TAB 2

Bill C-4 Summary and Clause-by-Clause Review

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Bill C-4 summary and clause-by-clause review:

Bill C-4 is virtually unchanged from Bill C-49, which was widely criticized by human rights groups and lawyer associations.

Bill C-4 includes many provisions directly violating Canada's international law obligations towards Convention refugees and towards the family. Its mandatory incarceration provisions violate the Charter of Rights, in clear disregard for a recent Supreme Court ruling in the immigration law context. It also includes measures which will increase the risk of incarceration for all non-citizens. Its provisions for designation are far broader than is understood by the public, and can readily lend themselves to extension in contexts which have no connection to smuggling. Its explicit purpose of creating penalties for refugees, in order to deter the flight of refugees relying on smugglers, is contrary to the principles assumed and set out in the Convention –which values integration of the Convention refugee.

The provision of mandatory delays in family reunification will tend to aggravate, rather than diminish, the already-existing pressure on families in Canada to help relatives in danger flee by unlawful means.

Very few of the measures in Bill C-4 relate punishing smugglers who endanger refugees. The provision of minimum sentences, combined with an IRPA definition of smuggling which does not allow an exemption for humanitarian assistance, will result in unjust consequences for some. Furthermore, mandatory minimum sentences do not afford a judge scope to tailor a sentence to the actual circumstances of an offense.

Bill C-4's breaches international law obligations, includes measures known to be in breach of the Charter, and creates new and poorly understood risks for all non-citizens.

Summary of violations:

Measures violating the Convention Relating to the Status of Refugees:

All measures in Bill C-4 which delay the permanent residence of Convention refugees are in direct violation of Article 34 of the Convention, which provides that:

"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedited naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

The government has often stated that it recognizes this international law obligation. An Overseas Processing Manual (OP24) expressly states that "The granting of permanent resident status to protected persons helps fulfill Canada's international legal obligations" and that applying for permanent residence for oneself and family members is the "next natural step" after being determined a Convention refugee.

The term "naturalization" refers to citizenship. Permanent residence is an intermediary status created by local statute. As permanent residence is, in Canadian domestic law, an interim stage before citizenship (naturalization) can be applied for, obstacles to permanent residence are prohibited by Article 34. While Article 34 can be read in conjunction with

provisions allowing states to refuse status to persons who pose a security risk and the requirement in Article 2 that the Convention refugee comply with the laws of the host nation, the intent of Article 34 is unequivocal. Once a person is determined a Convention refugee the host government should be seeking to integrate the refugee.

A primary purpose of Bill C-4 is to hinder and delay the assimilation and naturalization of Convention refugees. The five-year delay on being permitted to apply for permanent residence, the additional one-year delay for officers to re-question the refugee, the prolongation of being barred from obtaining permanent residence while the government seeks cessation, and the application of the statutory delays to reunification of the immediate family are all willful violations of Article 34. The entire philosophy of Bill C-4's measures against Convention refugees is specifically contrary to the Convention's goal of refugees being integrated into the host society as quickly as possible.

The Convention's entire philosophy is to promote integration by refugees into the host nation. Many of the Convention's provisions are specifically tailored to ensuring that refugees can seek employment or start a business, get recognition of their educational or professional qualifications, in short take whatever steps facilitate their establishment and integration. Bill C-4's philosophy is in direct conflict with this.

The imposition of "penalties" on refugees for the mere fact of arriving unlawfully is prohibited by Article 31 of the Convention. All of Bill C-4's provisions punishing the refugee for arriving unlawfully, from mandatory incarceration through delays on integration, conflict with Article 31. It is self-evident that some refugees will have to seek asylum by means of unlawful travel. This was anticipated and presumed in the Convention. The government is repudiating the Convention through these measures.

Bill C-4 deliberately breaches Article 28 of the Convention by barring designated Convention refugees from being issued travel documents for a minimum of five years.

Measures violating the International Covenant on Civil and Political Rights:

Article 23 of the ICCPR provides that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The government of Canada has expressly stated in its reports to the United Nations on compliance with the ICCPR that the IRPA and IRPR provisions allowing concurrent processing of family members of Convention refugees is intended to comply with Article 23. The government is willfully violating the ICCPR through its measures delaying permanent residence processing for the accepted Convention refugee, as this necessarily delays family reunification.

