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LEGISLATIVE SUMMARY

Bill C-49:

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

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Daphne Keevil Harrold
Danielle Lussier

Social Affairs Division
Parliamentary Information and Research Service

Legislative Summary of Bill C-49

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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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CONTENTS

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*

1 BACKGROUND

1.1 PURPOSE OF THE BILL AND PRINCIPAL AMENDMENTS

Bill C-49, 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 21 October 2010 by the Minister of Public Safety, the Honourable Vic Toews.

The purpose of the bill is to modify the *Immigration and Refugee Protection Act*[1] and the *Marine Transportation Security Act*.[2] Specifically, the bill:

- creates the new category of "designated foreign national" for members of a group which has been designated by the Minister as an "irregular arrival" to Canada with the resultant creation of a new detention regime; mandatory conditions on release from detention; restrictions on the issuance of refugee travel documents; and bars on certain immigration applications, applicable only to "designated foreign nationals";
- restricts the ability to appeal certain decisions to the Refugee Appeal Division (RAD), 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 *Immigration and Refugee Protection Act* (IRPA), introduces new mandatory minimum sentences for human smuggling, and adds new 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
- amends the *Marine Transportation Security Act* (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,[3] as "irregular migration poses very real dilemmas for states as well as exposing migrants themselves to insecurity and vulnerability."[4]

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.[5]

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-49 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-49 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, to whose drafting Canada made a substantial contribution and which it ratified in 2002. Migrant smuggling has been an internationally recognized crime since 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."[6] 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. Whereas "human smuggling" is typically a business transaction that ends upon arrival,[7] individuals who are "trafficked" are assumed not to have given their consent and are considered to be "victims" or "survivors."[8]

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

The *Canadian Charter of Rights and Freedoms*[9] 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*[10] 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.[11]

1.2.2 Canada's Obligations and Internal Policy Objectives

It is generally believed that the law regarding the spontaneous arrival of refugee claimants must be stringent enough to counteract the perception that Canada does not have control of its borders. 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."[12]

The Government of Canada has long been concerned that, without proper border control, public support for all immigration and refugee programs would be endangered. Currently, deterring the irregular arrival of new claimants in Canada by a variety of means is implemented through methods 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 immigration control officers overseas who work with airlines to prevent those without valid documents from boarding aircraft.[13]

Among other considerations, large-scale arrivals present logistical challenges in processing large numbers of 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 adhere 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.[14]

Bill C-49 is situated within the context of the tension between these two policy objectives.

2 Description and Analysis

As introduced, Bill C-49 consists of 36 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 as an "irregular arrival";
- new powers of detention related to people entering the country who are suspected of involvement in criminal activities;

- changes to the provisions of the *Immigration and Refugee Protection Act* regarding human smuggling in Canada; and
- increased penalties for contraventions of the *Marine Transportation Security Act*.

2.1 "Designated Foreign National" Regime

Among other things, Bill C-49 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 deemed by the Minister to be 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."

"Designated foreign nationals" will be subject to a new and mandatory automatic detention regime, mandatory conditions on release from detention, and new bars 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."

The bill also restricts the ability to appeal certain decisions to the Refugee Appeal Division, places restrictions on the issuance of refugee travel documents to "designated foreign nationals," and adds to the powers of officers detaining persons upon entry to Canada for suspected criminality.

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 4, and 33 and 34)

2.1.1.1 Designation of a Group as an "Irregular Arrival" (Clause 4)

Clause 4 provides for the creation in the IRPA of two new sections, including new section 20.1 concerning the designation of "irregular arrival."

New subsection 20.1(1) gives the Minister[15] a new discretionary power that he or she can exercise in the "public interest"[16] 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 paragraphs 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[17] of those persons,
  - *nor* any other investigations concerning persons in the group

  can be conducted in a "timely manner"[18] (new paragraph 20.1(1)(*a*)).
- The Minister has reasonable grounds to suspect that there has been, or will be, human smuggling[19] for the benefit/profit of, at the direction of, or in association with a criminal organization[20] or terrorist group (new paragraph 20.1(*b*)).

New subsection 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*.[21] However, these designations must be published in the *Canada Gazette*.[22]

2.1.1.2 Members of an "Irregular Arrival" Designated as "Designated Foreign Nationals" (Clause 4)

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.

