



LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

LEGISLATIVE SUMMARY



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
30 August 2011

Julie Béchar

Social Affairs Division
Parliamentary Information and Research Service

Legislative Summary of Bill C-4

HTML and PDF versions of this publication are available on IntraParl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament **Legislative Summaries** summarize government bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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

CONTENTS

1	BACKGROUND.....	1
1.1	Purpose of the Bill and Principal Amendments.....	1
1.2	General Background to Proposed Reform.....	1
1.2.1	Canada's International Obligations	2
1.2.2	Canada's Obligations and Internal Policy Objectives.....	3
2	DESCRIPTION AND ANALYSIS	3
2.1	"Designated Foreign National" Regime Created in the <i>Immigration and Refugee Protection Act</i>	4
2.1.1	"Irregular Arrival" and "Designated Foreign National" (Clauses 3, 5, 34 and 35)	4
2.1.1.1	Designation of a Group as an "Irregular Arrival" (Clause 5)	4
2.1.1.2	Members of an "Irregular Arrival" Designated as "Designated Foreign Nationals" (Clause 5)	5
2.1.1.3	Retroactive Designation as an "Irregular Arrival" (Clause 34)	5
2.1.2	Consequences of Becoming a "Designated Foreign National" – Detention	6
2.1.2.1	Mandatory Arrest and Detention (Clauses 10 and 11)	6
2.1.2.1.1	Officer's Obligation.....	6
2.1.2.1.2	Arrest Without Warrant	6
2.1.2.1.3	Duration of Detention	6
2.1.2.2	Detention Review Regime (Clause 12)	7
2.1.2.2.1	Current Detention Review Regime	7
2.1.2.2.2	Proposed Detention Review Regime for "Designated Foreign Nationals"	8
2.1.2.2.3	Charter Considerations: Sections 9 and 10 of the <i>Canadian Charter of Rights and Freedoms</i>	8
2.1.2.2.4	Charter Considerations: Sections 7 and 12 of the <i>Canadian Charter of Rights and Freedoms</i>	9
2.1.2.3	Changes to the Release from Detention Regimes (Clauses 11, 13, 14 and 15)	10
2.1.2.3.1	Changes to Grounds for Detention (Clause 13)	10
2.1.2.3.2	Changes to Release with Conditions (Clauses 13 and 15)	10
2.1.2.3.3	Impact of Breaching Conditions of Release (Clauses 4, 5, 7 and 8)	11
2.1.2.4	Reporting Requirement for "Designated Foreign Nationals" Who Are Granted Refugee Protection (Clause 16)	11
2.1.3	Other Consequences for "Designated Foreign Nationals"	11
2.1.3.1	Restrictions on Applications (Clauses 4, 5, 7 and 8).....	11
2.1.3.2	No Permanent Residence While an Application for Cessation of Refugee Protection Under Way (Clause 6)	12

2.1.3.3	Restrictions on Appeals to the Refugee Appeal Division (Clause 17)	12
2.1.3.4	Restrictions on the Issuance of Refugee Travel Documents: Bill C-4 and Article 28 of the Refugee Convention (Clause 9)	13
2.2	Powers of Detention on Entry for Suspected Criminality (Clause 10).....	14
2.3	Changes to the Human Smuggling and Human Trafficking Regime	14
2.3.1	Change in the Definition of “Human Smuggling” (Clause 18)	14
2.3.2	Mandatory Minimum Sentences for Human Smuggling (Clause 18)	15
2.3.3	Aggravating Factors When Determining Penalties for Trafficking in Persons and Disembarking Persons at Sea (Clause 19)	15
2.3.4	Definitions of “Criminal Organization” and “Terrorist Group” (Clause 20)	15
2.4	Increased Penalties Under the <i>Marine Transportation Security Act</i> (Clauses 25 to 32).....	16
2.4.1	Increased Penalties for Contravening Ministerial Directions (Clause 27)	16
2.4.2	New Offences for Vessels Contravening Ministerial Directions (Clauses 27, 29, 30, 31 and 32)	17
2.4.3	Increased Penalties for Default to File Pre-arrival Information (Clause 25)	17
2.4.4	Increased Penalties for Providing False or Misleading Information (Clause 28)	18
2.4.5	Sharing Information (Clause 26)	18
2.5	Limitation Periods (Clause 23)	18
2.6	Coming into Force (Clause 37)	19

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*

1 BACKGROUND

1.1 PURPOSE OF THE BILL AND PRINCIPAL AMENDMENTS

Bill C-4, An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act (short title: Preventing Human Smugglers from Abusing Canada's Immigration System Act), was introduced in the House of Commons on 16 June 2011 by the Minister of Public Safety, the Honourable Vic Toews. The bill had first been introduced in October 2010 during the 3rd Session of the 40th Parliament as Bill C-49, but it died on the *Order Paper* on 26 March 2011 with the dissolution of the 40th Parliament. The current Bill C-4 is very similar to its predecessor.

