Legislative Summary

Bill C-11:

An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)

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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-11: AN ACT TO AMEND THE IMMIGRATION AND REFUGEE PROTECTION ACT AND THE FEDERAL COURTS ACT (BALANCED REFUGEE REFORM ACT)

1 BACKGROUND

Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act (short title: Balanced Refugee Reform Act), was introduced in the House of Commons on 30 March 2010 by the Minister of Citizenship, Immigration and Multiculturalism, the Honourable Jason Kenney. The bill makes a number of changes to Canada's in-land refugee determination system. Some of the more significant changes include: the provision that the first-level refugee determination decision-maker is a public servant and is no longer appointed by the Governor in Council; the implementation of a refugee appeal division for some claimants; changes to humanitarian and compassionate provisions; and limited access to Pre-Removal Risk Assessments and Temporary Resident Permits. The bill also increases the number of Federal Court judges.

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 their lives or freedom would be threatened on the basis of their race, religion, nationality, membership in a particular social group or political opinion. 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.

The *Canadian Charter of Rights and Freedoms*[1] is also an important part of the legal framework for those seeking asylum in Canada. In 1985, the Supreme Court of Canada decided in *Singh* v. *the Minister of Employment and Immigration*[2] that the Charter protects refugee claimants; this decision has been instrumental in setting the standards for procedural fairness that must be met in such cases.

In this context, governments strive to operate a refugee determination system that is fair and upholds Canada's legal obligations, while at the same time minimizes the risk of abuse and is reasonably efficient and cost-effective to administer. Asylum seekers whose claims for protection are deemed eligible are offered the opportunity of a hearing by the Immigration and Refugee Board (IRB), a quasi-judicial federal body. Following an initial interview before an immigration officer, claimants for refugee protection proceed to a hearing before a panel of the Refugee Protection Division of the IRB. Unsuccessful claimants are removed from Canada; however, they may apply for a judicial review and a stay of their deportation order to the Federal Court of Canada.[3]

The IRB currently faces a number of challenges in finalizing a large volume of refugee claims. Some, such as the upward trend in asylum claims lodged in industrialized countries over the last number of years and increasingly complex or mixed migration flows, are global in scope. Others are particular to the Canadian context, and include the delay in appointments and reappointments to the IRB over the 2004 to 2008 period, the backlog of 63,000 pending refugee protection claims, and the amount of resources available to the IRB to administer claims.[4]

2 DESCRIPTION AND ANALYSIS

2.1 CHANGES TO THE IMMIGRATION AND REFUGEE BOARD

The IRB is Canada's largest independent administrative tribunal. It comprises, at least in theory, four divisions, and the roles and responsibilities of each division are outlined in the *Immigration and Refugee Protection Act* (IRPA).[5] Each division has a different area of jurisdiction, but all of them are intended to perform adjudicative or quasi-appellate functions under the Act. It is important to note, however, that although IRPA theoretically creates four IRB divisions, only three of these divisions are currently operational: the Refugee Protection Division (RPD), the Immigration Division, and the Immigration Appeal Division (IAD). While the IRPA includes provisions designed to create a Refugee Appeal Division (RAD) within the IRB, the sections creating the RAD have never been brought into force and as a result, the RAD does not presently exist.

With respect to the three operational divisions, sections 100 and 162 of IRPA provide the RPD with the jurisdiction to hear refugee claims referred to it by an immigration officer following the officer's initial eligibility review of the claimant's case. The Immigration Division, by virtue of sections 44, 45 and 162 of the Act, has the jurisdiction to hold admissibility hearings with respect to permanent residents and foreign nationals who are alleged to be inadmissible to Canada because they cannot meet the requirements of IRPA or its regulations. The Immigration Appeals Division (IAD), under sections 62, 63 and 162, has the jurisdiction to hear certain appeals.[6]

2.1.1 CHANGES TO APPOINTMENT PROCESS FOR IMMIGRATION AND REFUGEE BOARD MEMBERS (CLAUSES 17, 18, 26, AND 29)

Bill C-11 provides that RPD officials are no longer appointed by the Governor in Council and will instead be employed as part of the public service. This means that the first-level decision maker in the in-land refugee determination process will no longer hold office for a specified term and will no longer be governed by IRPA's appointment, qualification and conflict provisions. Further, the IRB Chairperson's powers are changed in a number of ways.

2.1.2 Officials of the Refugee Protection Division Employed as Public Servants (Clauses 17, 19, 26, and 30)

Clause 26 creates a new section 169.1 in IRPA which provides that members of the RPD are no longer appointed by the Governor in Council, but instead are appointed in accordance with the *Public Service Employment Act*.[7] Members of the Immigration Division of the IRB continue to be employed as public servants (pursuant to section 172 of IRPA). It also provides that the RPD consists of a Deputy Chairperson, an Assistant Deputy Chairperson and other members, including coordinating members.

All members of the Immigration and Refugee Board must continue to swear an oath or give a solemn affirmation of office (clause 17, creating new section 152.1). However, members of the RPD are no longer included in the following provisions, which continue to apply to the Chairperson and members of the IAD and the RAD and not to members of the Immigration Division (clause 18 of the bill and section 153 of IRPA):

- appointment by the Governor in Council to hold office during a term of up-to seven years subject to removal by the Governor in Council only for cause;
- eligibility for reappointment in the same or another capacity;
- remuneration set by the Governor in Council;
- terms of appointment including conflicting office or employment; and
- qualification quotas requiring that at least 10% of the members of these divisions be lawyers or notaries with memberships in good standing in their governing provincial bars, law societies or notaries' chambers.