2.1.1.3 Retroactive Designation as an "Irregular Arrival" (Clauses 33 and 34)

Subclause 33(1) of Bill C-49 allows a designation of an "irregular arrival" to be made retroactively to 31 March 2009.

Subclause 33(2) provides an explanation of subclause 33(1) for greater certainty, and notes that an individual who becomes a "designated foreign national" as a result of a retroactive designation under subclause 33(1) will be subject to the full application of Bill C-49. Subclause 33(3) sets out one exception, providing that new paragraph 55(3.1)(*b*)[23] 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.

Clause 34 of Bill C-49 provides that the timelines for review of the conditions of continued detention apply to those newly and retroactively "designated foreign nationals."

2.1.2 Consequences of Becoming a "Designated Foreign National" – Detention

2.1.2.1 Mandatory Automatic Detention (Clauses 9 and 10)

2.1.2.1.1 Officer's Obligation

Subclause 9(2) of Bill C-49 amends section 55 of IRPA by adding new subsection 55(3.1), which provides that once the Minister has designated the arrival in Canada of a group of persons as an "irregular arrival" (new subsection 20.1(1)), resulting in all the people in that group becoming "designated foreign nationals" (pursuant to new subsection 20.1(2)), an officer must either:

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

2.1.2.1.2 Arrest Without Warrant

The power to arrest without warrant already exists in different contexts in IRPA, and its constitutionality has been considered by the courts in those different contexts. For example, the power to arrest without warrant in subsection 55(2) of 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."[24]

The Supreme Court of Canada has recently made general comments about arrest without warrant, arrest based on a ministerial order, or automatic detention without a warrant under former section 82 of IRPA. Chief Justice 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, Charter[25] provisions surrounding other aspects of arrest and detention continue to apply.[26]

2.1.2.1.3 Duration of Detention

Bill C-49 also provides for the duration of detention for a "designated foreign national." Specifically, clause 10 of Bill C-49 amends section 56 of IRPA by renumbering the current section 56 as subsection 56(1), and by adding a new subsection 56(2).

The newly added subsection 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;
- the person is released as a result of an Immigration Division order under section 58;[27] or
- the person is released as a result of a ministerial order under section 58.1.[28]

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

2.1.2.2 Detention Review Regime (Clause 11)

Clause 11 of Bill C-49 creates a separate regime for the review of detention for "designated foreign nationals" by creating a new section 57.1 in IRPA. This new regime differs from existing detention review regimes currently in place under 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 IRPA 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 (subsection 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 (subsection 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 (subsection 57(2)).

At all three stages in the mandatory detention review process the officer conducting the review is required to bring the permanent resident or foreign national before the Immigration Division (subsection 57(3)). The use of the language "at least once" in section 57 of IRPA implies that the Immigration Division has the discretion to conduct reviews of the reasons for continued detention prior to the expiry of six months.

The existing detention review regime under section 82 of IRPA applicable to persons named by the Ministers in security certificates[29] provides for the following:

- a mandatory review by a judge of the reasons for continued detention within 48 hours of the person being taken into detention (subsection 82(1));
- a mandatory review by a judge of the reasons for continued detention at least once in the six months following the 48-hour review (subsection 82(2) or (3)); and
- a mandatory review by a judge of the reasons for continued detention at least once during every 6-month period thereafter (subsection 82(2) or (3)).

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

2.1.2.2.2 New Detention Review Regime

Clause 11 of Bill C-49 adds a new detention review procedure applicable only to “designated foreign nationals,” and not to other permanent residents and foreign nationals (subsection 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 subsection 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 six months after the previous review.

As is required in detention reviews for permanent residents and other foreign nationals, at all stages in the mandatory detention review process for “designated foreign nationals” the officer conducting the review is required to bring the “designated foreign national” before the Immigration Division (new subsection 57.1(3)).