Measures violating the Convention on the Rights of the Child:

Where mandatory detentions lead to separation of parents and children, this will be in violation of Article 9(1) of the Convention on the Rights of the Child.

Mandatory delays on permanent residence and family reunification violate Articles 9(1) and 10(1) of the Convention on the Rights of the Child.

Mandatory imprisonment, penalties against child refugee claimants and mandatory delays on family reunification for children who are determined Convention refugees violate Article 22 of the Convention on the Rights of the Child –which requires that states "take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee ... receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties" and that states facilitate family reunification for refugee children.

Measures violating the International Covenant on Economic, Social and Cultural Rights

Article 10(1) of the International Covenant on Economic, Social and Cultural Rights likewise provides that states should assure the "widest possible" protection of the family. All of C-4's measures delaying permanent residence and family reunification for persons who are designated violate this Covenant.

Measures violating ss. 7 and 9 of the Charter of Rights and Freedoms:

Bill C-4's provisions mandating detention without a hearing for a minimum of one year violate ss. 9 and 7 of the Charter. Provisions requiring that a person remain incarcerated indefinitely while the Minister is investigating her are contrary to ss. 9 and 7 of the Charter. The measure requiring indefinite incarceration so long as the Minister is not satisfied of her identity clearly breaches ss. 9 and 7.

In *Charkaoui* (2007 SCC 9) the Supreme Court ruled on whether the detention of a suspected terrorist without warrant, and a minimum waiting period of 120 days following judicial confirmation of a security certificate before a detention review hearing, violated s. 9 of the Charter. As with a Minister's designation under Bill C-4, the initial decision to issue a security certificate against a person would be made by a Minister. The Supreme Court held that a the failure to obtain a warrant did not in and of itself violate s. 9, noting that the "security ground is based on the danger posed by the named person, and therefore provides a rational ground for the detention." The Court distinguished the decision in R. v. Swain (1991 SCR 933) where a provision requiring mandatory detention of all persons acquitted based on an insanity defence was struck down as arbitrary, since not all such individuals would be dangerous. The Court accepted that the government must act quickly to prevent a terrorist act, and that the purpose of the security certificate was to take action against a person considered dangerous.

The Court held that the delay in detention review "infringes the guarantee against arbitrary detention in s. 9 of the Charter, which encompasses the right to prompt review of detention under s. 10 (c) of the Charter." The Court held that while there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained, this cannot justify the complete denial of a timely detention review.

As the purpose of having a mandatory detention is to deter refugees it is expressly punitive, and has no connection to protecting the public from a dangerous individual, the Supreme Court's acceptance of detention based simply on a Minister's directive should not withstand Charter scrutiny under ss. 7 and 9. The detention is without a hearing, without any

permitted defense –such as the common-law defense of necessity- and has no connection to protecting the public from an actual danger.

As the Supreme Court has already determined that delay of detention review renders detention arbitrary under s. 9, the government is willfully ignoring the Court's ruling by providing a minimum one-year delay. There can be no doubt that if a mandatory minimum 120-day delay was unacceptable for a suspected terrorist, a minimum 365 day delay for the purpose of deterring refugees is in violation of the Charter. The government is showing complete disregard for the Court's ruling by including a provision already known to be in breach of the Charter.

For Convention refugees enforced separation from a spouse and children can also cause psychological hardship in violation of s. 7 of the Charter. The Federal Court of Appeal has commented on this in obiter in DeGuzman (2005 FCA 436), and the Federal Court has recognized this in Bageerathan (2009 FC 513).

Clause-by-clause review of Bill C-4:

3: Amendments to IRPA ss. 11, 20 and 21

IRPA s. 11 is the general provision applicable to anyone applying for permanent residence or a temporary residence visa from abroad. IRPA s. 20 is applicable to people applying from abroad or from within Canada. IRPA s. 21 is the provision applicable for a person already in Canada to be granted permanent residence. The same restrictions will be placed on either type of application for permanent residence (from abroad or within Canada), once a person is designated as a "designated foreign national" or "designated irregular arrival".

Amended s. 11(1.1):

(1.1) A designated foreign national may not make an application for permanent residence under subsection (1)

Subsections (a) to (c) of this provision require a minimum delay of five years for an accepted Convention refugee or protected person (ie. accepted by the Refugee Protection Division under s. 97 or accepted in a Pre-Removal Risk Assessment) to apply for permanent residence. Subsection (c) extends this for five years for other people (ie. people who have not sought refugee status) from the point at which the government designates a person as a "designated foreign national". This implies the government expects it may designate people other than refugee claimants.