2.1.3 Powers of the Chairperson (Clauses 19, 20, and 30)

Clause 19 amends section 159 of IRPA, which governs the powers and duties of the Chairperson, who is the chief executive officer of the IRB. Broadly stated, this clause limits the Chairperson's ability to exercise certain powers over the RPD, while specifying that he or she continues to be able to exercise those powers with respect to members of the RAD and IAD.

The Chairperson continues to have supervision over and direction of the work and staff of the entire Board pursuant to section 159(1)(*a*). Currently, section 161(1) of IRPA allows the Chairperson to make rules governing the practice and procedures of all four divisions of the IRB. Clause 20 amends this section of the IRPA to include in the Chairperson's rule-making authority the power to make rules governing the new step in the refugee determination process, the refugee claimant's initial interview before the RPD (discussed later). It also amends section 161(1) of IRPA to remove the need for the Chairperson to consult with the Director of the Immigration Division before making rules regarding the procedures and practices of any division.

Pursuant to Bill C-11, the Chairperson no longer has the ability to assign at any time members to the RPD, to assign a member of the RPD to work in another office or district to meet operational needs, or to designate coordinating members of the RPD pursuant to sections 159(1)(*b*) to (*d*). The Chairperson continues to exercise these powers in respect of members of the RAD and the IAD. Clause 19 amends the length of time that members of the RAD and IAD may be assigned by the Chairperson to different regions or districts based on operational needs from up to 90 days to up to 120 days.

Clause 19 preserves additional powers of the Chairperson while somewhat restricting their ambit. For example, the Chairperson continues to have the power to issue guidelines and to delegate certain powers. Clause 19 amends section 159 of IRPA, changing from a mandatory to a permissive power the ability of the Chairperson to choose when and if a coordinating member should be appointed.

Clause 30 amends section 176(1) of the Act to provide that the Chairperson may request the Minister to decide whether any member of the IAD or the RAD should be subject to remedial or disciplinary measures if the member has become incapacitated by reason of infirmity; has been guilty of misconduct; has failed in the proper execution of the office; or has been placed, by conduct or otherwise, in a position that is incompatible with the execution of that office. Under the bill, the Chairperson no longer has the power to refer members of the RPD for disciplinary decisions before the Minister.

2.2 Changes to the Procedure for Making a Claim for Refugee Protection From Inside Canada

Bill C-11 makes significant changes to the process for making a claim for refugee protection from inside Canada. Major changes include the creation of an initial interview stage before the RPD in advance of the claimant's refugee determination hearing; the requirement that a refugee hearing be held before a one-member panel of the RPD; the implementation of an appeal body with the ability to hold a hearing; and preventing designated groups from accessing the appeal body.

2.2.1 Changes to the Refugee Protection Division Process

2.2.1.1 Initial Interview Followed by a Hearing (Clauses 8, 11, 24, and 27)

Section 99(3) of IRPA currently provides that a claim for refugee protection from within Canada must be made to an immigration officer who determines within three working days, pursuant to IRPA section 100(1), whether the claim is eligible to be referred to the RPD. Once referred, the claim proceeds to a hearing before the RPD pursuant to section 170 of IRPA. During this hearing both the refugee claimant and the Minister of Citizenship and Immigration may present evidence, question witnesses and make representations regarding whether the person, is, in fact a refugee or a person in need of protection.

Clause 11 of the bill creates a new step in the process for referred claims: prior to his or her hearing before the RPD, the claimant must attend an interview with an official on a date fixed by the referring officer in accordance with the rules of the Board.

During the interview, the official of the RPD has the power to question witnesses (clause 27), a power previously restricted to the RPD hearing. The official of the Board conducting the interview must fix a date for the claimant to attend a hearing before the RPD, in accordance with the rules of the Board and any directions of its Chairperson (clause 11, new section 100(4.1)).

If a claimant fails to attend the initial interview with an official, the Division may find that a proceeding before it has been abandoned (clause 24). Previously, section 168(1) of IRPA provided that a failure to appear for a hearing, a failure to provide information required or a failure to communicate with the Division on request could result in a finding that the claim had been abandoned.

The interview is also included in the proceedings covered by regulations governing who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister or an officer of the Board (clause 8).

2.2.1.2 Single-Member Panel for the Refugee Protection Division Hearing (Clause 21)

Clause 21 amends section 163 of the Act to provide that matters before any division of the IRB must be conducted before a single member, unless it is a matter before either the RAD or the IAD and the Chairperson is of the opinion that a matter requires a panel of three members. Previously, the Chairperson had the ability to appoint panels of three to determine claims before the RPD as well. This power has now been removed. The Chairperson continues to have no power to appoint panels of three for matters before the Immigration Division.