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*

Mandatory Reviews of Reasons for Continued Detention	Regime Applicable to Permanent Residents and Foreign Nationals (Section 57 of IRPA)	Regime Applicable to Persons Detained Under the Authority of a Security Certificate (Section 82 of IRPA)	Regime Applicable to “Designated Foreign Nationals” (New Section 57.1 of IRPA Created by Bill C-49)
First review	Within 48 hours of detention (subsection 57(1))	Within 48 hours of detention (subsection 82(1))	12 months after the day of initial detention, and no sooner (new subsection 57.1(1))
Second review	Within 7 days of the first review (subsection 57(2))	Within 6 months of the first review (subsection 82(2) or 82 (3))	6 months after the day on which the first review was conducted and no sooner (new subsection 57.1(2))
Subsequent reviews	At least once during every 30-day period after the second review (subsection 57(2))	At least once during the 6-month period following the most recent review (subsection 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

The mandatory waiting periods before first and subsequent reviews of reasons for continued detention set out in Bill C-49 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 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 IRPA: [30]

> 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.[31]

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 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.[32] 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 IRPA – though it noted that "… this cannot justify the complete denial of a timely detention review."[33]

2.1.2.2.4 CHARTER CONSIDERATIONS: SECTIONS 7 AND 12

In addition, the Supreme Court of Canada in *Charkaoui* discussed extended periods of detention under IRPA and the legal responsibilities that flow from it. 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.[34]

Under Bill C-49, release from detention prior to the initial review (after 12 months in detention) is only 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 10, 12, 13 and 14)

2.1.2.3.1 Changes to Discretionary Bars to Release (Clause 12)

Subclause 12(1) of Bill C-49 amends subsection 58(1) of IRPA. Specifically, subclause 12(1) amends paragraphs 58(1)(*c*) and (*d*), and adds a new paragraph 58(1)(*e*).

Section 58 of IRPA provides a list of factors that the Immigration Division will consider before ordering the release from detention of a permanent resident or foreign national. Bill C-49 amends this list of factors.

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

- The permanent resident or foreign national is considered a danger to the public (paragraph 58(1)(*a*)).
- The permanent resident or foreign national is considered unlikely to appear for proceedings under IRPA (paragraph 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 (paragraph 58(1)(*c*)). Further grounds of inadmissibility are added by Bill C-49 to paragraph (*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 (paragraph 58(1)(*d*)). Paragraph (*d*) is amended by Bill C-49 to specify that this factor only applies to foreign nationals and *does not apply* to "designated foreign nationals."
- Bill C-49 creates a new paragraph 58(1)(*e*), which sets out a new factor applicable to "designated foreign nationals" only, 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 (Clause 12 and 14)

Subclause 12(2) of Bill C-49 amends section 58 of IRPA by adding a new subsection 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 IRPA, as amended by Bill C-49, provides that the type of conditions will be set out in regulations.[35]

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 IRPA (renumbered as subsection 56(1) in Bill C-49) 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.[36]

2.1.2.3.3 Impact of Breaching Conditions of Release (Clauses 4, 5, 6, and 7)

Breaching conditions of release provides an officer with the discretion to refuse to consider certain immigration applications of a "designated foreign national." Specifically, new subsections 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 New Reporting Requirement for "Designated Foreign Nationals" Who Are Granted Refugee Protection (Clause 15)

Clause 15 creates a new section 98.1 of IRPA which requires "designated foreign nationals" who have obtained refugee protection in Canada to report to an officer in accordance with the regulations.[37]

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).

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

This new reporting requirement does not apply to persons who were not previously "designated foreign nationals" and who obtain refugee status under IRPA.

2.1.3 Other Consequences for "Designated Foreign Nationals"

2.1.3.1 Bars on Applications (Clauses 3, 4, 5 and 6)

Clauses 3, 4, 5 and 6 of Bill C-49 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: "Designated foreign nationals" are barred from making these applications or requests for at least five years, 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 of the five-year waiting period for applications for permanent residence is that "designated foreign nationals" will not be able to sponsor their family members to come to Canada.[38]

By contrast, persons who are not "designated foreign nationals" and who obtain the status of refugee or person in need of protection must apply for permanent residence within 180 days of obtaining the status,[39] and are consequently able to gain permanent residence and sponsor family members.

Table 2 – "Designated Foreign Nationals": Waiting and Suspension Periods for Immigration Applications

Application for Permanent Residence, Request for Temporary Resident Permit, or Application on Humanitarian and Compassionate Grounds[a]	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 paragraphs 11(1.1)(*a*) and 20.2(1)(*a*) TRP: New paragraph 24(5)(*a*)) H&C: New paragraph 25(1.01)(*a*)	PR: New paragraphs 11(1.2)(*a*) and 20.2(2)(*a*) TRP: New paragraph 24(6)(*a*) H&C: New paragraph 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 paragraphs 11(1.1)(*b*) and 20.2(1)(*b*) TRP: New paragraph 24(5)(*b*) H&C: New paragraph 25(1.01)(*b*)	PR: New paragraphs 11(1.2)(*b*) and 20.2(2)(*b*) TRP: New paragraph 24(6)(*b*) H&C: New paragraph 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 paragraphs 11(1.1)(*c*) and 20.2(1)(*c*) TRP: New paragraph 24(5)(*c*) H&C: New paragraph 25(1.01)(*c*)	PR: New paragraphs 11(1.2)(*c*) and 20.2(2)(*c*) TRP: New paragraph 24(6)(*c*) H&C: New paragraph 25(1.02)(*c*)

a. 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 5)