Note that the delay is not that the person will only be granted permanent residence after five years. The provision states:

may not make an application for permanent residence

In other words, five years after the person has been determined a Convention refugee, protected person (or been designated if they have other or temporary status in Canada), they can apply for permanent residence. At present permanent residence applications take any length of time, from six months to several years in the ordinary course, and much longer in

unusual cases. The process to become a permanent resident and to be reunited with any spouse/children abroad will only begin after five years.

Amended s. 11(1.2):

(1.2) The processing of an application for permanent residence under subsection (1) of a foreign national who, after the application is made, becomes a designated foreign national is suspended

Subsections (a) to (c) provide for a five year suspension for a person who has applied for permanent residence if that person is designated. It also extends this to five years after acceptance of a refugee claim, s. 97 or PRRA application. As the transitional provisions make the law retroactive to March 2009, the Minister may designate people who arrived in the past, were determined Convention refugees and are in the process of applying for permanent residence. In the future, it will be possible to designate people well after they have been determined Convention refugees –effectively allowing the Minister to delay or block their integration, despite acceptance. The provision and designation criteria are also broad enough that the Minister can designate people who did not claim refugee status, but were otherwise seeking permanent residence.

Amended s. 11 (1.3):

(1.3) The officer may refuse to consider an application for permanent residence made under subsection (1) if

(*a*) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and

(*b*) less than 12 months have passed since the end of the applicable period referred to in subsection (1.1) or (1.2).

These provisions are conjunctive. In effect they allow an Immigration officer to extend the waiting period to 6 years by refusing to consider a permanent residence application if a person has not complied with any condition under IRPA ss. 58(4), 58.1 or 98.1. Each of these provisions is an amendment included in Bill C-4.

Amended 58(4) provides that the Immigration Division must impose any conditions prescribed on designated persons who are released from detention. Amended 58.1 allows that the Minister can release a designated person from detention in "exceptional circumstances" but meanwhile impose conditions on the designated person.

Amended 98.1 provides that even after being recognized as a Convention refugee:

98.1 (1) A designated foreign national on whom refugee protection is conferred under paragraph 95(1)(*b*) or (*c*) must report to an officer in accordance with the regulations.

(2) A designated foreign national who is required to report to an officer must answer truthfully all questions put to him or her and must provide any information and documents that the officer requests.

Even after persuading the Refugee Board, the accepted refugee can be required to report and will not be considered to have completed that process until an officer accepts that she has provided all information or documents the officer demands.

This could extend the waiting period to six years in many cases, as it would be relatively easy to demand an answer or document an accepted Convention refugee could give to an officer's satisfaction. The fact that the Convention refugee satisfied the Refugee Board would not suffice.

The interview process can also become a tool to initiate investigations leading to vacation hearings.

4 Amendments to IRPA s. 20:

Amended IRPA s. 20.1:

20.1 (1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she

***a*) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility — and any investigations concerning persons in the group — cannot be conducted in a timely manner; or**

(*b*) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

Note at the outset that the term "group" is not defined. Group might be two or more people. In prosecutions under the organized crime provisions of the IRPA the CBSA has taken the position that 2 people can be a criminal organization.

Note also that s. 20.1(1) implies this is not limited to any particular method of arrival, including lawful arrival of persons with passports and visas. For example, if two people arrived travelling with their own passports, with temporary residence visas, the Minister could declare them "irregular" on the basis that he wants to investigate whether they are actually inadmissible.

The proposed section 20.1(1)(b) refers to IRPA s. 117(1), which currently provides:

117. (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.

In other words, this provision allows the Minister to designate persons as "irregular" if he suspects someone has in any way encouraged their travel to Canada without a required document. This would apply to many refugee claimants, as only a minority have a visa, and it is difficult for many refugees to travel to Canada without either paying for assistance in travel.

If Bill C-4 is passed, the provision will be even broader, as C-4 amends IRPA 117(1) to reduce the requirement of intent (discussed below). The amended version of 117(1) would be:

117. (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.

Note that the provision "for profit" is stand-alone. The person receiving the profit need not be part of a "criminal organization" or "terrorist group". The term "for profit" is undefined, leaving it unclear if a lawyer informing a person that they can claim refugee status in Canada could be subject to prosecution.

