold criteria for designation, according to two different scenarios. In the first scenario, when the number of claims from a country reaches a certain threshold, to be established by ministerial order, the rate of rejected, withdrawn, and abandoned claims of nationals of that country is the only criterion for designation.

In the second scenario, when the number of claims from a country is less than the threshold established by ministerial order, the Minister may make a designation if he or she believes the country in question has an independent judicial system, recognizes basic democratic rights and freedoms and makes available a mechanism for redress, and if civil society organizations exist.

Claimants from designated countries of origin would face greater restrictions under Bill C-31 than under the BRRA, which only accelerated their timelines for RPD and RAD decisions. As indicated above, under Bill C-31 failed claimants from designated countries of origin would not have access to the RAD to appeal a negative RPD decision. **In addition, they would not be eligible for pre-removal risk assessment until 36 months had passed since their negative RPD decision**. Other restrictions may be made by regulation. For example, the government has signalled its intention to make claimants from designated countries of origin ineligible for a work permit until their claim is approved by the IRB or 180 days have passed.[14]

Under the current regime, when claimants are referred to the IRB they are given a conditional removal order that will come into force if the decision from the IRB is negative. However, failed claimants who appeal to the Federal Court are granted an automatic stay of removal.[15] An additional restriction on claimants from designated countries of origin was proposed in regulations after the BRRA received Royal Assent: they would not be granted an automatic stay of removal upon filing a leave to appeal application to the Federal Court.[16] In background material on the changes introduced by Bill C-31, the government has indicated that it intends to reintroduce similar regulations, and to expand the exception to the automatic stay of removal to include claims found to have no credible basis, those from designated foreign nationals, and those made as exceptions to Safe Third Country Agreements.[17]

2.1.4 Changes to Finding of "Manifestly Unfounded Claim" (Clause 57)

The BRRA, as amended, provided that if the RPD rejects a claim for refugee protection, it may state in its reasons for the decision that the claim is manifestly unfounded if the RPD is of the opinion that the claim is clearly fraudulent. Clause 57 of Bill C-31 removes the discretion currently provided by the word "may," replacing it with "must." If the RPD is of the opinion that a claim is clearly fraudulent, it *must* state in its reasons for the decision that the claim is manifestly unfounded. People with manifestly unfounded claims cannot access the RAD and, depending on the regulations as indicated above, may not be eligible for a stay of removal for judicial review.

2.1.5 Restrictions on Pre-Removal Risk Assessment (Clauses 38, 40, 60**, 69 and 84**)

An unsuccessful claimant facing removal may be eligible for a pre-removal risk assessment (PRRA) by CIC. In this process, submissions are made concerning facts that were not presented before the IRB because they were unknown at the time. The PRRA is a paper review evaluating the risks that the individual would face if he or she were returned to the country of origin. The PRRA is offered only when valid travel documents are available for the person facing removal and must be completed before removal takes place.

The BRRA introduced a bar on PRRAs for unsuccessful refugee claimants for the year following the negative IRB decision, though the Minister could make exemptions to this bar for nationals of a country, nationals who lived in a given part of a country, and a class of nationals of a country (section 15(4)). Bill C-31 extends the bar on PRRA applications to include those who received a negative PRRA decision within the previous 12 months. **Further, the bar on PRRA applications for failed claimants from designated countries of origin was extended through amendment at committee stage, to provide that these claimants may not apply for PRRA for 36 months from the negative RPD decision.** The Minister may, in these cases, make the same exemptions as described above (clause 60(3)).

The 12-month waiting period will come into force on the day Bill C-31 receives Royal Assent, and the 36-month waiting period for nationals of designated countries of origin will come into force when the relevant sections of the BRRA come into force (clauses 69 and 84).

Bill C-31, in clause 60(2), also extends the exemptions to the 12-month bar on PRRA applications to include those whose claims were deemed to be rejected because they were vacated (IRPA, section 109(3)).

Finally, Bill C-31 also provides, in clause 40, that the regulations may include provisions respecting time limits for PRRA decisions.

2.1.6 Transitional Provisions and Coming into Force (Clauses 54, 66, 68, 69 **and 83.1**)

Bill C-31 amends the transitional provisions of the BRRA so that the changes affect most claims in process. Whereas the BRRA applied only to claims where the claimant had not yet submitted a PIF, Bill C-31 applies to every claim referred to the

RPD before this bill comes into force if there has been no hearing or, if there has been a hearing, where no substantive evidence has been heard. In respect of a claim referred before the bill comes into force, if a PIF has not been submitted and the time limit for doing so has not expired, the claimant must submit the PIF as required by the *Refugee Protection Division Rules* as they read on that day (clause 66).

Bill C-31 also limits access to the RAD for decisions in process. Clause 68 provides that decisions referred to the RPD before the coming into force of this bill may not be appealed to the RAD, whereas the BRRA used a cut-off of decisions made by the RPD. With respect to RPD decisions set aside at judicial review, Bill C-31 provides that the new decision will be made by the RPD as amended and there is no appeal to the RAD (clause 68).

Applications for PRRAs will be terminated if they were made before the coming into force of this section and did not comply with the 12-month restriction (clauses 68 and 83.1). Before amendment by the committee, clause 68 allowed claimants who had been referred to the RPD before the coming into force of Bill C-31 access to PRRAs without a 12-month restriction.