The purpose of the bill is to modify the *Immigration and Refugee Protection Act* (IRPA)¹ and the *Marine Transportation Security Act* (MTSA).² Specifically, the bill:

- creates the new category of “designated foreign national” for any member of a group which the Minister has designated as an “irregular arrival” to Canada, with the resultant creation of a mandatory detention regime; mandatory conditions on release from detention; restrictions on the issuance of refugee travel documents; and restrictions on certain immigration applications, applicable only to “designated foreign nationals”;
- does not allow “designated foreign nationals” any right to appeal to the Refugee Appeal Division³ while limiting access to other foreign nationals, and adds to the powers of officers detaining persons upon entry to Canada for suspected criminality;
- amends the definition of what constitutes “human smuggling” under the IRPA, introduces mandatory minimum sentences for human smuggling, adds aggravating factors to be considered by the court when determining the penalties for the offences of “trafficking in persons” and “disembarking persons at sea,” and adds the *Criminal Code* definitions of “criminal organization” and “terrorist group” to the IRPA; and
- amends the MTSA to increase the penalties for individuals and corporations who contravene existing laws, and creates new penalties to be imposed specifically on vessels involved in contraventions of the MTSA.

1.2 GENERAL BACKGROUND TO PROPOSED REFORM

Irregular migration, which occurs when people enter or reside in a country without having received legal authorization from the host state to do so, is a hotly debated international migration topic,⁴ as “irregular migration poses very real dilemmas for states as well as exposing migrants themselves to insecurity and vulnerability.”⁵

There have been some recent high-profile cases where a large number of persons have arrived in Canada by boat to claim refugee status, such as those arriving on the *Ocean Lady* in October 2009, and on the *Sun Sea* in August 2010.⁶

These events highlighted a growing trend of individuals paying large sums of money to human smugglers to assist the migrants in gaining entry into Canada.

A key objective of Bill C-4 is to deter large-scale events of irregular migration to Canada, particularly where these involve human smuggling.

1.2.1 CANADA'S INTERNATIONAL OBLIGATIONS

Bill C-4 should be considered in the context of Canada's relevant international commitments, which are briefly outlined in this section. The United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air* and its parent convention, the *Convention against Transnational Organized Crime*, address these issues and provide a broad legal framework for countering these activities. Canada's efforts to prevent and combat migrant smuggling are guided by the 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.

In international law, the "smuggling of migrants" is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident."⁷ It is important to note that while the terms "human trafficking" and "human smuggling" have been used interchangeably in regards to these arrivals, human smuggling and human trafficking are vastly different offences. "Human smuggling" is typically a consensual business transaction, generally between the smuggler and the individuals seeking entry, which ends upon arrival.⁸ Individuals who are "trafficked," meanwhile, are assumed not to have given their consent, are often forced to work for their traffickers upon arrival and are considered to be "victims" or "survivors."⁹

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 or membership in a particular social group or political opinion. These persons are known as Convention refugees.

Canada is also a signatory party to the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. 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 if returned to their country of origin or of habitual residence.

The *Canadian Charter of Rights and Freedoms* is also an important part of the legal framework for those seeking asylum in Canada.¹⁰ In 1985, the Supreme Court of Canada decided in *Singh v. Minister of Employment and Immigration* that the Charter protects refugee claimants;¹¹ this decision has been instrumental in setting the standards for procedural fairness that must be met in such cases.¹²

1.2.2 CANADA'S OBLIGATIONS AND INTERNAL POLICY OBJECTIVES

While the *Convention Relating to the Status of Refugees* creates a positive obligation not to impose penalties on account of a refugee's illegal entry or presence in the territory when the refugee is coming directly from a territory where his or her life or freedom was threatened (Article 31), "there is no corresponding explicit obligation to admit potential refugee claimants who are outside a state party's territory."¹³

The Government of Canada has long been concerned that, without proper border control, public support for all immigration and refugee programs would be endangered.¹⁴ Currently, Canada uses a number of methods to deter the irregular arrival of new claimants in Canada, such as:

- visitor visa requirements on individuals from countries that produce significant numbers of claimants;
- fines and charges for transportation companies that bring undocumented individuals to Canada; and
- a network of migration integrity officers overseas who work with airlines to prevent those without valid documents from boarding aircraft.¹⁵

Among other considerations, large-scale arrivals present logistical challenges in processing refugee applications, making it difficult to assess whether those who arrive, including the smugglers themselves, pose risks to Canada on the basis of either criminality or national security, or whether they are refugees or persons in need of Canada's protection. The balancing of Canada's commitment to its international obligations regarding asylum seekers with the prerogative to control its borders and ensure security is not unique to Canada. Most nations face similar dilemmas, as outlined in a report prepared for the Global Commission on International Migration:

... integral to the concept of sovereignty is the right of states to control their borders. But the respect of human rights is an equally important prerogative for states. One of the key dilemmas for policy-making in the realm of irregular migration is that at times these two principles are difficult to reconcile.¹⁶

Bill C-4 reflects the tension between these two policy objectives.

2 DESCRIPTION AND ANALYSIS

As introduced, Bill C-4 consists of 37 clauses. In this section, the following four aspects 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";¹⁷
- new powers of detention related to people entering the country, including those who are suspected of involvement in criminal activities;
- changes to the provisions of the IRPA regarding human smuggling in Canada; and

- increased penalties for contraventions of the MTSA.

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

2.1 “DESIGNATED FOREIGN NATIONAL” REGIME CREATED IN THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

Among other things, Bill C-4 creates under the IRPA the category of “designated foreign national,” which is primarily intended to deter individuals from using human smugglers to assist them in gaining entry into Canada. 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 permitted to make claims for refugee status or applications to become a “person in need of protection.”