Note as well that "criminal organization" is not necessarily interpreted by the CBSA as a conventional organized crime group. It is simply two or more people who have committed crime together –and that can include offences related to travel. Membership in a criminal organization has been defined as broadly as being the mother of a member of a criminal organization and knowingly giving him shelter.

Suspicion that a "terrorist organization" has or will benefit can also be very loosely defined, as we have seen with declarations about the LTTE benefiting from the arrival of Tamils in Canada. The term "benefit" is also undefined, meaning the arrival of the persons need not have any connection to the "terrorist organization". For example, if a movement could be said to theoretically benefit from victims of persecution arriving in Canada and promoting awareness of the plight of a people in a country, that could be argued as a "benefit". If it can be argued that those people might support or promote the movement's cause in the future, that could be argued as a "benefit".

As there is no temporal limit on the amended IRPA s. 20.1(b) ("has been, or will be") the designation can be completely speculative, or applied to people well after the fact. This could indirectly become a vehicle for suppression of expression of opinion. An accepted refugee who criticizes the human rights record of her country of origin can readily be accused by the regime she criticizes of thereby promoting terrorism or criminality. It is routine for repressive regimes to label their critics –and even international human rights agencies- of promoting terrorism or crime.

In principle, the ability of a refugee to speak to the human rights abuses or underlying political issues in her country of origin not only adds to democratic discourse in Canada, it can also contribute to pressure for improvement in the country of origin. The Damocles sword of designation, and the fact that it is a decision made by a political office-holder, will be an incentive for repressive regimes to lobby for any refugee who criticizes them to be designated.

History gives us ample example of foreign governments claiming that refugees are somehow promoting crime or terrorism when they criticize the government they have fled from. During apartheid the South African government claimed South African protesters in Canada were terrorist supporters. When refugees from Kenya protested in Toronto in the early 1990s that the Moi dictatorship was abusing human rights, President Moi asserted that they

were criminals, should be prosecuted as criminals and deported to Kenya. The Kenyan ambassador to Canada was recalled and protests were held against Canada in Kenya. The Iranian government has also demanded that refugees in Canada who protested against it should be classed as criminals and deported to Iran. Having a vague provision left in the discretion of a Minister will open up the field to lobbying by governments, and create a new risk for refugees.

(2) When a designation is made under subsection (1), a foreign national — other than a foreign national referred to in section 19 — who is part of the group whose arrival is the subject of the designation becomes a designated foreign national unless, on arrival, they hold the visa or other document required under the regulations and, on examination, the officer is satisfied that they are not inadmissible.

It is unlikely the above exemption could assist a refugee claimant. Anyone claiming refugee status becomes inadmissible, by virtue of the fact that they intend to remain in Canada indefinitely rather than for the limited period provided in their temporary residence visa.

For this exemption to assist a person designated under s. 20.1(1)(a), (where the Minister is of the opinion inadmissibility needs to be investigated) an officer would have to be willing to override the Minister's opinion by declaring that the officer is satisfied the person is not inadmissible.

(3) An order made under subsection (1) is not a statutory instrument for the purposes of the *Statutory Instruments Act*. However, it must be published in the *Canada Gazette*.

The requirement of publication in the Canada Gazette means the designation will be publicized. Publication could be worded to avoid naming individuals (for example referring simply to the arrival, without naming the people who arrived), however this may be traceable to individuals. There is no requirement that names not be published.

If the persons were refugee claimants, this could allow their persecutors to learn they are in Canada, and impact on the security of the refugee claimant's family in the country of origin. The fact that designation can imply the government of Canada considers the person aiding or abetting a terrorist group makes this particularly problematic.

As this provision applies to applicants within or outside Canada, a refugee claimant in another country could find that identifying information is published in the Canada Gazette. As the refugee claimant would not have any particular protection from refoulement by the third country, or from measures by that country, she could be directly put at risk as a result. For example, if the government of Canada learns that refugees in a third country are planning to come to Canada, and designates them, then the refugees are deported to their country of origin, it may be apparent to a regime that they would have been the people designated by the government of Canada.

The recent example of Canada specifically becoming involved in the government of Thailand's repatriation of Tamil refugees is an example. Under Bill C-4 the Canadian government could both assist another government in deporting refugees and label them

terrorist supporters, which is likely to increase risk to the refugees as it is an open signal from a democratic state that the designated refugees are *persona non grata.*

Amended IRPA s. 20.2:

This provision replicates the delays on being granted permanent residence for people applying from within Canada.