Rather than coming into force no later than 29 June 2012 as originally provided, under Bill C-31 the provisions of the BRRA will come into force on a day or days to be fixed by order of the Governor in Council. The exceptions are those sections that came into force immediately upon Royal Assent of the BRRA in 2010, **and section 15(3) of the BRRA, which will come into force when Bill C-31 receives Royal Assent** (clause 69, **as amended by the committee**).

The provision in the BRRA that transferred responsibility for most PRRA decisions from CIC to the IRB no later than 29 June 2013 has been removed. Instead, Bill C-31 provides that the regulations may provide transitional provisions for PRRA decisions (clause 54).

2.2 Provisions Dealing with "Irregular Arrivals" of Refugee Claimants (Bill C-4)

Please note that Bill C-31 includes most of the provisions that are contained in Bill C-4, currently at second reading in the House of Commons. The only significant difference between the two bills is that Bill C-31 exempts minors below the age of 16 from detention.

This section describes the changes that Bill C-31 will make to the IRPA in regards to irregular migration. The following three aspects of Bill C-31 are examined:

- the new category of "designated foreign national" which applies to those who arrive in Canada as members of a group that is designated by the Minister of Public Safety as an "irregular arrival," and the implications this designation may have for these individuals;[18]
- new definitions regarding human smuggling, criminal organization and terrorist group; and
- increased penalties for contraventions of the *Marine Transportation Security Act*.

2.2.1 "Designated Foreign National" Regime Created in the *Immigration and Refugee Protection Act*

Among other things, Bill C-31 creates under the IRPA the category of "designated foreign national." This new category applies to persons who arrive in Canada as part of a group designated by the Minister as an "irregular arrival." Designated foreign nationals will be subject to a different detention regime than other refugee claimants and will face restrictions on applications different from other claimants.

2.2.2 "Irregular Arrival" and "Designated Foreign National" (Clauses 3, 10, 81 and 82)

2.2.2.1 Designation of a Group as an "Irregular Arrival" (Clause 10)

Clause 10 provides for the creation in the IRPA of two new sections, including new section 20.1 concerning the designation of "irregular arrival."

New section 20.1(1) gives the Minister discretionary power that he or she can exercise in the "public interest"[19] to order the arrival in Canada of a group of persons to be designated as an "irregular arrival" based on one of two criteria (new sections 20.1(1)(*a*) and (*b*)):

- The Minister is of the opinion that
  - *neither* examinations of the persons in the group, particularly for the purpose of establishing the identity or determining the inadmissibility of those persons[20]
  - *nor* any other investigations concerning persons in the group

  can be conducted in a "timely manner" (new paragraph 20.1(1)(*a*)).[21]
- The Minister has reasonable grounds to suspect that there has been, or will be, human smuggling[22] for the benefit/profit of, at the direction of, or in association with, a criminal organization or terrorist group (new paragraph 20.1(1)(*b*)).[23]

New section 20.1(3) provides that an order of the Minister designating the arrival in Canada of a group of persons as an "irregular arrival" is not a statutory instrument for the purposes of the *Statutory Instruments Act*.[24] However, these designations must be published in the *Canada Gazette*.[25]

The Minister may not delegate authority to designate an "irregular arrival" (new section 6(3) of the IRPA).

2.2.2.1.1 Members of an "Irregular Arrival" Designated as "Designated Foreign Nationals" (Clause 10)

A foreign national who is part of a group whose arrival in Canada is designated by the Minister as an "irregular arrival" automatically becomes a "designated foreign national" unless he or she holds the documents required for entry, and on examination the officer is satisfied that the person is not inadmissible to Canada (new section 20.1(2)).

2.2.2.1.2 Retroactive Designation as an "Irregular Arrival" (Clause 81)

Clause 81(1) of Bill C-31 allows a designation of an "irregular arrival" to be made retroactively to 31 March 2009. Mass arrivals of claimants by boat in October 2009 (*Ocean Lady*) and in August 2010 (*Sun Sea*) are covered by this time period.

Clause 81(2) provides an explanation of clause 81(1) for greater certainty, and notes that an individual who becomes a "designated foreign national" as a result of a retroactive designation under clause 81(1) will be subject to the full application of Bill C-31. Clause 81(3) sets out one exception, providing that new section 55(3.1)(*b*) will not apply. This means that persons who retroactively become "designated foreign nationals" and are not in detention at the time of designation will not be subject to automatic detention.

2.2.3 Consequences of Becoming a "Designated Foreign National"

2.2.3.1 Mandatory Arrest and Detention (Clauses 23 and 24)

Clause 23(3) of Bill C-31 amends section 55 of the IRPA by adding new section 55(3.1), which provides that once the Minister has designated the arrival in Canada of a group of persons as an "irregular arrival," resulting in those without proper documentation becoming "designated foreign nationals," an officer must either:

- detain the "designated foreign national" *upon entry into Canada* (new section 55(3.1)(*a*));
- arrest and detain without a warrant a foreign national who becomes a "designated foreign national" *after entry into Canada* (new section 55(3.1)(*b*)); or
- issue a warrant for the arrest and detention of a foreign national who becomes a "designated foreign national" *after entry into Canada* (new section 55(3.1)(*b*)).

2.2.3.2 Duration of Detention (Clause 24)

Bill C-31 specifies what may determine the period of detention for a "designated foreign national." Clause 24 of Bill C-31 amends section 56 of the IRPA by renumbering the current section 56 as section 56(1), and by adding a new section 56(2).