However, “designated foreign nationals” will be subject to mandatory detention upon arrival or upon designation; mandatory conditions on release from detention; and restrictions on applications for permanent residency, temporary resident permits and applications on humanitarian and compassionate grounds for at least five years after they become “designated foreign nationals,” even if their claim for asylum is found to be credible and they are found to be Convention refugees or are in need of protection.

The bill will not allow “designated foreign nationals” to appeal to the Refugee Appeal Division. Contrary to the 1951 UN *Convention Relating to the Status of Refugees*, no refugee travel documents will be issued to “designated foreign nationals” until they have obtained permanent residence.

This section will examine the following subjects:

- the designation by the Minister of an arrival as an “irregular arrival” and its effect on the category of “designated foreign national”;
- detention as a consequence of belonging to the category of “designated foreign national”; and
- other consequences of belonging to the category of “designated foreign national.”

2.1.1 “IRREGULAR ARRIVAL” AND “DESIGNATED FOREIGN NATIONAL” (CLAUSES 3, 5, 34 AND 35)

2.1.1.1 DESIGNATION OF A GROUP AS AN “IRREGULAR ARRIVAL” (CLAUSE 5)

Clause 5 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”¹⁸ 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 examinations establishing the identity or determining the inadmissibility of those persons¹⁹
 - *nor* any other investigations concerning persons in the group can be conducted in a “timely manner” (new section 20.1(1)(a)).²⁰
- The Minister has reasonable grounds to suspect that there has been, or will be, human smuggling²¹ for the benefit/profit of, at the direction of, or in association with, a criminal organization or terrorist group (new section 20.1(1)(b)).²²

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*.²³ However, these designations must be published in the *Canada Gazette*.²⁴

The Minister may not delegate authority to order a group arrival be designated as an “irregular arrival” (new section 6(3) of the IRPA).

2.1.1.2 MEMBERS OF AN “IRREGULAR ARRIVAL” DESIGNATED AS “DESIGNATED FOREIGN NATIONALS” (CLAUSE 5)

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)).

2.1.1.3 RETROACTIVE DESIGNATION AS AN “IRREGULAR ARRIVAL” (CLAUSE 34)

Clause 34(1) of Bill C-4 allows a designation of an “irregular arrival” to be made retroactively to 31 March 2009.

Clause 34(2) provides an explanation of clause 34(1) for greater certainty, and notes that an individual who becomes a “designated foreign national” as a result of a retroactive designation under clause 34(1) will be subject to the full application of Bill C-4. Clause 34(3) sets out one exception, providing that new section 55(3.1)(b)²⁵ 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.

2.1.2 CONSEQUENCES OF BECOMING A “DESIGNATED FOREIGN NATIONAL” – DETENTION

2.1.2.1 MANDATORY ARREST AND DETENTION (CLAUSES 10 AND 11)

2.1.2.1.1 OFFICER’S OBLIGATION

Clause 10(2) of Bill C-4 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)).

2.1.2.1.2 ARREST WITHOUT WARRANT

The power to arrest without warrant already exists in different contexts in the IRPA, and its constitutionality has been considered by the courts in those different contexts. For example, the power to arrest without warrant in section 55(2) of the IRPA allows an officer to make an arrest when he or she “... has reasonable and probable grounds to believe the person falls within several inadmissible classes ... and for believing that the person would fail to appear for an inquiry or determination, or poses a danger to the public.”²⁶

In 2007, the Supreme Court of Canada made general comments about arrest without warrant, arrest based on a ministerial order, or automatic detention without a warrant under former section 82 of the IRPA. These comments were made in regards to security certificates issued in relation to a permanent resident. Chief Justice Beverly McLachlin, on behalf of a unanimous Court, stated that “... the rule of law does not categorically prohibit automatic detention or detention on the basis of an executive decision”; however, Charter²⁷ provisions surrounding other aspects of arrest and detention continue to apply.²⁸

2.1.2.1.3 DURATION OF DETENTION

Bill C-4 specifies what may determine the period of detention for a “designated foreign national.” Clause 11 of Bill C-4 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 newly added section 56(2) provides that detention of a “designated foreign national” is mandatory until such a time as:

- a final determination is made to allow a claim or application for refugee protection;²⁹
- the person is released as a result of an Immigration Division order under section 58,³⁰ or
- the person is released as a result of a ministerial order under section 58.1.³¹

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

2.1.2.2 DETENTION REVIEW REGIME (CLAUSE 12)

Clause 12 of Bill C-4 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.

2.1.2.2.1 CURRENT DETENTION REVIEW REGIME

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 the Immigration Division of the reasons for continued detention within 48 hours of the start of detention (section 57(1));
- a mandatory review by the Immigration Division of the reasons for continued detention at least once during the 7 days following the 48-hour review (section 57(2)); and
- a mandatory review by 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.

The existing detention review regime under section 82 of the IRPA applicable to persons named by the ministers responsible in security certificates provides for the following:³²

- a mandatory review by a 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 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.