5 Amended IRPA s. 21:

(3) A person in respect of whom the Minister has made an application under subsection 108(2) may not become a permanent resident under subsection (2) while the application is pending.

This amends the provision permitting a person who has been accepted as a Convention refugee or protected person to apply for permanent residence. IRPA s. 108(2) is the "cessation" provision, whereby the Minister can apply to the Refugee Protection Division for a declaration that the conditions which were the basis for the person to be at risk have ceased. In other words, if a Convention refugee is accepted but the Minister takes the position it is safe for the refugee to return to her country, and the RPD accepts that argument, the person's status ceases.

The amendment allows the Minister to freeze the processing of a permanent residence application by the Convention refugee (or protected person) until the RPD decides the Minister's application. This could extend delay indefinitely.

Also, there is no limit on how many applications the Minister can make. A person could be blocked from becoming a permanent resident for life.

If a cessation determination is made by the Board, the Minister could initiate proceedings to deport the person.

6 Amended IRPA s. 24:

IRPA s. 24 is the provision allowing an officer to give a Temporary Resident Permit to a person who is otherwise inadmissible. This amendment imposes the same 5 to 6 year delay before an application can be made, for people seeking temporary permission to remain in Canada. This ensures officers cannot have flexibility to accommodate situations where the circumstances would justify allowing the person to travel to or remain in Canada.

7 Amended IRPA s. 25

IRPA s. 25 is the provision allowing the Minister to give permanent residence on Humanitarian and Compassionate grounds to a person who is otherwise inadmissible. This amendment imposes the same 5 to 6 year delay before an application can be made, for people seeking on Humanitarian and Compassionate grounds to enter or remain in Canada. This ensures a Minister will not have flexibility to accommodate situations where Humanitarian and Compassionate grounds would justify allowing the person to travel to or remain in Canada.

Basically the combined effect of the amendments to ss. 24 and 25 is that no matter what the situation is, and no matter how much public sympathy there is for a person, the Minister and Immigration officers will have no mechanism to permit the person to remain in Canada lawfully or get permanent residence for a delay of 5 to 6 years. In cases where the rights of a child are at stake, this implies they will be violated without redress in the federal immigration system.

For example, a person makes a refugee claim which is finally determined to be rejected. After 5 years (or 6 years) she may apply for permanent residence under humanitarian grounds. In the meantime she cannot apply for a Temporary Resident Permit. She will only remain in Canada if she has not been deported during the 5 to 6 year prohibition on making any application to legalize her status.

Humanitarian applications take a variable amount of time to process, and can readily take several years. The submission of a humanitarian application is not a bar to being deported. Accordingly, the person must be fortunate not to be deported for 5 to 6 years from the date her refugee claim was rejected, and must be fortunate not to be deported for whatever length of time before the humanitarian application is decided.

This compares poorly to European states which combine a high rate of arbitrary refusal of refugee claims with use of temporary status to allow rejected refugees to remain. The rejected refugee will have no legal mechanism to remain. If the decision was wrong, or the person has valid humanitarian grounds to remain, there is no mechanism to resolve that.

8 Amended IRPA s. 31:

This provision bars an accepted Convention refugee from being issued a Refugee Travel Document until after she becomes a permanent resident.

The provision also refers to a Convention refugee who has been designated being allowed to receive a Refugee Travel Document if she has been issued a Temporary Resident Permit under IRPA 24, but there is the same 5 to 6 year bar on this, so this exemption would only be attainable in cases where a person is not yet being granted permanent residence, but has passed the 5 to 6 year limit and persuades the government of special circumstances warranting issuance of a Temporary Resident Permit.

The provision literally states that the Convention refugee is deemed not to be "lawfully staying in Canada" for the purposes of the Convention. This directly obviates an obligation under the Convention. Under international law a person determined to be a Convention refugee is lawfully staying in the host country. Essentially Canada is violating an international law commitment by including the violation in domestic legislation.

The purpose of this amendment is to ensure accepted Convention refugees cannot travel for the many years before they become permanent residents.

For example, a refugee arrives "irregularly" from Haiti and is designated. She is barred from seeking permanent residence for 5 to 6 years. There is an earthquake in Haiti and she learns that her children have fled to the Dominican Republic. She is concerned about the

condition they are in and wants to travel to see them. She cannot be granted a refugee travel document.