The new section 56(2) provides that detention of a "designated foreign national" is mandatory for those who are 16 years of age and older until such a time as:

- a final determination is made to allow a claim or application for refugee protection;
- the person is released as a result of an order of the Immigration Division of the IRB under section 58 (as amended); or
- the person is released as a result of a ministerial order under section 58.1.

A discussion of these provisions follows, in combination with an overview of the detention review regime for "designated foreign nationals."

2.2.3.3 Distinct Detention Review Regime (Clause 25)

Clause 25 of Bill C-31 creates a distinct regime for the review of detention for "designated foreign nationals" in section 57.1 of the IRPA. This new regime differs from existing detention review regimes currently in place under the IRPA for permanent residents, foreign nationals and persons named in security certificates.

The existing detention review regime under section 57 of the IRPA that is generally applicable to permanent residents or foreign nationals provides for the following:

- a mandatory review by a member of the Immigration Division of the reasons for continued detention within 48 hours of the start of detention (section 57(1)) or without delay afterward;
- a mandatory review by a member of the Immigration Division of the reasons for continued detention at least once during the seven days following the 48-hour review (section 57(2)); and
- a mandatory review by a member of the Immigration Division of the reasons for continued detention at least once during every 30-day period thereafter (section 57(2)).

The Immigration Division has the discretion to conduct reviews of the reasons for continued detention prior to the expiry of the next planned review, if new evidence is brought forward and all parties agree to an early hearing.

In the extraordinary case of security certificate detainees,[26] the existing detention review regime under section 82 of the IRPA provides for the following:

- a mandatory review by a Federal Court judge of the reasons for continued detention within 48 hours of the person being taken into detention (section 82(1)); and
- a mandatory review by a Federal Court judge of the reasons for continued detention at least once in the six months following the 48-hour review and subsequently once every six months (section 82(2) or (3)).

The use of the language "at least once" in section 82 of the IRPA implies that the judge has the discretion to conduct reviews of the reasons for continued detention prior to the expiry of the six-month period.

Clause 25 of Bill C-31 introduces a detention review procedure applicable only to "designated foreign nationals," as follows:

- The Immigration Division must conduct a mandatory first review of the reasons for continued detention **within 14 days** after the day of initial detention **or without delay afterward** (new section 57.1(1)).

- The Immigration Division must conduct subsequent reviews of the reasons for continued detention on the expiry of six months **following the conclusion of** the previous review **and may not do so before** the six months have expired (new section 57.1(2)).

Originally, clause 25 had provided that the Immigration Division could not conduct a first review of the reasons for continued detention unless 12 months had passed, and subsequent reviews were to be held every six months.

Release from detention prior to the initial review may occur upon the determination of a claim for refugee or protected person status, or with a discretionary order from the Minister based on exceptional circumstances **or, if in the Minister's opinion, the reasons for detention no longer exist**.

For further clarity, below is a summary of how the three regimes compare:

Table 2 – Detention Review Regimes Under the *Immigration and Refugee Protection Act*

Mandatory Reviews of Reasons for Continued Detention	Regime Applicable to Permanent Residents and Foreign Nationals (Section 57 of IRPA)	Regime Applicable to Persons Detained Under the Authority of a Security Certificate (Section 82 of IRPA)	Regime Applicable to "Designated Foreign Nationals" (New Section 57.1 of IRPA Created by Bill C-31)
First review	Within 48 hours of detention (section 57(1))	Within 48 hours of detention (section 82(1))	Within 14 days after the day of initial detention or without delay afterward (new section 57.1(1))
Second review	Within 7 days of the first review (section 57(2))	Within 6 months of the first review (section 82(2) or 82(3))	6 months following the conclusion of the previous review (new section 57.1(2))
Subsequent reviews	At least once during every 30-day period after the second review (section 57(2))	At least once during the 6-month period following the most recent review (section 82(2) or 82(3))	6 months following the conclusion of the previous review (new section 57.1(2))

2.2.3.4 Changes to the Release from Detention Regimes (Clauses 24, 26, 27 and 28)

2.2.3.4.1 Changes to Grounds for Detention (Clause 26)

Section 58 of the IRPA provides a list of factors that the Immigration Division is to consider before ordering the release from detention of a permanent resident or foreign national. Bill C-31 amends this list of factors.

If the Immigration Division is satisfied that any of the following factors are met, then the permanent resident, foreign national or "designated foreign national" (where applicable) will not be released:

- The permanent resident or foreign national is considered a danger to the public (section 58(1)(*a*)).
- The permanent resident or foreign national is considered unlikely to appear for certain proceedings under the IRPA (section 58(1)(*b*)).
- The Minister is inquiring into a reasonable suspicion that the permanent resident or foreign national is inadmissible on the grounds of security or for violating human or international rights (section 58(1)(*c*)). Further grounds of inadmissibility

are added by Bill C-31 to section (*c*), specifically "serious criminality, criminality, or organized criminality."

- The Minister is of the opinion that the identity of the foreign national has not been, but may be, established and that the foreign national has not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing his or her identity, or the Minister is making reasonable efforts to establish the identity (section 58(1)(*d*)). Paragraph (*d*) is amended by Bill C-31 to specify that this factor applies only to foreign nationals and *does not apply* to "designated foreign nationals."
- Bill C-31 creates a new section 58(1)(*e*), which sets out a factor applicable only to "designated foreign nationals" who are 16 years of age or older on the day of arrival, that the Minister is of the opinion that the identity of the "designated foreign national" has not been established.