2.1.2.2.2 PROPOSED DETENTION REVIEW REGIME FOR “DESIGNATED FOREIGN NATIONALS”

Clause 12 of Bill C-4 introduces a detention review procedure applicable only to “designated foreign nationals,” and not to permanent residents and other foreign nationals (section 57(1)), as follows:

- The Immigration Division must conduct a mandatory first review of the reasons for continued detention on the expiry of 12 months after the day of initial detention and may not do so before the 12 months have expired (new section 57.1(1)). In other words, the Immigration Division may not conduct a review of reasons for continued detention until at least 12 months have passed.
- The Immigration Division must conduct subsequent reviews of the reasons for continued detention on the expiry of 6 months after the day on which the previous review was conducted and may not do so before the 6 months have expired (new section 57.1(2)). In other words, a subsequent review cannot be conducted until at least 6 months after the previous review.

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

Table 1 – Detention Review Regimes Under the *Immigration and Refugee Protection Act* (IRPA)

Mandatory Reviews of Reasons for Continued Detention	Regime Applicable to Permanent Residents and Foreign Nationals (Section 57 of the IRPA)	Regime Applicable to Persons Detained Under the Authority of a Security Certificate (Section 82 of the IRPA)	Regime Applicable to “Designated Foreign Nationals” (New Section 57.1 of the IRPA Created by Bill C-4)
First review	Within 48 hours of detention (section 57(1))	Within 48 hours of detention (section 82(1))	12 months after the day of initial detention, and no sooner (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 after the day on which the first review was conducted, and no sooner (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 after the day of the most recent review, and no sooner (new section 57.1(2))

2.1.2.2.3 CHARTER CONSIDERATIONS: SECTIONS 9 AND 10 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The mandatory waiting periods before first and subsequent reviews of reasons for continued detention set out in Bill C-4 for “designated foreign nationals” could raise some Charter concerns. They mark a significant departure from the timelines in the existing detention review regimes applicable to other persons detained under the IRPA.

Section 9 of the Charter contains a guarantee against “arbitrary detention,” which encompasses the right to a prompt review of detention under section 10(c) of the Charter. The Supreme Court of Canada considered time constraints for detention reviews of foreign nationals in the context of a national security certificate issued under the IRPA.³³

Whether through *habeas corpus* or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law. [...] While the government accepts this principle, it argues that the 120-day period in s. 84(2) is sufficiently prompt, relying, as did the courts below, on the fact that foreign nationals can apply for release and depart from Canada at any time.

The lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantee against arbitrary detention in s. 9 of the Charter, a guarantee which encompasses the right to prompt review of detention under s. 10(c) of the Charter. Permanent residents named in certificates are entitled to an automatic review within 48 hours. The same time frame for review of detention applies to both permanent residents and foreign nationals under s. 57 of the IRPA. And under the *Criminal Code*, a person who is arrested with or without a warrant is to be brought before a judge within 24 hours, or as soon as possible: s. 503(1). These provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed.³⁴

Rights under the Charter are subject to such reasonable limits as can be demonstrably justified in a free and democratic society (section 1). In *Charkaoui*, the case cited above, the Supreme Court ultimately determined that the lack of timely review of detention violated sections 9 and 10(c) of the Charter and could not be justified under section 1.³⁵ However, the Supreme Court in *Charkaoui* also stated that when confronted with a threat to national security, a certain amount of flexibility may be required regarding the period for which someone is detained under the IRPA – though it noted that “... this cannot justify the complete denial of a timely detention review.”³⁶

2.1.2.2.4 CHARTER CONSIDERATIONS: SECTIONS 7 AND 12 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In addition, the Supreme Court of Canada in *Charkaoui* discussed extended periods of detention under the IRPA and the legal responsibilities that flow from this continued detention. The Chief Justice, writing on behalf of a unanimous Court, stated:

I conclude that the s. 7 principles of fundamental justice and the s. 12 guarantee of freedom from cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release.³⁷

Under Bill C-4, release from detention prior to the initial review (after 12 months in detention) is available upon resolution of a claim for refugee or protected person status, or with a discretionary order from the Minister based on exceptional circumstances.

2.1.2.3 CHANGES TO THE RELEASE FROM DETENTION REGIMES (CLAUSES 11, 13, 14 AND 15)

2.1.2.3.1 CHANGES TO GROUNDS FOR DETENTION (CLAUSE 13)

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-4 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-4 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)). Section (d) is amended by Bill C-4 to specify that this factor only applies to foreign nationals and *does not apply* to “designated foreign nationals.”
- Bill C-4 creates a new section 58(1)(e), which sets out a factor applicable only to “designated foreign nationals,” that the Minister is of the opinion that the identity of a “designated foreign national” has not been established.

2.1.2.3.2 CHANGES TO RELEASE WITH CONDITIONS (CLAUSES 13 AND 15)

Clause 13(2) of Bill C-4 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,” shall impose any condition that is prescribed. Section 61 of the IRPA, as amended by Bill C-4, provides that the type of conditions will be set out in regulations.³⁸

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-4) 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.³⁹

2.1.2.3.3 IMPACT OF BREACHING CONDITIONS OF RELEASE (CLAUSES 4, 5, 7 AND 8)

Breaching conditions of release provides an officer with the discretion to refuse to consider certain immigration applications of 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 a humanitarian and compassionate application 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.

2.1.2.4 REPORTING REQUIREMENT FOR “DESIGNATED FOREIGN NATIONALS” WHO ARE GRANTED REFUGEE PROTECTION (CLAUSE 16)

Clause 16 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.

Under this clause, the “designated foreign national” is required to answer all questions asked by the officer truthfully and to provide any documents and information the officer requests (new section 98.1(2)).