As another example, a Convention refugee wants to marry, does not intend to return to her country of origin, but will meet a spouse in a third country. She cannot do this.

If the underlying motivation behind this provision were to ensure accepted refugees do not travel to their country of origin, this is already accomplished by placing an explicit prohibition in a Refugee Travel Document stating that it is valid for travel to all countries except the country of origin. The provision is, instead, a broad punitive measure against the refugee for having arrived "irregularly".

9 Amendments to IRPA s. 55

IRPA s. 55(1) provides that an officer can detain a permanent resident or foreign national if he believes the person "is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada." IRPA s. 55(3) provides that on arrival in Canada

> "(3) A permanent resident or a foreign national may, on entry into Canada, be detained if an officer
>
> (*a*) considers it necessary to do so in order for the examination to be completed; or
>
> (*b*) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights."

In other words, on arrival in Canada the person can be detained so that an officer can continue questioning the individual, on suspicion of inadmissibility for the above grounds; or based on a belief she is a danger to the public, or that she will not report for a hearing or removal. After entry into Canada the permanent resident or foreign national can be arrested or have a warrant issued for her arrest for the two latter reasons (danger to the public/will not report for a hearing or removal).

In practice it would be rare for a permanent resident to be suspected for "security", "human or international rights" issues. IRPA ss. 55(3)(b) is rarely applied, and unfamiliar to the average immigrant or immigration lawyer.

The amendment to s. 55(3)(b) is:

(*b*) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.

This means that when any "permanent resident" or foreign national is "on entry into Canada", an officer can detain her on suspicion of being inadmissible for "serious criminality, criminality or organized criminality."

Foreign nationals can be inadmissible for "criminality", whereas permanent residents become inadmissible for "serious criminality" or "organized criminality".

Criminality has a very low threshold. Many acts which are not of shocking gravity can be criminal offences or the equivalent of Canadian criminal offences.

However serious criminality –despite the term "serious" implying gravity- also has a very low threshold, as many acts or offences which are not especially heinous can be categorized as equivalent to offences for which there could be a ten year maximum sentence.

For example, personation is a serious criminal offence as it has a potential ten-year maximum. Showing a parking officer a friend's disabled parking permit to get out of a ticket could be classed as personation, which is serious criminality. The fact that a crime has been prosecuted as a summary offence is irrelevant, as the IRPA deems hybrid offences to be indictable. Accordingly offences which police and prosecutors do not see as especially "serious" can still be classed as "serious criminality" under the IRPA.

Organized criminality is interpreted by the CBSA as any series of crimes involving more than one person. For example the CBSA takes the position that if a person buys and sells stolen property more than once, that is organized criminality as it involves a series of acts and more than one person. Because organized criminality is interpreted subjectively by the CBSA, it is not possible to predict what the CBSA will categorize as "organized". The CBSA simply does not follow the interpretation or meaning a member of the public would presume.

This provision makes it fairly easy for a person with a visa or a permanent resident to be detained on entry into Canada on suspicion of any type of crime.

For example, a businessman from Asia applied for and was granted permanent residence on the basis of his investment in Canada. However on arrival at an airport an officer decided he did not believe the businessman had been candid about declaring all his past sources of income, based on questions the officer asked. The businessman was turned away and denied admission to Canada. The practical consequence is that he had to return to his country, and suffered serious inconvenience after having arranged to move to Canada. Under the new provision he could also be imprisoned if the officer believes his comments in the interview give "reasonable grounds to suspect" a criminal offence.

The new provision creates a risk of arbitrary incarceration for tourists, students, workers, skilled immigrants, family class immigrants and investors.

If entry into Canada is limited to a person's first arrival in Canada, a permanent resident is testing the risk of detention by arriving here. If entry into Canada is interpreted as any entry into Canada (ie. travel and return) a non-citizen who lives in Canada is also exposed to this risk by any travel, since any return exposes her to the possibility of being questioned, seen as suspicious and incarcerated by an officer.

This provision must be read in conjunction with the amendment to IRPA ss. 58(1)(c) and (d), which will allow indefinite detention while an inadmissibility concern is being investigated.

Amended IRPA 55(3.1)

For the designated foreign national, this amendment requires that an officer "must" detain any foreign national who has been designated, without a warrant (or the officer may issue a warrant for their arrest).

If a person arrives in Canada and is designated, she "must" be detained.