New section 58(1.1) clarifies that the factors described in sections 58(1)(*a*) to 58(1)(*c*) and 58(1)(*e*) are the only factors to be taken into consideration by the Immigration Division for continued detention of a "designated foreign national." Clause 26 was amended by the committee to create this new section.

2.2.3.4.2 New Ministerial Power to Release from Detention (Clause 27)

Clause 27 of Bill C-31 amends the IRPA by adding new section 58.1**(1)**, which provides that, on the request of a "designated foreign national," the Minister may order his or her release if the Minister is of the opinion that exceptional circumstances exist.

New section 58.1(2) allows the Minister to release the "designated foreign national," on the Minister's own initiative, if in his or her opinion the reasons for detention no longer exist. This second circumstance in which the Minister could order release was added by the committee.

2.2.3.4.3 Changes to Release with Conditions (Clauses 26, 27 and 28)

Clause 26(2) of Bill C-31 amends section 58 of the IRPA by adding a new section 58(4), which provides that the Immigration Division, when ordering the release from detention of a "designated foreign national" who was 16 years of age or older on the day of arrival, shall impose any condition that is prescribed. Section 61 of the IRPA, as amended by Bill C-31, provides that the type of conditions will be set out in regulations. Also, when ordering the release from detention (as described above), the Minister may impose any conditions he or she considers necessary.

The imposition of mandatory conditions on "designated foreign nationals" is different from the regime applicable to permanent residents and foreign nationals being released from detention. Section 56 of the IRPA (renumbered as section 56(1) in Bill C-31) provides a discretionary power for an officer to order the release from detention of a permanent resident or foreign national prior to the first detention review by the Immigration Division, and the power to impose any conditions on the release that the officer considers necessary.

2.2.3.4.4 Impact of Breaching Conditions of Release (Clauses 5, 10, 12 and 13)

A breach of release conditions provides an officer with the discretion to refuse to consider certain immigration applications made by a "designated foreign national." Specifically, new sections 11(1.3), 20.2(3), 24(7) and 25(1.03) provide that an officer *may* refuse to consider an application for permanent residence, a request for a temporary resident permit, or an application for permanent residence on humanitarian and compassionate grounds if:

- a foreign national is a "designated foreign national";
- the person fails to comply, without reasonable excuse, with any of the conditions of release imposed on him or her under new sections 58(4), 58.1 and 98.1; and
- less than 12 months have passed since the end of the applicable five-year waiting period for these various applications.

2.2.3.5 Reporting Requirement for "Designated Foreign Nationals" Who Are Granted Refugee Protection (Clause 32)

Clause 32 creates a new section 98.1 of the IRPA, which requires "designated foreign nationals" who have obtained refugee protection in Canada to report to an officer in accordance with the regulations. This is not a requirement for others who are found to be protected persons in Canada after a determination before the IRB.

2.2.4 Other Consequences for "Designated Foreign Nationals"

2.2.4.1 Restrictions on Applications (Clauses 5, 10, 12 and 13)

Clauses 5, 10, 12 and 13 of Bill C-31 add a number of restrictions on the ability of a "designated foreign national" to make an application for permanent residence, a request for a temporary resident permit, or an application for permanent residence on humanitarian and compassionate grounds. Applications or requests from "designated foreign nationals" will not be considered for at least five years after they have become "designated foreign nationals," and the processing of these applications or requests will be suspended if a foreign national becomes a "designated foreign national" after his or her application or request is made.

The practical consequence of these waiting periods is that a "designated foreign national" can obtain refugee status or the status of a person in need of protection but will need to wait five years before being able to apply for permanent residence. A second practical consequence is that "designated foreign nationals" will not be able to sponsor their family members to come to Canada as they must have acquired permanent residence status to do so.[27]

By contrast, foreign nationals who obtain the status of refugee or person in need of protection must apply for permanent residence within 180 days of obtaining the status,[28] and are consequently able to gain permanent residence and sponsor family members.

2.2.4.2 Restrictions on Appeals to the Refugee Appeal Division (Clause 36)

As explained in section 2.1.2.1 of this paper, RPD decisions concerning "designated foreign nationals" may not be appealed to the RAD.

2.2.4.3 Restrictions on the Issuance of Refugee Travel Documents: Bill C-31 and Article 28 of the Refugee Convention (Clause 16)

Clause 16 adds new section 31.1 to the IRPA. This section provides that a "designated foreign national" is considered to be "lawfully staying" in Canada only if his or her claim or application for refugee protection is accepted and, after five years from the decision, the person becomes a permanent resident or is issued a temporary resident permit. As a result of this new section, "designated foreign nationals" will not benefit from Article 28 of the Refugee Convention, which requires contracting states, such as Canada, to issue travel documents to refugees "lawfully staying" in their territory. In practical terms, "designated foreign nationals" will not have the ability to travel outside of Canada for at least five years.

2.2.5 Powers of Detention on Entry for Suspected Criminality (Clause 23)

Clause 23(2) of Bill C-31 amends section 55(3) of the IRPA, which governs the detention upon entry into Canada of permanent residents or foreign nationals.

Section 55(3) of the IRPA currently provides that a permanent resident or a foreign national may be detained by an officer upon entry into Canada if:

- the officer considers detention necessary in order to complete the examination of the permanent resident or foreign national; or
- the officer has reasonable grounds to suspect that the permanent resident or foreign national is inadmissible on grounds of security or for violating human or international rights.