2.2.2 Refugee Appeal Division

As previously discussed, when IRPA received Royal Assent on 1 November 2001, the Act included text which proposed the creation of a Refugee Appeal Division (RAD) within the IRB; however, the sections of IRPA creating the RAD are currently not in force and the RAD has never come into existence. Bill C-11 proposes changes to the original, unproclaimed sections in IRPA designed to create the RAD. It also proposes to bring the amended sections concerning the RAD into force two years after Bill C-11 receives Royal Assent.

2.2.2.1 Powers of the Refugee Appeal Division (Clauses 14 and 22)

Clause 14 provides that the RAD may refer a matter back to the RPD for a redetermination only in circumstances where the RAD is of the opinion that the decision of the RPD is wrong in law, in fact or in mixed law and fact; and it cannot make an appeal decision without hearing evidence that was presented to the RPD. Clause 22 amends section 165 (not currently in force) to provide that members of

the RAD now have the powers of Commissioners appointed under Part I of the *Inquiries Act*, whereas previously these powers were provided to members of the RPD and Immigration Division. Commissioners under Part I of the *Inquiries Act* have the powers of a civil court to enforce the attendance of witnesses and compel them to give evidence. They also have the power to summon witnesses and to require the production of evidence or documents deemed required for a full investigation into the matters they are appointed to examine.

2.2.2.2 Procedure Before the Refugee Appeal Division (Clauses 13, 25, and 28)

Clause 13(2) replaces section 110(3) (not currently in force) to amend the procedure for the RAD. The original section 110(3) provides that the RAD may accept written submissions from the Minister, the person who is the subject of the appeal, a representative or agent of the United Nations High Commissioner for Refugees, and any other person described in the rules of the Board. However, clause 13 amends section 110(3) to provide that the Minister and the person who is the subject of the appeal may now provide not only written submissions, but also documentary evidence to the RAD. Clause 13 also amends section 110(3) to provide that the RAD "must," rather than "shall," proceed without a hearing on the basis of the record of the proceedings of the RPD.

Regarding what new evidence the person concerned and the Minister may provide to the RAD, new section 110(4) (clause 13) states that the person who is the subject of the appeal may only present evidence that arose after the rejection of his or her claim or evidence that was not reasonably available or that the person could not reasonably have been expected in the circumstances to have presented at the time the refugee claim was rejected by the RPD.

However, new section 110(4) is silent with respect to what documentary evidence the Minister may submit to the RAD. This raises the issue of how this section could be interpreted in the future by courts. For example, it is possible this section could be interpreted to mean that the Minister may present any evidence to the RAD he or she chooses, including evidence that the Minister could have presented at the RPD hearing.

New section 110(5) (clause 13) states that when the person subject to the appeal is presenting evidence in response to evidence presented by the Minister, he or she is not restricted by the limitations of new section 110(4). The claimant's responding evidence could have arisen or have been reasonably available prior to the rejection of the claim before the RPD.

Notwithstanding the fact that section 110(3) provides that paper hearings, as opposed to in-person hearings, before the RAD will be the norm, new section 110(6) (clause 13) does empower the RAD to hold an in-person hearing if the documentary evidence provided by the Minister or the person concerned raises a credibility issue (under new section 110(4)). In deciding whether an in-person hearing is necessary, new section 110(6) states that the RAD must be satisfied that the evidence (1) raises a serious issue with respect to the credibility of the person who is the subject of the

appeal; (2) be central to the decision with respect to the refugee protection claim; and (3) would justify allowing or rejecting the refugee protection claim, if the evidence is accepted.

Clause 28 addresses proceedings before the RAD, replacing section 171(*a*) (not currently in force) and creating new sections 171(*a*), (*a.1*), (*a.2*), (*a.3*) and (*a.4*). New section 171(*a*) provides that the RAD must give notice of any hearing to both the Minister and the person who is the subject of the appeal. New section 171(a.1) provides that, subject to the rules governing the introduction of new evidence before the RAD (section 110(4)), if an in-person hearing is held, the RAD must give the Minister and the person who is the subject of the appeal the opportunity to present evidence, question witnesses and make submissions. New sections 171(*a.2*) and 171(*a.3*) further provide that the RAD is not bound by any legal or technical rules of evidence and that the RAD may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.

Finally, new section 171(*a.4*) provides that the Minister may, after giving notice in accordance with the rules, intervene in the appeal, including intervening for the purpose of filing submissions. This provision is found in the current version of section 171(*a*) of the Act, which will be repealed and replaced by clause 28.

Clause 25 widens the powers of the RAD in terms of how it renders decisions. Currently, section 169(*c*) of IRPA specifies that the RAD must render its decision in writing. Clause 25 amends the provision to empower the RAD to render decisions orally, as the other divisions of the IRB are already empowered to do.

2.2.2.3 Designated Countries, Parts of Countries, and Classes of Nationals Provided No Access to the Refugee Appeal Division (Clauses 12 and 13)

Clause 12 creates new section 109.1(1), which provides that the Minister may designate by order nationals of a country, a part of a country, or a class of nationals of a country, if the Minister is of the opinion that they meet criteria established in the regulations. Claimants from certain designated groups would not have access to the RAD, nor could the Minister appeal decisions involving these individuals to the RAD. Clause 12 creates new section 109.1(3), which provides that neither the person who is the subject of an RPD decision nor the Minister may appeal against that decision to the RAD if on the day the RPD decision was made, the national was of a country, of a part of a country where the person lived before leaving that country, or belonging to a class of nationals in a country that was designated under new section 109.1(1) by Ministerial order.