New section 98.2 provides that the regulations may concern any matter under new section 98.1.

2.1.3 OTHER CONSEQUENCES FOR “DESIGNATED FOREIGN NATIONALS”

2.1.3.1 RESTRICTIONS ON APPLICATIONS (CLAUSES 4, 5, 7 AND 8)

Clauses 4, 5, 7 and 8 of Bill C-4 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 on humanitarian and compassionate grounds. Table 2 details these restrictions: 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.⁴⁰

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,⁴¹ and are consequently able to gain permanent residence and sponsor family members.

Table 2 – “Designated Foreign Nationals”:
Waiting and Suspension Periods for Immigration Applications as Proposed in Bill C-4

Application for Permanent Residence, Request for Temporary Resident Permit, or Application on Humanitarian and Compassionate Grounds	Waiting Period Before Application or Request Can Be Made	Period During Which Processing of Application or Request Is Suspended
“Designated foreign national” has made a claim for refugee protection, but not an application for protection	Five years after the date of a final determination of the claim	Five years after the date of a final determination of the claim
	PR: New sections 11(1.1)(a) and 20.2(1)(a) TRP: New section 24(5)(a) H&C: New section 25(1.01)(a)	PR: New sections 11(1.2)(a) and 20.2(2)(a) TRP: New section 24(6)(a) H&C: New section 25(1.02)(a)
“Designated foreign national” has made an application for protection	Five years after the date of a final determination of the application	Five years after the date of a final determination of the application
	PR: New sections 11(1.1)(b) and 20.2(1)(b) TRP: New section 24(5)(b) H&C: New section 25(1.01)(b)	PR: New sections 11(1.2)(b) and 20.2(2)(b) TRP: New section 24(6)(b) H&C: New section 25(1.02)(b)
Any other case	Five years after the date of designation as a “designated foreign national”	Five years after the date of designation as a “designated foreign national”
	PR: New sections 11(1.1)(c) and 20.2(1)(c) TRP: New section 24(5)(c) H&C: New section 25(1.01)(c)	PR: New sections 11(1.2)(c) and 20.2(2)(c) TRP: New section 24(6)(c) H&C: New section 25(1.02)(c)

Note: In this table, “Permanent Residence” is shortened to “PR,” “Temporary Resident Permit” to “TRP,” and “Application on Humanitarian and Compassionate Grounds” to “H&C.”

2.1.3.2 NO PERMANENT RESIDENCE WHILE AN APPLICATION FOR CESSATION OF REFUGEE PROTECTION UNDER WAY (CLAUSE 6)

Clause 6 amends section 21 to provide that if the Minister makes an application for the cessation of refugee protection pursuant to existing section 108(2) of the IRPA on grounds such as that the person chose to return to their country of origin, the situation in the country of origin has changed, etc., the foreign national may not become a permanent resident until a final determination is made on the Minister’s application.

2.1.3.3 RESTRICTIONS ON APPEALS TO THE REFUGEE APPEAL DIVISION (CLAUSE 17)

Bill C-4 amends section 110 of the IRPA, which details the types of decisions made by the Refugee Protection Division that may be appealed to the Refugee Appeal Division.⁴² This amendment impacts all those who have the right to appeal certain types of Refugee Protection Division decisions, and not only “designated foreign nationals.”

Section 110(1), as amended by Bill C-4, allows appeals of Refugee Protection Division decisions to allow or reject a person’s claim for refugee protection on questions of law, fact or mixed law and fact. Section 110(2) as amended by

Bill C-4 creates restrictions on appeals to the Refugee Appeal Division as detailed in the table below:

Table 3 – Appeals of Decisions to the Refugee Appeal Division

Type of Decision	Can the Decision Be Appealed to the Refugee Appeal Division Under the <i>Immigration and Refugee Protection Act</i> ?	Can the Decision Be Appealed to the Refugee Appeal Division Under Bill C-4?
A decision of the RPD to allow or reject a claim for refugee protection	Yes, under section 110(1)	Yes, under section 110(1) of the IRPA
A decision of the RPD to allow or reject the claim of a “designated foreign national” for refugee protection	Not applicable, as the category of “designated foreign national” is created in Bill C-4	No, under section 110(2)(a) of the IRPA
A determination that a refugee protection claim has been withdrawn or abandoned	No, under section 110(2)	No, under new section 110(2)(b) of the IRPA
A decision of the RPD rejecting an application by the Minister for a determination that refugee protection has ceased	Yes, under section 110(1)	No, under section 110(2)(c) of the IRPA
A decision of the RPD allowing an application by the Minister for a determination that refugee protection has ceased	Not addressed in section 110, and so not appealable to the RAD	No, under section 110(2)(c) of the IRPA
A decision of the RPD rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection	Yes, under section 110(1)	No, under section 110(2)(d) of the IRPA
A decision of the RPD allowing an application by the Minister to vacate a decision to allow a claim for refugee protection	Not addressed in section 110, and so not appealable to the RAD	No, under section 110(2)(d) of the IRPA

Note: In this table, “Refugee Protection Division” is shortened to “RPD” and “Refugee Appeal Division” is shortened to “RAD.”

It is important to note that even if a decision of the Refugee Protection Division cannot be appealed to the Refugee Appeal Division, a person or the Minister may apply (once all avenues of appeal under the IRPA are exhausted) to the Federal Court seeking judicial review of any decision under the IRPA pursuant to section 72 of the Act.