Clause 23(2) of Bill C-31 amends section 55(3)(*b*) of the IRPA to add that an officer may also detain a permanent resident or foreign national on the grounds of suspected inadmissibility for "serious criminality, criminality, or organized criminality."

2.2.6 Changes to the Human Smuggling and Human Trafficking Regime

Bill C-31 amends and expands the definition of what constitutes "human smuggling" under the IRPA, and introduces mandatory minimum sentences for a person convicted of human smuggling under the Act. The bill also adds several aggravating factors to be considered by the court when determining the penalties to be imposed for the offences of "trafficking in persons" and "disembarking persons at sea."

2.2.6.1 CHANGE IN THE DEFINITION OF "HUMAN SMUGGLING" (CLAUSE 41)

Section 117 of the IRPA addresses human smuggling. The section prohibits organizing, inducing, aiding or abetting entry into Canada of persons who are not in possession of required documentation, and it imposes penalties. The consent of the Attorney General of Canada is required in order to begin proceedings under this section.

Bill C-31 amends the definition of what constitutes "human smuggling" as follows:

Table 3 – Changes to the Definition of "Human Smuggling"

Section 117 of the *Immigration and Refugee Protection Act*	Amendments to Section 117 Made by Bill C-31
(1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act	(1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act

2.2.6.2 MANDATORY MINIMUM SENTENCES FOR HUMAN SMUGGLING (CLAUSE 41)

Sections 117(2) and (3) of the IRPA outline maximum penalties for smuggling fewer than 10 people (section 117(2)) and 10 people or more (section 117(3)).

Bill C-31 amends section 117 to add new sections 117(3.1) and 117(3.2). New sections 117(3.1) and (3.2) provide a mandatory minimum punishment for a person who is convicted of human smuggling of fewer than 50 people (117(3.1)) or 50 people or more (117(3.2)) if:

> (i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed; or
>
> (ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

In each case, the penalty differs according to whether one or the other or both of the conditions apply.

2.2.6.3 AGGRAVATING FACTORS WHEN DETERMINING PENALTIES FOR TRAFFICKING IN PERSONS AND DISEMBARKING PERSONS AT SEA (CLAUSE 42)

Section 121 of the IRPA sets out aggravating factors for consideration by the court in determining penalties. Clause 42 of Bill C-31 amends section 121 to add the factors of endangering the life or safety of any person as a result of the trafficking of persons or disembarking persons at sea (sections 118 and 119 of the IRPA).

2.2.6.4 Definitions of "Criminal Organization" and "Terrorist Group" (Clause 43)

Clause 43 of Bill C-31, in adding section 121.1, imports into the IRPA the definitions of "criminal organization" and "terrorist group" as set out in the *Criminal Code*. Under the current Act, "criminal organization" is defined only in relation to the penalties for the offence of disembarking persons at sea (section 121(2)); no formal definition of a "terrorist group" is provided.

Section 467.1(1) of the *Criminal Code* states that:

> "criminal organization" means a group, however organized, that
>
> (*a*) is composed of three or more persons in or outside Canada; and
>
> (*b*) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

The definition of a "terrorist group" found in section 83.01(1) of the *Criminal Code* is more complex. It currently includes 42 listed entities (persons or corporations) that are designated by the Governor in Council.[29] In addition, under the Code, a terrorist group is one that facilitates or carries out any "terrorist activity,"[30] which generally includes acts intended to intimidate by intentionally causing death or serious bodily harm by the use of violence, destruction of property or disruption of essential services for a political, religious or ideological purpose (not to be confused with advocacy, protest, dissent or stoppage of work not intended to cause personal injury).

2.2.7 Increased Penalties and New Offences under the *Marine Transportation Security Act* (Clauses 70–77)

2.2.7.1 Increased Penalties for Contravening Ministerial Directions (Clause 72)

Section 16 of the *Marine Transportation Security Act* (MTSA) provides the Minister of Transport with the discretion to direct any vessel not to enter Canada, or to leave Canada or travel to another area in Canadian waters in accordance with any instructions the Minister may give regarding the route and manner of proceeding. Ministerial directions to vessels may be made when there are reasonable grounds to believe the vessel is a threat to the security of any person or thing, including any goods, vessel, or marine facility.[31]

Clause 72 of Bill C-31 amends section 17 of the MTSA, which sets out the penalties imposed on operators of vessels that contravene ministerial directions, and significantly increases the maximum fines for individuals or corporations and the maximum period of incarceration for individuals.

2.2.7.2 New Offence for Vessels Contravening Ministerial Directions (Clauses 72, 74, 75, 76 and 77)

In addition to increasing the maximum fines and penalties imposed on operators of vessels described earlier, Bill C-31 also creates a new offence and fine regime for vessels involved in contravening a ministerial direction.

New section 28(5) of the MTSA clarifies that one can prove a ministerial direction was given to a vessel if it was given to the master or any person on board who is or appears to be in charge of the vessel. The vessel can be convicted of contravening a direction if it can be established that the offence was committed by any person on board other than the security inspector, even if no specific individual can be identified and prosecuted. All persons who appear to be in charge of the vessel are equally liable to be fined and prosecuted.