Leave for judicial review by the Federal Court can be sought for any administrative decision made under IRPA,[8] which would include a decision made by the RPD. Thus, although Bill C-11 will prevent individuals and the Minister from appealing a negative decision regarding the claim of claimants from designated countries, areas, and groups to the RAD, the individual and the Minister may still seek leave for judicial review at the Federal Court, which has a different standard of review.

These Ministerial orders designating a country, area or group are not considered statutory instruments pursuant to the *Statutory Instruments Act*[9] (clause 12, creating section 109.1(2) of IRPA); however, such orders must still be published in the *Canada Gazette*. 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 which 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.

2.3 Changes to Humanitarian and Compassionate Considerations

Currently, section 25(1) of IRPA provides that the Minister may examine humanitarian and compassionate considerations relating to foreign nationals who are inadmissible to Canada or who do not meet the requirements of IRPA, taking into account the best interests of a directly affected child or public policy considerations. Specifically, section 25(1) of IRPA provides the Minister with two powers: (1) the power to grant permanent resident status and (2) the power to grant an exemption from any applicable criteria or obligation of the Act based on these humanitarian and compassionate considerations.

Pursuant to section 25 the Minister may establish public policies under the Act. Examples of public policies which have been used to facilitate immigration to Canada under this section of the Act include granting permanent residence or providing fee exemptions to groups of persons impacted by natural disasters or civil unrest, persons victimized by human traffickers, or partner-spouses in Canada without legal immigration status, notwithstanding the inability of these persons to meet one or more criteria specified under IRPA.[10]

Under section 25(1), foreign nationals inside or outside Canada may apply for permanent residence or exemption from any applicable criteria or obligations under the Act on humanitarian and compassionate grounds (hereinafter an application on humanitarian and compassionate grounds). Alternatively, the Minister may on his or her initiative consider circumstances of foreign nationals pursuant to section 25. The Minister is obliged to consider applications made by foreign nationals within Canada but is not obliged to consider applications made by a foreign national outside of Canada.

2.3.1 Removal of Public Policy Considerations from Examinations Conducted on Request (Clauses 4 and 5)

Clauses 4 and 5 of Bill C-11 amend section 25(1) to divide the humanitarian and compassionate decision making process into three Ministerial powers. Clauses 4 and 5 also limit the Minister's consideration of public policy considerations to situations where the Minister, on his or her initiative, undertakes an examination of the foreign national's circumstances (new section 25.2). In other words, when a foreign national submits an application under section 25(1) of the IRPA, the Minister or his or her

delegate may only consider humanitarian and compassionate considerations, taking into account the best interests of a child affected by a decision. Only when the Minister or his delegate undertakes an examination of the foreign national's circumstances on his or her initiative can the Minister grant permanent residence or exempt a foreign national from any applicable criteria or obligations under the Act based both on humanitarian and compassionate considerations and public policy considerations.

In cases where a foreign national submits an application on humanitarian and compassionate grounds, clause 4 creates a new section 25(1.1), which provides that the Minister is not seized of the applicant's request unless the applicable fees have been paid. However, new section 25.1(2), introduced by clause 5 of the bill, provides that the Minister, when examining a foreign national's circumstances on his or her own initiative, may exempt a foreign national from the payment of any applicable fees.

2.3.2 Humanitarian and Compassionate Determinations Separated from Refugee Determination (Clause 4)

In addition to the changes described above, clause 4 creates a new section 25(1.2) which provides that the Minister may not examine a foreign national's application on humanitarian and compassionate grounds if the foreign national already has such an application pending; if the foreign national has made a claim for refugee protection which is still in process or still before the RPD or RAD; or if less than 12 months have passed since the foreign national's claim for refugee protection was rejected by or determined to be withdrawn or abandoned by the RPD or the RAD. New section 25(1.3), also introduced by clause 4, specifies that the Minister may not consider factors taken into account during refugee determination when examining an application on humanitarian and compassionate grounds made by a foreign national.

2.3.3 "Shall" Changed to "Must" (Clause 4)

Clause 4 amends the English text of section 25(1) to state that the Minister "must, on request" examine the circumstances of a foreign national in Canada making an application on humanitarian and compassionate grounds. The English text of section 25(1) currently reads the Minister "shall, on request." The French text remains unchanged, stating that the Minister "doit, sur demande," which translates as "must, on request."

Section 11 of the *Interpretation Act*[11] states that the expression "shall" is to be construed as imperative. However, interpretation of the use of the word "shall" in jurisprudence has suggested that "shall" may be found to be directory rather than mandatory in nature depending on the context; thus "shall" may be a command or a future event.[12] While "must" is much less frequently used in legislation and thus has had less judicial consideration, it is generally seen as mandatory and not directive, i.e., a common imperative with no other meaning.[13] It would appear that replacing "shall" with "must" has been done to minimize disagreement and any possible

resulting litigation over the strength of the requirement that the Minister consider an application on humanitarian and compassionate grounds.