**2.1.3.4 RESTRICTIONS ON THE ISSUANCE OF REFUGEE TRAVEL DOCUMENTS:
BILL C-4 AND ARTICLE 28 OF THE REFUGEE CONVENTION (CLAUSE 9)**

Clause 9 adds new section 31.1 to the IRPA. This section provides that a “designated foreign national” is only considered to be “lawfully staying” in Canada 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 POWERS OF DETENTION ON ENTRY FOR SUSPECTED CRIMINALITY (CLAUSE 10)

Clause 10(1) of Bill C-4 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 10(1) of Bill C-4 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.”

2.3 CHANGES TO THE HUMAN SMUGGLING AND HUMAN TRAFFICKING REGIME

Bill C-4 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.”

2.3.1 CHANGE IN THE DEFINITION OF “HUMAN SMUGGLING” (CLAUSE 18)

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-4 amends the definition of what constitutes “human smuggling” as follows:

Table 4 – Changes to the Definition of “Human Smuggling”

Section 117 in the <i>Immigration and Refugee Protection Act</i>	Amendments to Section 117 made by Bill C-4
(1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons <i>who are not in possession of a visa, passport or other document required by this Act</i> [emphasis added].	(1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons <i>knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act</i> [emphasis added].

The scope of the existing definition of human smuggling in section 117 of the IRPA has been the subject of some judicial criticism. For example, Justice Anne M. Molloy of the Ontario Superior Court of Justice made the following comment when acquitting persons charged under the existing section 117:

The Crown submitted that interpreting the legislation and applying the law in the manner I have done will make it virtually impossible to successfully prosecute those engaged in human smuggling. I recognize the difficulty, particularly when the individuals being smuggled are not apprehended or when the charge is conspiracy and the underlying crime itself is not completed. I do not understand why s. 117 of IRPA is limited to the smuggling of persons across the border who are without the required documents, as opposed to simply smuggling people across the border for whatever reason. However, if the manner in which the legislation is drafted makes it difficult to prosecute wrongdoers (which it does), and the wrongdoing is serious (which it is), the remedy lies in legislative reform, not by judicial interpretation that violates the plain meaning of the existing statutory language.⁴³

The definition of “human smuggling,” as amended by Bill C-4, addresses some of the concerns raised.

2.3.2 MANDATORY MINIMUM SENTENCES FOR HUMAN SMUGGLING (CLAUSE 18)

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

Bill C-4 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 more than 50 people (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.

2.3.3 AGGRAVATING FACTORS WHEN DETERMINING PENALTIES FOR TRAFFICKING IN PERSONS AND DISEMBARKING PERSONS AT SEA (CLAUSE 19)

Section 121 of the IRPA sets out aggravating factors for consideration by the court in determining penalties. Clause 19 of Bill C-4 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).

2.3.4 DEFINITIONS OF “CRIMINAL ORGANIZATION” AND “TERRORIST GROUP” (CLAUSE 20)

Clause 20 of Bill C-4, 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 only defined in relation to the penalties for

the offence of disembarking persons at sea (section 121(2)) and no formal definition of a “terrorist group” was 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 at 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.⁴⁴ In addition, under the Code, a terrorist group is one that facilitates or carries out any “terrorist activity,”⁴⁵ 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).

2.4 INCREASED PENALTIES UNDER THE *MARINE TRANSPORTATION SECURITY ACT* (CLAUSES 25 TO 32)

2.4.1 INCREASED PENALTIES FOR CONTRAVENING MINISTERIAL DIRECTIONS (CLAUSE 27)

Section 16 of the 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.⁴⁶

Clause 27 of Bill C-4 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.

In addition, clause 27 creates a new distinction between a first contravention and subsequent contraventions, imposing higher penalties for second or subsequent contraventions of a ministerial direction.

Table 5 – Penalties for Failure to Comply with Ministerial Directions

Type of Vessel Operator	Current Maximum Penalties in Section 17 of the <i>Marine Transportation Security Act</i> (MTSA)	Maximum Penalties Under Section 17 of the MTSA as Amended by Bill C-4
Individual, first contravention	Fine up to \$10,000; and/or term of imprisonment up to 1 year	Fine up to \$200,000; and/or term of imprisonment up to 1 year
Individual, subsequent contraventions	Not applicable, as the distinction between first and subsequent contraventions is created in Bill C-4	Fine up to \$500,000; and/or term of imprisonment up to 2 years
Corporation, first contravention	Fine up to \$200,000	Fine up to \$500,000
Corporation, subsequent contraventions	Not applicable, as the distinction between first and subsequent contraventions is created in Bill C-4	Fine up to \$1,000,000

2.4.2 NEW OFFENCES FOR VESSELS CONTRAVENING MINISTERIAL DIRECTIONS (CLAUSES 27, 29, 30, 31 AND 32)

In addition to increasing the maximum fines and penalties imposed on operators of vessels described earlier, Bill C-4 also creates a new offence and fine regime for vessels involved in contravening a ministerial direction. New section 17(2) provides that vessels may be liable for a fine up to a maximum of \$100,000 for a first contravention, and up to a maximum of \$200,000 for any subsequent contraventions.