2.2.7.3 Increased Penalties for Default to File Pre-arrival Information (Clause 70)

Clause 70 of the bill, which amends section 5 of the MTSA by adding new section 5(3), should be read in the context of section 221 of the *Marine Transportation Security Regulations*. According to these regulations, the master of a vessel is obliged to report pre-arrival information at least 96 hours before entering Canadian waters.[32] These regulations set out the list of information to be provided before the vessel enters Canadian waters.[33]

2.2.8 Limitation Periods (Clause 46)

Clause 46 creates a new limitation period of 10 years for a summary conviction offence under section 117 (human smuggling), sections 126 and 127 (counselling and misrepresentation) or section 131 as it relates to section 117 (offence for counselling human smuggling). For any other summary conviction offence under the IRPA, the limitation period is five years.

2.3 Other Changes to Refugee Determination in Canada

2.3.1 Changes to Inadmissibility and Loss of Status (Clauses 17, 18 and 19)

Section 40(1) of the IRPA describes what constitutes misrepresentation, a cause for refusal to enter or remain in Canada. Section 40(1)(*c*) refers to misrepresentation in the refugee protection context. Section 109 of the IRPA indicates that the Minister may apply to the IRB to vacate refugee protection when it is found that the original decision was based on omission or misrepresentation. Clause 17 modifies section 40(1)(*c*) to add the notion that a final determination on an application for protection, not only refugee protection, may be vacated and would be cause for inadmissibility to Canada. Misrepresentation renders a foreign national inadmissible to Canada for two years.

Bill C-31 introduces a new provision governing inadmissibility by adding section 40.1 to the IRPA. Clause 18, **as amended,** states that upon a final decision that refugee protection has ceased, the **foreign national** who was previously a Convention refugee is now inadmissible to Canada, and therefore cannot remain in or enter Canada. Cessation of refugee protection is described in section 108 of the IRPA and involves situations such as the individual returning to his or her country of origin, reacquiring his or her original citizenship or acquiring a new one, or simply that the conditions in the country of origin have changed and the person is no longer in need of protection. The RPD may make such a determination upon application by the Minister.

Clause 18 originally provided that all persons, including permanent residents, could be found inadmissible based on a cessation decision for any reason listed in section 108 of the IRPA. This clause was amended by the committee so that under new section 40.1(2), permanent residents may only be rendered inadmissible when a decision is made that refugee protection has ceased for circumstances identified in sections 108(*a*) to 108(*d*) of the IRPA. As described in section 108(*e*), this excludes cessation if the reasons for which the person sought refugee protection have ceased to exist, such as a change of conditions in the country of origin. Bill C-31 makes the impact of cessation decisions more serious, providing in clause 19 that permanent resident status may be **lost if refugee protection has ceased for reasons described in sections 108(*a*) to 108(*d*) of the IRPA**.

2.3.2 Clarifications in Regards to the Enforcement of Removal Orders (Clauses 21 and 22)

Clause 21 of Bill C-31 seeks to clarify when the conditional removal order comes into force for a failed refugee claimant. Section 49(2)(*c*) is amended to indicate two situations: if a claim is rejected at the RPD but is not appealed, then the removal order comes into force according to regulations that have not yet been published. If the failed claimant appeals to the RAD, the removal order will come into force if the appeal fails, within 15 days after notification of this final decision.

Regulations, provided for by section 53 of the IRPA, describe the different types of removal orders.[34] However, clause 22 seeks to modify section 53 so that the regulations may also include the consideration of factors that will determine when the enforcement of the removal order is possible.

2.3.3 No Re-opening of Claim or Appeal (Clauses 51 and 53)

Bill C-31 adds two new sections to the IRPA – 170.2 and 171.1 – that affirm that a final decision from a higher jurisdiction cannot be revisited by a lower one. A decision made by the Federal Court, for example, that contains a failure to observe a principle of natural justice, must be challenged in the Federal Court of Appeal. Similarly, a decision by the RAD must be challenged at Federal Court. Appeals to the Federal Court or to the Federal Court of Appeal are not automatic and a person must apply for leave to appeal to them.

2.4 Changes to Other Aspects of Immigration Law

Bill C-31 introduces one entirely new element to non-refugee-related aspects of Canada's immigration policy: the use of biometrics for temporary resident visa applications. The bill also makes changes to the ability of individuals and groups to sponsor foreign nationals, and to applications for permanent residence on humanitarian and compassionate grounds.

2.4.1 Biometrics for Temporary Resident Visa Applications (Clauses 6, 9, 30, 47 and 78)

Although fingerprints have been collected from refugee claimants and from individuals arrested for contravening the IRPA in Canada, clause 6 introduces the collection of biometrics in a non-enforcement context by adding section 11.1 to the Act.

A foreign national identified in regulations, who applies for a temporary resident visa, will be subject to this new procedure starting in 2013. Clause 9, which refers to the content of the regulations, indicates that there may be exceptions to the rule. Clause 30 refers to fees related to the collection of biometrics and adds new section 89(2), which states that those fees will not be subject to the *User Fees Act*. (This Act allows Parliament to review fee schedules.) Clause 47 amends section 150.1 of the IRPA to allow the disclosure of information, including biometrics, to foreign governments and to the RCMP. Clause 78, which amends the *Department of Citizenship and Immigration Act*, allows CIC to enter into arrangements with foreign governments and to provide services to the Canada Border Services Agency.

CIC has indicated that it expects to use the network of Visa Application Centres (of which there are 60 in 41 countries) to collect the data that are to be used to verify the identity of applicants entering Canada.[35]

2.4.2 Sponsorship (Clauses 7, 8 and 9)

Section 13 of the IRPA provides for the right to sponsor foreign nationals in two circumstances: individuals may sponsor members of their family; and a group of individuals or an organization may sponsor Convention refugees or persons in similar circumstances.