Clause 5 amends section 21 to provide that if the Minister makes an application for the cessation of refugee protection (pursuant to existing subsection 108(2) of IRPA) 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 16)

Bill C-49 amends section 110 of IRPA, which details the types of Refugee Protection Division (RPD) decisions that may be appealed to the Refugee Appeal Division (RAD).[40] (This amendment applies to all those who have the right to appeal certain types of RPD decisions, and not only to "designated foreign nationals.")

Subsection 110(1), as amended by Bill C-49, allows appeals of RPD decisions to allow or reject a person's claim for refugee protection on questions of law, of fact or of mixed law and fact. Subsection 110(2) as amended by Bill C-49 creates new restrictions on appeals to the RAD:

Table 3 – Appeals of Decisions to the Refugee Appeal Division

Type of Decision[a]	Can the decision be appealed to the Refugee Appeal Division under the *Immigration and Refugee Protection Act*?	Can the decision be appealed to the Refugee Appeal Division under Bill C-49?
A decision of the RPD to allow or reject a claim for refugee protection	Yes, under subsection 110(1).	Yes, under subsection 110(1) of 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-49.	No, under paragraph 110(2)(*a*) of IRPA.
A determination that a refugee protection claim has been withdrawn or abandoned	No, under subsection 110(2).	No, under new paragraph 110(2)(*b*) of IRPA.
A decision of the RPD rejecting an application by the Minister for a determination that refugee protection has ceased.	Yes, under subsection 110(1).	No, under paragraph 110(2)(*c*) of 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 paragraph 110(2)(*c*) of 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 paragraph 110(2)(*d*) of 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 paragraph 110(2)(*d*) of IRPA.

a. 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 RPD cannot be appealed to the RAD, a person or the Minister may apply (once all avenues of appeal under IRPA are exhausted) to the Federal Court seeking judicial review of any decision under IRPA pursuant to section 72 of the Act.

2.1.3.4 Restrictions on Issuing Refugee Travel Documents: Bill C-49 and the Refugee Convention (Clause 8)

Clause 8 adds new section 31.1 to 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 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.

2.2 Powers of Detention on Entry for Suspected Criminality (Clause 9)

Subclause 9(1) of Bill C-49 amends subsection 55(3) of IRPA, which governs the detention upon entry into Canada of permanent residents or foreign nationals.

Subsection 55(3) of 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.

Subclause 9(1) of Bill C-49 amends paragraph 55(3)(*b*) of IRPA to add that an officer may also detain a permanent resident or foreign national on the added grounds of suspected inadmissibility for "serious criminality, criminality, or organized criminality."

2.3 Changes to the Human Smuggling and Human Trafficking Regime in the *Immigration and Refugee Protection Act*

Bill C-49 amends and expands the definition of what constitutes "human smuggling" under IRPA, and introduces new mandatory minimum sentences for a person who is 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 17)

Section 117 of 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-49 amends the definition of what constitutes “human smuggling” as follows:

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

Section 117 in the Immigration and Refugee Protection Act	Amendments to Section 117 made by Bill C-49
(1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons *who are not in possession of a visa, passport or other document required by this Act* [emphasis added].	(1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons *knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act* [emphasis added].

The scope of the existing definition of human smuggling in section 117 of IRPA has been the subject of some judicial criticism. For example, Justice 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.[41]

The definition of “human smuggling,” as amended by Bill C-49, addresses some of the concerns raised.

2.3.2 Mandatory Minimum Sentences for Human Smuggling (Clause 17)

Subsections 117(2) and (3) of IRPA outline maximum penalties for smuggling fewer than 10 people (subsection 117(2)) and more than 10 people (subsection 117(3)).

Bill C-49 amends section 117 to add new subsections 117(3.1) and 117(3.2). New subsections 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)) and 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

(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.