Clause 29 amends the English version of section 26 of the MTSA to provide that persons or vessels which contravene ministerial directions may be convicted of a separate offence for each day on which the offence is committed or continued. The current continuing offence provision found in section 26 of the MTSA applies to persons (individuals and corporations) but not to vessels.

Bill C-4 makes several procedural changes to the MTSA to allow for the prosecution of this new offence for vessels. Clause 31 also amends section 29 of the MTSA to include a defence of “due diligence” for vessels in contravention of the MTSA, already available in that section as a defence for individuals and corporations. Clause 30 amends section 28 of the MTSA to provide details regarding what evidence is required for a vessel offence to be established under the Act.

Finally, clause 32 of Bill C-4 amends section 31(1) of the MTSA to allow for the possibility of fines being imposed on a vessel. Section 31(1), as amended, provides that if a fine imposed on a vessel convicted of an offence under the Act is not paid when required, the conviction may be registered in the superior court of the province in which the trial was held. This provision setting out jurisdiction already applies to individuals and corporations under the MTSA.

2.4.3 INCREASED PENALTIES FOR DEFAULT TO FILE PRE-ARRIVAL INFORMATION (CLAUSE 25)

Clause 25 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.⁴⁷ These regulations set out the list of information to be provided before the vessel enters Canadian waters.⁴⁸

Clause 25 of Bill C-4 increases the penalties for failing to provide pre-arrival information before a vessel enters Canadian waters. The maximum fines set out in the proposed new section 5(3) of the MTSA are up to \$75,000 and/or imprisonment for up to one year.

2.4.4 INCREASED PENALTIES FOR PROVIDING FALSE OR MISLEADING INFORMATION (CLAUSE 28)

Clause 28(2) of Bill C-4 amends section 25 of the MTSA by adding a new section 25(5).

According to the current section 25(3)(a) of the MTSA, no person shall knowingly make any false or misleading statement, or knowingly provide false or misleading information to a security inspector or other person carrying out functions under the current MTSA.

Bill C-4 provides for significantly increased penalties for individuals and corporations who provide false or misleading information. For individuals, the maximum penalties set out in new section 25(5) are fines up to \$200,000 and/or imprisonment for up to one year for a first offence, and fines up to \$500,000 and/or imprisonment for up to two years for any subsequent offence. In the case of a corporation, maximum fines are up to \$500,000 for a first offence and up to \$1,000,000 for any subsequent offence.

2.4.5 SHARING INFORMATION (CLAUSE 26)

Clause 26 of Bill C-4 adds new section 5.1 to the MTSA. This section authorizes the Governor in Council to make new regulations respecting disclosure of information by the Minister about vessels to departments and agencies of the Government of Canada (or their agents) (new section 5.1(1) of the MTSA). This enables the Minister of Transport to use his or her discretion to disclose information about vessels “that in the Minister’s opinion, may pose a threat to the safety or security of Canada or Canadians” (new section 5.1(2) of the MTSA).

2.5 LIMITATION PERIODS (CLAUSE 23)

Clause 23 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 5 years.

2.6 COMING INTO FORCE (CLAUSE 37)

Many of the provisions of Bill C-4 come into force immediately upon Royal Assent. These provisions include clauses 1 to 17, 24 and 33 to 36.

Clauses 18 to 23 and 25 to 32 come into force on a day to be determined by order of the Governor in Council.

NOTES

- * This paper was prepared with the assistance of Julia Nicol of the Legal and Legislative Affairs Division. It is a revised version of *Legislative Summary of Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, prepared on 8 November 2010 by Daphne Keevil Harrold and Danielle Lussier, formerly of the Library of Parliament.
- 1. [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27 [IRPA].
- 2. [Marine Transportation Security Act](#), S.C. 1994, c. 40 [MTSA].
- 3. The Refugee Appeal Division will be created when the relevant sections of the *Balanced Refugee Reform Act* come into force, currently planned for June 2012.
- 4. International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, Geneva, Switzerland, 2010.
- 5. Khalid Koser, *Irregular migration, state security and human security*, Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p. 2.
- 6. In addition, between July and September 1999, 599 migrants from China's Fujian province arrived on Canada's west coast on four different vessels. According to officials in the Department of Foreign Affairs Canada, 24 of these Chinese migrants were granted refugee status, and a dozen were permitted to remain in Canada in exchange for testifying against the smugglers. Approximately 200 individuals went underground following their release and are believed to have illegally entered the United States with the further assistance of the smugglers. The remaining individuals were returned to China. Source: Department of Foreign Affairs Canada, *Briefing Note for the Canada–Europe Parliamentary Association Topic: Human Smuggling to Canada*, 2010.
- 7. *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 December 2000, UN Doc. A/55/383 (Annex III) (effective date: 28 January 2004), art. 3.
- 8. Royal Canadian Mounted Police, [Human Trafficking in Canada](#), March 2010.
- 9. Jacqueline Bhabha, [Trafficking, Smuggling, and Human Rights](#), Migration Policy Institute, March 2005.
- 10. *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 [Charter].
- 11. [Singh v. Minister of Employment and Immigration](#), [1985] 1 S.C.R. 177 (Supreme Court of Canada).