Clause 7 of Bill C-31 replaces the existing text of the IRPA referring to the two circumstances above with an open-ended provision that allows the same actors (Canadian citizens, permanent residents, groups of these last two, corporations, unincorporated organizations and associations) to sponsor a foreign national "subject to the regulations."

2.4.2.1 Undertakings (Clauses 8 and 9)

Clause 8 of Bill C-31 expands the possible use of undertakings in the context of sponsorship of foreign nationals. Currently, Canadian citizens and permanent residents who wish to sponsor family members are required by regulation to enter into an undertaking, committing to provide for their family member(s) for the

designated period and to repay any financial assistance provided by government to family members during that time.[36]

Clause 8 introduces new sections 13.1 and 13.2, which provide that undertakings are binding on persons who give them, and that, if required by regulations, a foreign national who makes an application for a visa or for permanent or temporary resident status must obtain the specified undertaking. Officers must apply the regulations concerning undertakings and penalties for failure to comply with undertakings (clause 9, new section 14(2)(*e.1*) in accordance with any instructions that the Minister may give (clause 8, new section 13.2(2)).

2.4.3 Changes to Applications for Permanent Residence on Humanitarian and Compassionate Grounds (Clauses 13, 14, 15 and 80)

2.4.3.1 Restrictions on Applications for Permanent Residence on Humanitarian and Compassionate Grounds (Clauses 13 and 80)

A failed refugee claimant (and any other foreign national) can request permanent residence through an application on humanitarian and compassionate grounds ("H & C application"), which allows a foreign national to submit an application that, under other circumstances, would be rejected because it fails to meet a basic requirement. The H & C application considers how well established the foreign national is in Canada and what hardship would be caused should he or she have to leave.

Bill C-31 restricts permanent residence applications on humanitarian and compassionate grounds, similar to the restriction included in the original Bill C-11, An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act), in the 40th Parliament. Clause 13(3) of Bill C-31 states that the Minister may not examine an H & C application if:

- such an application is already made and is pending; or
- a claim has been made and is pending before the RPD **or the RAD**; or
- less than 12 months have passed since the foreign national's claim for refugee protection was **last** rejected, determined to be abandoned, or determined to be withdrawn **by the RPD or the RAD**.

The amendment proposed by the committee clarifies at what point the H & C application may be studied by the minister.

Unlike Bill C-11, however, Bill C-31 includes exceptions to this bar for cases where there is a risk to life in the country of origin due to inadequate health or medical care or where "removal would have an adverse effect on the best interests of a child directly affected."

The transitional provision for this change provides that H & C applications for permanent residence should be considered in accordance with the Act in force on the day of application (clause 80).

2.4.3.2 Undertakings for Applications for Permanent Residence on Humanitarian and Compassionate Grounds (Clauses 14 and 15)

Clause 14(1) of Bill C-31 allows the Minister to impose conditions on foreign nationals granted permanent residence on humanitarian and compassionate grounds for public policy considerations. These conditions are new and are further elaborated in clause 14(2), which states "the conditions referred to in subsection (1) may include a requirement for the foreign national to obtain an undertaking or to obtain a determination of their eligibility from a third party that meets any criteria specified by the Minister." Clause 15 states that the regulations may provide for any matter related to: undertakings in respect of humanitarian and compassionate requests; penalties for failure to comply with undertakings; and the determination of eligibility referred to above.

2.5 Coming into Force (Clause 85)

Many of the provisions in C-31 come into force immediately upon Royal Assent: the provisions dealing with designated foreign nationals, staffing at the RPD, the modifications to the IRPA in regards to H & C applications **and the new waiting restriction for PRRA applications (except for those for nationals of designated countries of origin, which will come into force along with the relevant sections of the BRRA)**.

Clause 4 and the clauses dealing with biometrics (6, 9(2), 30, 47 and 78) come into force on a day to be fixed by order of the Governor in Council.

Clauses identified in 85(2) come into force on a day or days to be fixed by order of the Governor in Council (clauses 7 and 8, 9(1) and 11(1), 17–22, 23(1) and 29, 31, 33–35, **38(1) and 38(2), 39**–46, 49–51, 53, 54 and 70–77).

NOTES

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1. For details on the *Balanced Refugee Reform Act*, which received Royal Assent on 29 June 2010, see Daphne Keevil Harrold and Sandra Elgersma, *Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, Publication no. 40-3-C11-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 January 2011.
2. For details on Bill C-4, introduced in the House of Commons on 16 June 2011, see Julie Béchard, *Legislative Summary of Bill C-4: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, Publication no. 41-1-C4-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 30 August 2011.
3. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
4. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Supreme Court of Canada).