The constitutionality of mandatory minimum sentences has been previously considered by the courts in the context of criminal law:

> Mandatory minimum sentences would appear to be inconsistent with the fundamental principle of sentencing set out in section 718.1 of the *Criminal Code* – namely, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. MMSs do not allow a judge to make any exception in an appropriate case.
>
> This does not mean, however, that a minimum sentence is unconstitutional. An MMS may constitute cruel and unusual punishment, in violation of section 12 of the *Canadian Charter of Rights and Freedoms*, if it is possible for the mandatory punishment, in a specific matter or a reasonable hypothetical case, to be "grossly disproportionate," given the gravity of the offence or the personal circumstances of the offender.
>
> The Supreme Court of Canada has, in some cases, struck down mandatory sentences that were considered too harsh. That said, it has also recently held that sentencing judges cannot override a clear statement of legislative intent and reduce a sentence below a statutory mandated minimum, absent exceptional circumstances. (*R.* v. *Nasogaluak*).[42]

2.3.3 Aggravating Factors When Determining Penalties for Trafficking in Persons and Disembarking Persons at Sea (Clause 18)

Clause 18 of Bill C-49 amends section 121 of IRPA, which sets out aggravating factors to be considered by the court when determining penalties to be imposed for trafficking in persons and disembarking persons at sea (sections 118 and 119 of IRPA).

Specifically, clause 18 amends section 121 of IRPA to add the aggravating factors of endangering the life or safety of any person as a result of the trafficking of persons or disembarking persons at sea.

2.3.4 Definition of "Criminal Organization" (Clause 19)

Clause 19 of Bill C-49 imports the definition of "criminal organization" as set out in the *Criminal Code* into IRPA. Subsection 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.

2.4 Increased Penalties Under the *Marine Transportation Security Act* (Clauses 24 to 31)

2.4.1 Increased Penalties for Contravening Some Ministerial Directions (Clause 26)

Section 16 of the *Marine Transportation Security Act* (MTSA) provides the Minister of Transport with the discretion to direct any vessel not to enter Canada, or to leave Canada or travel to another area in Canadian waters in accordance with any instructions the Minister may give regarding the route and manner of proceeding. Ministerial directions to vessels may be made when there are reasonable grounds to believe the vessel is a threat to the security[43] of any person or thing, including any goods, vessel, or marine facility.

Clause 26 of Bill C-49 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 26 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

	Current Maximum Penalties in Section 17 of the *Marine Transportation Security Act*	Maximum Penalties Under Section 17 of IRPA as Amended by Bill C-49
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-49	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-49	Fine up to $1,000,000

2.4.2 New Offenses for Vessels Contravening Ministerial Directions (Clauses 26, 28, 29, 30 and 31)

In addition to increasing the maximum fines and penalties imposed on operators of vessels described above, Bill C-49 also creates a new offence and fine regime for vessels involved in contravening a ministerial direction. New subsection 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 28 amends the English version of section 26 of the MTSA to provide that 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-49 makes several procedural changes to the MTSA to allow for the prosecution of this new offence for vessels. Clause 30 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 29 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 31 of Bill C-49 amends subsection 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 24)

Clause 24 of the bill, which amends section 5 of the MTSA by adding new subsection 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.[44] These regulations set out the list of the information to be provided before the vessel enters Canadian waters.[45]

Clause 24 of Bill C-49 sets out penalties for failing to provide pre-arrival information before a vessel enters Canadian waters. The maximum fines set out in the proposed new subsection 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 27)

Clause 27(2) of Bill C-49 amends section 25 of the MTSA by adding a new subsection 25(5).

According to the current paragraph 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-49 provides for significantly increased penalties for individuals and corporations who provide false or misleading information. For individuals, the maximum penalties set out in new subsection 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 25)

Clause 25 of Bill C-49 adds new section 5.1 to the MTSA. This section provides the Minister of Transport with the discretionary power 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 subsection 5.1(2) of the MTSA). This section also provides the Governor in Council with the authority to make new regulations respecting the disclosure of information by the Minister about these vessels to departments and agencies of the Government of Canada (or their agents) (new subsection 5.1(1) of the MTSA).

2.5 Limitation Periods (Clause 22)

Clause 22 creates a new limitation period of five years for conviction of summary offences under IRPA.

2.6 Coming into Force (Clause 36)

Many of the provisions of Bill C-49 come into force immediately upon Royal Assent. These provisions include clauses 1 to 16, 23, and 32 to 35.