12. These three paragraphs are taken in large part from the following publication: 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 May 2010.
13. Martin Jones and Sasha Baglay, *Essentials of Canadian Law: Refugee Law*, Irwin Law, Toronto, 2007, p. 216.
14. Citizenship and Immigration Canada, "[Speaking notes for the Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism at a news conference announcing the coming into force of Bill C-35 and the designator of a new regulator for immigration consultants](#)," *Speaking notes*, 28 June 2011. In that speech, Minister Kenney said, "It's so important to maintain the public's support for the fairness and integrity of our immigration system and that is why we must deal head-on with those who seek to break the rules and cheat our system, to cut corners and who do not respect the legal integrity of our immigration system."
15. Jones and Baglay (2007), pp. 217–222.
16. Koser (2005), p. 4.
17. 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 section 6(3) of the IRPA makes the designation of an "irregular arrival" a responsibility of the Minister of Public Safety and Emergency Preparedness.
18. "Public interest" is not defined in Bill C-4 or in the IRPA. It appears, however, in other legislation, such as the *Privacy Act*, and has been interpreted by the courts.
19. Sections 33 to 37 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.
20. "Timely manner" is not defined in Bill C-4 or in the IRPA, and it is unclear what length of time would be considered "timely" by the Minister for an "irregular arrival" designation under new section 20.1(1)(a). As this paper shows, the norm is usually 48 hours, a deadline that cannot be met in the context of mass arrivals of claimants.
21. "Human smuggling" is defined in section 117(1) of the IRPA and is amended in Bill C-4, as discussed later in this paper.
22. Clause 19 of Bill C-4 imports a definition of "criminal organization" into the IRPA in section 121.1 of the Act, as discussed later in this paper.
23. [Statutory Instruments Act](#), R.S.C. 1985, c. S-22.
24. This means that the ministerial orders will not be considered to be regulations, notwithstanding section 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* according to certain specified procedures.
25. New section 55(3.1)(b) is discussed later in this paper.
26. Lorne Waldman, *Immigration Law and Practice*, LexisNexis subscription binder, Markham, October 2010, s. 12.8.
27. Charter, s. 12.

28. [Charkaoui v. Canada \(Citizenship and Immigration\)](#), [2007] 1 S.C.R. 350 (Supreme Court of Canada), para. 137.
29. The *Balanced Refugee Reform Act* has not come into force yet in its entirety. However, one of its objectives is faster determination of claims, with strict timelines indicating that claims may be determined within four months of application once it is fully implemented. The “designated foreign national” will not be able to appeal the decision to the Refugee Appeal Division but will have a last option of judicial review at the Federal Court.
30. Orders made under section 58 are amended by Bill C-4 and are discussed later in this paper.
31. Clause 13 of Bill C-4 amends the IRPA by adding new section 58.1, which creates a power for release from detention of a “designated foreign national” by ministerial order. It provides that the Minister, on the request of a “designated foreign national,” may order the person’s release from detention. The Minister does this if he or she is of the opinion that “exceptional circumstances” exist that warrant the release. When ordering the release from detention, the Minister may impose any conditions he or she considers necessary.
32. 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.
33. Please note that the 120-day waiting period discussed is *in addition to* the time the individual would already have waited in detention for the Federal Court to make a determination as to the reasonableness of the security certificate. In some cases these individuals may have waited several years for a decision from the Court. Also note that the detention review regime discussed by the Supreme Court in this case was struck down by the Court as not being compliant with the constitution and was replaced by the detention review regime set out in current section 82 of the IRPA, as discussed earlier in this document.
34. *Charkaoui v. Canada (Citizenship and Immigration)*, paras. 90 and 91.
35. *Ibid.*, para. 94.
36. *Ibid.*, para. 93.
37. *Ibid.*, para. 107.
38. Clause 14 of Bill C-4 amends section 61(a) of the IRPA and adds two new sections, 61(a.1) and 61(a.2).
- The effect of these amendments is to extend the existing power granted to the Governor in Council by the IRPA to include mandatory and permissive criteria to be met before a permanent resident, foreign national or designated foreign national may be released from detention.
- Specifically, new section 61(a.2) provides that regulations may prescribe the types of conditions the Immigration Division *must* impose with respect to the release of a “designated foreign national,” and new section 61(a.1) continues to provide that regulations may prescribe the types of conditions that an officer, the Immigration Division or the Minister *may* impose with respect to the release of a person from detention.
39. In addition, section 82(5)(b) of the IRPA provides the same discretionary power to judges ordering the release from detention of persons named in security certificates, noting that a judge may “set any conditions that the judge considers appropriate.”

40. 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.
41. Section 175 of the [Immigration and Refugee Protection Regulations](#) (SOR/2002-227) sets out the applicable 180-day time limit for a protected person or refugee to apply for permanent residence pursuant to section 21(2) of the IRPA.
42. When the IRPA received Royal Assent on 1 November 2001, the Act included text which proposed the creation of a Refugee Appeal Division (RAD) within the Immigration and Refugee Board. However, the sections of the IRPA creating the RAD are currently not in force, and the RAD has never come into existence. The RAD is to be created by June 2012 under Bill C-11, An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act), which received Royal Assent during the 3rd Session of the 40th Parliament, on 29 June 2010.
43. [R. v. Alzehrani](#), 2008 CanLII 57164 (ON SC), para. 64.
44. Public Safety Canada, "[Currently listed entities](#)."
45. 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.
46. 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 2 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.
47. *Marine Transportation Security Regulations*, para. 221(1)(c).
48. *Ibid.*, s. 221(2).