5. Citizenship and Immigration Canada, "Harper Government Introduces the *Protecting Canada's Immigration System Act*," News release, 16 February 2012.
6. Changes to applications for permanent residence on humanitarian and compassionate grounds and temporary resident permits came into force immediately; the transfer of responsibility for most pre-removal risk assessments (PRRAs) from Citizenship and Immigration Canada to the Immigration and Refugee Board is to come into force on 29 June 2013.
7. Immigration and Refugee Board of Canada, *New Developments in the Refugee Determination System*, Presentation to the Ontario Bar Association, 23 February 2011, p. 5.
8. "Regulations Amending the Immigration and Refugee Protection Regulations" [Amended Regulations], Vol. 145, No. 12, *Canada Gazette*, 19 March 2011, s. 159.94 [not yet in force].
9. Citizenship and Immigration Canada, "Summary of Changes to Canada's Refugee System in the *Protecting Canada's Immigration System Act*," Backgrounder, 16 February 2012.
10. Section 102 of the IRPA provides for designating countries as safe third countries and for entering into agreements for the purpose of sharing responsibility for refugee claim consideration. In 2002 the United States and Canada signed the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, commonly referred to as the "Safe Third Country Agreement" (STCA). Exceptions under the STCA are provided for certain people with family members in Canada, unaccompanied minors, certain document holders, and those charged with or convicted of an offence that could subject them to the death penalty in the United States or in a third country. See Citizenship and Immigration Canada, "Canada–U.S. Safe Third Country Agreement," 23 July 2009.
11. Amended Regulations, s. 159.96(1)(*b*) [not yet in force].
12. Citizenship and Immigration Canada, "Overview of Reforms to Canada's Refugee System," Backgrounder, 16 February 2012.
13. Amended Regulations, s. 159.93 [not yet in force].
14. Citizenship and Immigration Canada, "Designated Countries of Origin," Backgrounder, 16 February 2012.
15. *Immigration and Refugee Protection Regulations* (IRPR), s. 231.
16. "Regulations Amending the Immigration and Refugee Protection Regulations," Vol. 145, No. 32, *Canada Gazette*, 6 August 2011, s. 231(2) [not yet in force].
17. Citizenship and Immigration Canada, "Summary of Changes to Canada's Refugee System in the *Protecting Canada's Immigration System Act*."
18. Section 4(2) of the IRPA states that the Minister of Public Safety and Emergency Preparedness is responsible for the administration of the IRPA where it relates to: examinations at ports of entry; enforcement including arrest, detention and removal; and the establishment of policies respecting inadmissibility and enforcement. New s. 6(3) of the IRPA makes the designation of an "irregular arrival" a responsibility of the Minister of Public Safety and Emergency Preparedness.
19. "Public interest" is not defined in Bill C-31 or in the IRPA. It appears, however, in other legislation, such as the *Privacy Act*, and has been interpreted by the courts.
20. Sections 33–41 of the IRPA define "inadmissibility" to Canada based on grounds of security, human or international rights violations, criminality, health, financial support concerns, misrepresentation or non-compliance with the Act.

21. "Timely manner" is not defined in Bill C-31 or in the IRPA. As this paper shows, the norm is usually 48 hours, a deadline that may not be possible to meet in the context of mass arrivals of claimants.

22. "Human smuggling" is defined in s. 117(1) of the IRPA and is amended in Bill C-31, as discussed later in this paper.

23. Clause 43 of Bill C-31 imports a definition of "criminal organization" into the IRPA in s. 121.1 of the Act, as discussed later in this paper.

24. *Statutory Instruments Act*, R.S.C. 1985, c. S-22.

25. This means that the ministerial orders will not be considered to be regulations, notwithstanding s. 2(1) of the *Statutory Instruments Act*, which normally classifies ministerial orders as such. These orders are thus exempted from the procedure that normally applies to regulations made pursuant to the *Statutory Instruments Act*, whereby proposed regulations must be sent to the Clerk of the Privy Council for examination, registration, scrutiny by Parliament, and publication in the *Canada Gazette* in accordance with certain specified procedures.

26. Security certificates are instruments signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration declaring a person to be inadmissible to Canada on "grounds of security, violating human or international rights, serious criminality or organized criminality." Most recently, the ministers signed certificates on 22 February 2008 naming five persons inadmissible to Canada on the grounds of national security.

27. Section 13(1) of the IRPA provides that sponsorship of a foreign national through the family class is restricted to Canadian citizens and permanent residents.

28. IRPR, s. 175.

29. Public Safety Canada, "Currently listed entities."

30. A series of offences are the subject of international treaties listed in the definition of "terrorist activity" in s. 83.01 of the *Criminal Code*: unlawful seizure of aircraft, unlawful acts against safety of civil aviation and violence at airports serving international civil aviation, unlawful acts against the safety of maritime navigation, crimes against protected persons, including diplomatic agents, taking hostages, violation of the physical protection of nuclear material, unlawful acts against the safety of fixed platforms located on the Continental Shelf, terrorist bombings, and financing of terrorism.

31. Under the *Marine Transportation Security Regulations* (SOR/2004-144), "security threat" is defined as "any suspicious act or circumstance that could threaten the security of a vessel or marine facility or an interface between vessels or a vessel and a marine facility" (section 1 of the regulations).

    The above definition is not found in the MTSA. However, the MTSA defines "security measure" as "a measure formulated by the Minister under section 7," which authorizes the Minister to formulate and to carry out measures respecting the security of marine transportation. The MTSA also defines "security rule" as "a rule approved by the Minister under section 10," which sets out the requirements that a vessel and marine facilities should fulfil in order to formulate and operate under security rules, as an alternative to security measures required or authorized by the Minister.

32. *Marine Transportation Security Regulations*, s. 221(1)(*c*).

33. Ibid., s. 221(2).

34. IRPR, ss. 223–226.

35. Citizenship and Immigration Canada, "Biometrics in Canada's Temporary Resident Program," Backgrounder, 16 February 2012.

36. IRPR, s. 132.