2.3.4 Regulatory Powers and Reporting to Parliament (Clauses 6 and 9)

Clause 6 of Bill C-11 extends the existing powers of the Minister to make regulations to include the power to make regulations concerning new sections 25.1 and 25.2. Clause 9 also requires the Minister to report to Parliament on the number of people granted permanent residence on humanitarian and compassionate grounds or on public policy considerations pursuant to new sections 25(1), 25.1(1) and 25.2(1).

2.4 Post-Claim Changes

2.4.1 No Pre-removal Risk Assessment for 12 Months Following Rejection, Abandonment or Withdrawal of Claim for Refugee Protection (Clause 15)

When an individual makes a claim for refugee protection from inside Canada, a removal order conditional on the outcome of the claim is issued against the person. If the refugee claim is successful, the removal order pertaining to the claimant will be deemed void when permanent residence is obtained.[14] Removal orders pertaining to failed refugee claimants will usually come into force 15 days following the refusal.[15] At this time the person is given notice that he or she may apply for a pre-removal risk assessment (PRRA), subject to certain eligibility criteria.[16]

Applying for a PRRA normally stays a person's removal from Canada until a decision is made on the application.[17] The PRRA decision is made immediately prior to removal in order to ensure a timely risk assessment such that the person is deported in a way that complies with Canada's international human rights obligations as well as the individual's Charter rights to life, liberty and security of the person.[18] The PRRA assessment is made by an employee of Citizenship and Immigration Canada who seeks to determine if a person may be safely removed from Canada based exclusively on evidence not available at the time of the refugee hearing or which arose since the hearing, due, for example, to a change in the destination country. If an applicant is determined to be ready for removal that person must leave Canada once travel arrangements are finalized.[19]

Clause 15 adds section 112(2)(*b.1*) to the IRPA. New section 112(2)(*b.1*) states that persons subject to a removal order may not apply for a pre-removal risk assessment if their claim for refugee protection was rejected, abandoned, or withdrawn within the last 12 months.

New section 112(2.1) empowers the Minister to exempt from the 12-month bar on applying for a PRRA nationals of certain countries, habitual former residents of certain countries, persons who before leaving a country last resided in a given part of that country, and persons belonging to a class of nationals or habitual former residents of a country (Clause 15(2)).

New section 112(2.3) provides that regulations may govern any matter relating to the application of new sections 112(2.1) or (2.2). The regulations may include provisions establishing the criteria to be considered when an exemption is made.

2.4.2 No Temporary Resident Permit for Refugee Claims Finalized in the Past 12 Months (Clause 3)

Section 24 of IRPA provides that an officer may issue a temporary resident permit to a foreign national who is inadmissible or does not meet the requirements of IRPA if the officer is of the opinion that issuing the permit is justified in the circumstances. The officer must act in accordance with any instructions the Minister may make. A permit may be cancelled at any time. If the permit is not cancelled, it is valid for up to three years or for the period of time the permit specifies, unless the permit holder leaves Canada without authorization to re-enter the country.[20]

Clause 3 of the bill amends section 24 of IRPA to specify that foreign nationals whose claims for refugee protection have been rejected or determined to be withdrawn or abandoned may not request a temporary resident permit if less than 12 months have passed since their claim for refugee protection was finalized.

2.5 Other Changes in Bill C-11

2.5.1 Youth Sentenced as Adults Under the *Youth Criminal Justice Act* now "Inadmissible"

Section 36(3)(*e*) of IRPA currently provides that any conviction under the *Youth Criminal Justice Act*[21] will not be considered when determining if a foreign national is inadmissible to Canada. Clause 7 amends section 36(3)(*e*) of the Act to provide that youth who received an adult sentence under the *Youth Criminal Justice Act* will now be considered inadmissible to Canada.

2.5.2 Appointment of Four Additional Federal Court Judges (Clause 41)

Clause 41 of the bill amends section 5.1(1) of the *Federal Courts Act*[22] to provide that the Federal Court of Canada consists of 36 judges in addition to the Chief Justice of the Federal Court. This amendment provides for the appointment of four new judges to the court.

2.6 Coming Into Force Provisions (Clauses 31 and 42)

Clause 42 provides that the provisions of Bill C-11 will come into force two years after the day on which the bill receives Royal Assent, or on an earlier day(s) to be fixed by the Governor in Council with the exception of clauses 3 to 6, 9, 13, 14, 28 and 31. Thus, changes to humanitarian and compassionate considerations (clauses 4 to 6 and 9) and the restriction on temporary resident permits (clause 3) come into force immediately upon Royal Assent and the remainder of the changes proposed in Bill C-11 will come into force two years after the bill receives Royal Assent at the latest.

Clause 42 provides that amendments to the unproclaimed text of IRPA relating to the Refugee Appeal Division will come into force immediately upon Royal Assent; however, the provisions creating the RAD and governing its operation will not immediately come into force. Clause 31 provides that sections 73, 110, 111, 171, 194 and 195 will come into force two years after the day on which the bill receives Royal Assent or on an earlier day that may be fixed by order of the Governor in Council. Thus, the provisions creating the Refugee Appeal Division and the sections governing appeals to the RAD will also come into force two years after the bill receives Royal Assent.