Clauses 17 to 22 and 24 to 31 come into force on a day to be determined by order of the Governor in Council.

NOTES

* This document was prepared with the assistance of Julie Cool, of the Social Affairs Division, and Ardiana Hallaci, of the Industry, Infrastructure and Resources Division.

1. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].
2. *Marine Transportation Security Act*, S.C. 1994, c. 40, [MTSA].
3. International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, Geneva, Switzerland, 2010.
4. Khalid Koser, *Irregular migration, state security and human security*, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p. 2.

5. 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.

6. *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.

7. Royal Canadian Mounted Police, *Human Trafficking in Canada*, March 2010.

8. Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, Migration Policy Institute, March 2005.

9. *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].

10. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Supreme Court of Canada).

11. These three paragraphs are taken in large part from the following publication: Daphne Keevil Harrold and Sandra Elgersma, *Legislative Summary – 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, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 May 2010.

12. Martin Jones and Sasha Baglay, *Essentials of Canadian Law: Refugee Law*, Irwin Law, Toronto, 2007, p. 216.

13. See Penny Becklumb, *Canada's Immigration Program*, Publication no. BP-190E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 10 September 2008, p. 12.

14. Koser (2005), p. 4.

15. Section 4(2) of IRPA outlines that the Minister of Public Safety and Emergency Preparedness is responsible for the administration of 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. As the designation of an "irregular arrival" relates to the manner of arrival in Canada, the Minister of Public Safety and Emergency Preparedness is likely responsible for this designation.

16. "Public interest" is not defined in Bill C-49 or in IRPA.

17. Sections 33 to 37 of 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.

18. "Timely manner" is not defined in Bill C-49 or in IRPA, and it is unclear what length of time would be considered "timely" by the Minister for an "irregular arrival" designation under new paragraph 20.1(1)(*a*).

19. "Human smuggling" is defined in subsection 117(1) of IRPA and is amended in Bill C-49, as discussed later in this paper.

20. Clause 19 of Bill C-49 imports a definition of "criminal organization" into IRPA in section 121.1 of the Act, as discussed later in this paper.

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

22. This means that the ministerial orders will not be considered to be regulations, notwithstanding subsection 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.

23. New paragraph 55(3.1)(*b*) is discussed later in this paper.

24. Lorne Waldman, *Immigration Law and Practice*, LexisNexis subscription binder, Markham, October 2010, section 12.8.

25. Charter, s. 12.

26. *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Supreme Court of Canada), para. 137.

27. Orders made under section 58 are amended by Bill C-49 and are discussed later in this paper.

28. Clause 13 of Bill C-49 amends 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.

29. 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. Most recently, the ministers signed certificates on 22 February 2008 naming five persons inadmissible to Canada on the grounds of national security.

30. 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 IRPA as discussed earlier in this document.

31. *Charkaoui* v. *Canada (Citizenship and Immigration)*, paras. 90 and 91.

32. Ibid., para. 94.

33. Ibid., para. 93.

34. Ibid., para. 107.

35. Clause 14 of Bill C-49 amends paragraph 61(*a*) of IRPA and adds two new paragraphs, 61(*a.1*) and 61(*a.2*).

    The effect of these amendments is to extend the existing power in IRPA of the Governor in Council to include newly added mandatory and permissive criteria to be met before a permanent resident, foreign national or designated foreign national may be released from detention.

Specifically, new paragraph 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 paragraph 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.

36. In addition, paragraph 82(5)(*b*) of 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."

37. As discussed earlier in this paper, new subsection 56(2) provides that obtaining refugee status results in release from detention for a "designated foreign national."

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

39. 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 subsection 21(2) of IRPA.

40. 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 Immigration and Refugee Board. However, the sections of 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.

41. *R.* v. *Alzehrani*, 2008 CanLII 57164 (ON S.C.), para. 64.

42. This section on the constitutionality of mandatory minimum sentences is an excerpt from Robin MacKay, *Mandatory Minimum Sentences in Canada*, HillNotes, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 3 November 2010. (The complete reference for the cited court case is *R.* v. *Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 (Supreme Court of Canada)).

43. Under *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 fulfill in order to formulate and operate under security rules, as an alternative to security measures required or authorized by the Minister.

44. *Marine Transportation Security Regulations*, para. 221(1)(*c*).

45. Ibid., subsection 221(2).