2.7 Transitional Provisions (Clauses 32 to 40)

2.7.1 Humanitarian and Compassionate Applications

Clause 32 of the bill provides that applications made under section 25 of IRPA immediately before the day on which the Act receives Royal Assent shall be read in accordance with the Act as it read immediately before Bill C-11 received Royal Assent. Clause 39 provides that claimants with pending claims before the RPD on the day that the provisions creating the RAD come into force may still make applications on humanitarian and compassionate grounds, notwithstanding newly created section 25(1.2)(*b*), which would otherwise bar them from making such an application. Clause 40 further provides that new section 25(1.2)(*c*), which creates a 12-month prohibition on making applications on humanitarian and compassionate grounds, does not apply to refugee claimants whose claims are still pending before the RPD on the day before the provisions creating the RAD come into force.

2.7.2 Refugee Protection Claims

Clause 33 provides that Bill C-11 will apply to all claims for refugee protection made before this bill comes into force where the claimant for refugee protection has not yet submitted a Personal Information Form,[23] as defined in section 1 of the Refugee Protection Division Rules, and the time limit for submitting that form has not yet expired. Clause 33 further provides that an official of the IRB may set a date for the initial interview referred to in section 100(4) for claimants included in the new provisions of Bill C-11.

Clause 34 states that on the day this bill comes into force, claimants for refugee protection who have not had an RPD hearing where substantive evidence was heard and who have submitted a Personal Information Form must attend an interview with an official of the IRB, if required to do so, on the date fixed by the official in accordance with the RPD Rules and must produce any supplementary documents and information the official considers necessary. All provisions of Bill C-11 will apply to these claimants except sections 100(4) and (4.1).

Clause 35 provides that claims for refugee protection where substantive evidence has been heard by the RPD before the day on which new section 18(1) comes into force must continue to be heard by that RPD member or panel of members pursuant to the Act as it read immediately before the day new section 18(1) comes into force.

However, if the single member is unable to continue to hear the claim, the claim must be referred to the RPD as amended, and must be conducted in accordance with the modified hearing procedures the bill introduces. Further, if one member of a panel of three is unable to hear the claim, the claim must continue to be heard by one of the two remaining members in accordance with the Act as it read immediately before the coming into force of new section 18(1).

2.7.3 Refugee Appeal Division

Clause 36 of the bill provides that decisions of the RPD made before Bill C-11 comes into force may not be appealed to the RAD after the bill comes into force.

Clause 37 provides that if the decision of the RPD is set aside in a judicial review to the Federal Court, the claim for refugee protection must be referred to a member of the RPD, prior to a judicial review.

2.7.4 Pre-removal Risk Assessments

Persons in respect of whom refugee protection decisions have been made under the Act as it read prior to the coming into force of Bill C-11 do not need to wait for 12 months before applying for protection under section 112(1) for a pre-removal risk assessment (clause 36(2)).

Clause 38 provides that the bar on applying for a pre-removal risk assessment if less than 12 months have passed since a claim for refugee protection was rejected, withdrawn or abandoned does not apply to applications for pre-removal risk assessment made before the day on which Bill C-11 comes into force.

3 COMMENTARY

Given that Bill C-11 introduces substantial reforms to Canada's in-land refugee determination system, it raises a number of areas for consideration. Public debate has centred on four major aspects: public servant first-level decision makers; the Refugee Appeal Division; designated countries, areas and groups; and limited recourse for failed claimants.

3.1 Public Servant First-Level Decision Makers

Replacing Governor-in-Council appointees with public servants for the first-level decision has been well received by lawyers and academics, who have in the past been critical of what they perceive as the politicization of appointments to the IRB. They feel that, under the proposed change, the risk of political influence over decision making is mitigated because the public servants will be employees of the independent IRB.[24] Other advocates have been more critical of this change, arguing that the independence, quality and expertise of decision makers will be compromised.[25]

The independence of first-level decision makers of the IRB has been the subject of past jurisprudence. In 2001 the Federal Court of Canada found that RPD members were sufficiently independent and able to perform their judicial functions due to the fact that members are appointed during good behaviour for a maximum period of seven years and the renewal of a member's mandate is a Cabinet responsibility. This appointment process was described by the Federal Court as meeting the minimal requirements of administrative independence.[26] Institutional independence is important in the refugee determination context, where the claimant's section 7 Charter rights to life, liberty and security of the person are at stake.[27]

3.2 Refugee Appeal Division

The provision for a Refugee Appeal Division (RAD) has been well received by refugee advocates and lawyers, who have long argued that the absence of an appeal for refugee determination decisions on the merits of the case is a serious shortcoming in Canada's current refugee law.[28] The powers envisioned for the RAD in Bill C-11 are more robust than those that were outlined in the *Immigration and Refugee Protection Act* but never implemented.

One of the unusual procedural aspects of the RAD is that new sections 110(3) and (4), created by Clause 13, could be interpreted as providing the Minister and the rejected refugee claimant with different abilities to present evidence before an appeal body, as previously discussed. Procedural fairness principles normally provide that both parties are governed by equal procedural rights. Further, the jurisprudence dictates that a claimant for refugee protection is entitled to full disclosure of all relevant information against them due to the seriousness of a claim for refugee protection.[29]

3.3 Designated Countries, Parts of Countries, and Classes of Nationals

Bill C-11 provides for designated countries that would be denied access to appeal but does not prescribe the process or criteria for such a designation. The government has indicated that the purpose is to designate safe countries, although the word "safe" is not in the legislation, which has been raised as a concern by some legal commentators.[30]

The United Nations High Commissioner for Refugees (UNHCR) has taken the position that safe country of origin provisions are an acceptable management tool, provided all refugee claimants have access to a fair hearing and appropriate safeguards are in place for special cases.[31]

Because Bill C-11 provides the Minister with the discretion to designate countries by Ministerial order, some commentators have suggested that the designation process may be influenced by political or foreign policy interests.[32] To partially mitigate this concern, some people recommend that principles for the designation of countries be included in the legislation or that an advisory committee be formed to provide input into the designation process.[33]

Others are critical of the prohibition on appeals to the RAD for persons from designated countries, areas, and groups, arguing that it is unfair and that these cases are by their very nature more complex and deserving of review.[34] Further, commentators suggest that the bar will be detrimental to specific groups who may face persecution within generally safe countries, for instance on the basis of gender or sexual orientation.[35] The provision in the bill allowing for the designation of specific groups is designed to address the latter concern.

As previously discussed, claimants from designated areas or groups are able to appeal to the Federal Court; however, the standard of review used by courts to evaluate an administrative decision is more deferential than the standard used by the RAD when it receives an appeal of a negative decision made on a refugee claim.[36]

IRPA provides for one other somewhat similar restriction on a right to appeal. Section 64 of IRPA provides that permanent residents or foreign nationals (including protected persons) who have been found to be inadmissible on the grounds of security, violating human or international rights, serious criminality (punished by a term of imprisonment in Canada of at least two years) or organized criminality, may not appeal to the Immigration Appeal Division. The Supreme Court of Canada upheld this different appeal procedure under the Charter due to the fact that foreign nationals have no unqualified right to enter or remain in Canada. The Court found that deportation itself cannot implicate the liberty and security interests protected under section 7 of the Charter. Further, the court found that the claimants could make an application on humanitarian and compassionate grounds under section 25 of IRPA, a procedure guaranteed to be fair under the Charter.[37] All of these considerations led the Court to conclude that the section 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. It is unclear what a court may decide regarding the differential appeal rights accorded to failed refugee claimants from designated countries, regions or groups.

3.4 Changes to Humanitarian and Compassionate Considerations

As explained above, clause 4 of Bill C-11 specifies that the Minister may not consider factors taken into account during refugee determination when examining an application on humanitarian and compassionate grounds made by a foreign national. Changes to humanitarian and compassionate considerations are designed to close avenues for persons who have made unsuccessful claims for refugee protection.

Legal commentators have explained that there is significant overlap between persons facing persecution who are found to be in need of refugee protection and persons facing serious hardship who are accepted to Canada based on humanitarian and compassionate considerations.[38] The overlap is such that some commentators suggest Bill C-11 creates a distinction that will be hard to implement in practice – it may create difficulties assessing harm if persecution-related risk cannot be considered.[39] Commentators stated that, in their experience, claimants who do not fit into the refugee protection definition are largely successful when making

applications for permanent residence on humanitarian and compassionate grounds.[40] As such, some commentators argued for flexibility to allow the Minister to consider refugee protection elements when assessing a request on humanitarian and compassionate grounds.[41]

Commentators have also expressed concern with the prohibition on filing an application for permanent residence on humanitarian and compassionate grounds for 12 months following a failed, withdrawn, or abandoned claim for refugee protection. They argue that humanitarian and compassionate considerations have been an important part of Canada's immigration legislation and serve as a final, catch-all remedy for potential injustices.[42] Furthermore, these commentators question whether the proposed changes will result in processing efficiencies, given that these applications provide for no right to stay in Canada, are made by different decision makers from those hearing claims for refugee protection, and are separately funded and resourced.[43]

NOTES

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Supreme Court of Canada).
3. For details on Canada's current in-land refugee determination system see Penny Becklumb, *Canada's Inland Refugee Protection System*, Publication no. BP-185, Parliamentary Information and Research Service, Library of Parliament, 16 September 2008.
4. Immigration and Refugee Board, Report on Plans and Priorities 2010-2011 pp. 7–9.
5. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].
6. The IAD has the jurisdiction to hear appeals initiated by the following persons: a permanent resident outside Canada appealing a decision that he or she has not met the residency requirements; sponsors appealing an officer's decision to refuse a permanent residence visa application made by that sponsor's family member; and foreign nationals who hold permanent resident visas and are ordered removed from Canada. See IRPA, s. 63.
7. *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13.
8. IRPA, s. 72.
9. *Statutory Instruments Act*, R.S.C. 1985, c. S-22.
10. *Aguilar Espino* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 74, 308 F.T.R. 92 (Eng.), (Federal Court of Canada) per Justice E.R. Dawson, paras. 42–44.
11. *Interpretation Act*, R.S., 1985, c. I-21.
12. *Duong* v. *Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 109, 197 F.T.R. 158 (Federal Court) per Justice Tremblay-Lamer, paras. 7–9; and *Lam* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 613, 15 Imm. L.R. (Federal Court) per Justice Teitelbaum, para. 31.

13. *U.A.W., Local 458* v. *Massey-Ferguson Industries Ltd.* (1979), 94 D.L.R. (3d) 743, 23 O.R. (2d) 56 (Ontario Divisional Court) per Justice Reid, paras. 8, 9, 10, 11, 12, 1, 14, 16, and 17.

14. IRPA, s. 51.

15. See IRPA, s. 49(2), for the different categories which may apply to different situations of specific claimants.

16. IRPA, s. 112.

17. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 232.

18. See *Figurado* v. *Canada (Solicitor General)*, 28 Admin. L.R. (4th) 82, 262 F.T.R. 219, especially para. 40. Risks are assessed based on risk of persecution, risk of torture, risk to life or risk of cruel and unusual treatment/punishment (IRPA, ss. 96–98); persons inadmissible to Canada due to violating human/international rights or serious criminality will only be assessed based on risk of torture, risk to life, or risk of cruel/unusual punishment/treatment (see discussion in Martin Jones and Sasha Baglay, *Refugee Law*, Irwin Law, Toronto, 2007, p. 336).

19. Jones and Baglay (2007), p. 338.

20. *Immigration and Refugee Protection Regulations* (SOR/2002-227) (IRPR), s. 63.

21. *Youth Criminal Justice Act*, S.C. 2002, c. 1.

22. *Federal Courts Act*, R.S.C. 1985, c. F-1.

23. A "Personal Information Form" (PIF) is the form in which a claimant for refugee protection gives information set out in Schedule 1 of the Refugee Protection Division Rules, which requires the disclosure of a great number of listed personal details, as well as the reason the person is claiming refugee protection and the facts supporting the claim.

24. Peter Showler, "Proposed Refugee Reforms may be a step towards a Faster, Fairer System," News release, Refugee Forum, Ottawa University, 30 March 2010.

25. See, for example, the Canadian Council for Refugees, "Refugee Reform: Weighing the Proposals," April 2010; House of Commons, Standing Committee on Citizenship and Immigration [CIMM], *Evidence*, 3rd Session, 40th Parliament, Meeting no. 14, 11 May 2010, 1555 (Amy Casipullai, Ontario Council of Agency Serving Immigrants).

26. See *Zrig* v. *Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043, [2002] 1 F.C. 559, especially para. 74.

27. For discussion of these rights see *Constitution Act, 1982*, (Charter); *Singh* v. *Minister of Employment and Immigration*, [1985], affirmed in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, where there is a prima facie risk of torture. For discussions on institutional independence see 2747-3174 *Québec Inc.* v. *Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Valente* v. *The Queen*, [1985] 2 S.C.R. 673; and *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3.

28. See, for example, CIMM, *Evidence*, 3rd Session, 40th Parliament, Meeting no. 15, 11 May 2010, 1840 (Lorne Waldman) and 2010, 2015 (Catherine Dagenais, Barreau du Québec); and CIMM, *Evidence*, 3rd Session, 40th Parliament, Meeting no. 14, 11 May 2010, 1645 (Mitchell Goldberg, Canadian Bar Association).

29. *Nrecaj* v. *Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 630.

30. CIMM (Meeting no. 15, 11 May 2010), Dagenais, 2045.

31. House of Commons, Standing Committee on Foreign Affairs and International Development, 3rd Session, 40th Parliament, Meeting No. 6, 25 March 2010, 1145 (His Excellency Antonio Guterres, United Nations High Commissioner for Refugees).

32. See, for example, CIMM (Meeting no. 14, 11 May 2010), Casapullai, 1550; and Salimah Valiani, Metro Toronto Chinese and Southeast Asian Legal Clinic, 1640; and CIMM (Meeting no. 15, 11 May 2010), Michael Greene, Immigration Lawyer, 2105.

33. CIMM (Meeting no. 15, 11 May 2010), Dagenais, 2015; and Peter Showler, 1820.

34. See, for example, CIMM (Meeting no. 14, 11 May 2010), Michael Bossin, Amnesty International, Committee, 1540; and CIMM (Meeting no. 15, 11 May 2010), Andrew Brouwer, Refugee Lawyers Association of Ontario, 1945; and Dagenais, 2015. See also Showler (March 2010).

35. See, for example, the Canadian Council for Refugees (2010); CIMM (Meeting no. 15, 11 May 2010), Vanessa Taylor, Centre des femmes immigrants de Montréal, 1905.

36. *Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (Supreme Court of Canada).

37. See *Medovarski* v. *Canada (Minister of Citizenship and Immigration)*; *Esteban* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, especially paras. 45–47.

38. See, for example, CIMM (Meeting no. 14, 11 May 2010), Valiani, 1635; and CIMM (Meeting no. 15, 11 May 2010), Greene, 2105; Showler, 1820; and Waldman, 1845.

39. CIMM (Meeting no. 15, 11 May 2010), Showler, 1820.

40. Ibid., Geraldine Sadoway, Parkdale Community Legal Services, 2025.

41. Ibid., Showler, 1820.

42. See, for example, ibid., Waldman, 1835; Greene, 2035; and Sadoway, 2025; and CIMM (Meeting no. 14, 11 May 2010), Goldberg, 1650.

43. See, for example, CIMM (Meeting no. 14, 11 May 2010), Goldberg, 1650; and CIMM (Meeting no. 15, 11 May 2010), Waldman, 1835; and Sadoway, 2025.