If a person arrived in Canada and is waiting to have her Convention refugee status determined, she must be detained once she is designated.

If a person has been accepted as a Convention refugee, but has not yet been granted permanent residence, and the Minister designates her, this provision would require that she must be detained. This can happen without a warrant, so she may have no particular warning (other than the fact that she has been listed in the Canada Gazette). However the following amendment provides that a person determined a Convention refugee or protected person should be released from detention. As the detention provision is mandatory, this may require detention and release of Convention refugees and protected persons who have been designated.

However note that a further amendment bars officers from releasing people who are designated. Although 56(2)(a) allows release from detention if a person has been determined a Convention refugee, the bar on Immigration officers granting release combined with the requirement that they detain, could create a bureaucratic quagmire.

10 Amended IRPA s. 56:

IRPA s. 56 allows an officer to release a person who has been detained. This amendment removes that discretion from officers for designated persons. The person cannot be released from detention until she is "finally" determined to be a Convention refugee or protected person, until the Immigration Division orders her release, or until the Minister orders her release.

In practice, most refugee claimants are released under the direction of an officer. This will eliminate that and ensure detention.

11 Amended IRPA s. 57:

IRPA s. 57 provides for detention reviews by the Immigration Division within 48 hours, after another seven days and every thirty days thereafter. This provision prohibits the Immigration Division from conducting a detention review for one year, in the case of a person who has been designated. Further reviews can only take place every six months thereafter.

In practical terms this will also prolong detention even where the Immigration Division could be satisfied a person should be released. At present it is routine for people to appear before the Immigration Division, without being in a position at the time of the hearing to persuade a Member they should be released. Counsel can ask for another hearing when the case for release is prepared. The new provision expressly prohibits this, as the Immigration Division is barred from scheduling any hearing in between the six-month waiting periods. Given that Immigration Officers are also prohibited from releasing people, this means there

will be extended incarcerations even where a persuasive case could be presented for the person's release.

The detention reviews will take place before the Immigration Division or at a place specified by the Immigration Division. (The person may not appear in person at the Immigration Division.)

The provision has no exemptions for children, pregnant women, or people who are in poor health. This presents an unresolved conflict with the principle expressed in IRPA s. 60, which states that children should only be detained as a last resort. For the designated child, incarceration is expressly mandated as a first measure.

If a family arrives in Canada and is designated, the family must be detained for a minimum of one year, and will only get a chance to challenge this once every six months thereafter.

If a family has already arrived in Canada and is subsequently designated, that family must also be detained for a minimum of one year.

The provision for mandatory incarceration for a minimum of one year punishes the person for the mere manner in which she arrived in Canada. It violates ss. 7 and 9 of the Charter of Rights as it provides for incarceration without due process (the only process is that the Minister has designated the person). By analogy it would not comply with ss. 7 and 9 of the Charter for the government to simply declare that Canadian citizens are listed by a Minister's discretion, and must therefore be incarcerated without a hearing. As set out above, the Supreme Court has already found that a mandatory 120 day delay on detention reviews for suspected "terrorists" constituted arbitrary detention in breach of s. 9 of the Charter.

Lawyers will have to find expedient means to challenge incarcerations, ensure the Charter is applied, and that unjustly incarcerated individuals get redress.

The Federal Court does not have an express statutory power to issue the remedy of *habeas corpus*. Applications for *habeas corpus* will have to be made to courts of general jurisdiction.

This provision opens the door for government to continue exploring incarceration by pure discretionary order. Canadian citizens who consider it trifling because it applies to non-citizens should think again. If a court were to find this provision Charter compliant, the implication would be that a Ministerial directive and listing in the Canada Gazette is adequate due process for persons to be incarcerated.

12 Amended IRPA ss. 58(1)(c) and (d):

IRPA ss. 58(1)(c) and (d) allows the Immigration Division to keep a person incarcerated if it believes the Minister is investigating the person's identity or whether the person is inadmissible on "grounds of security or for violating human or international rights".

The amendment provides that a person can remain incarcerated while the Minister is inquiring into whether the person is inadmissible for ordinary criminality, serious criminality or organized criminality.

This amendment is not restricted to designated foreign nationals. It is applicable to all foreign nationals and permanent residents. The government is basically sneaking a provision applicable to all non-citizens into a bill put forward as applying solely to people who have been "smuggled".

As the lowest threshold for a foreign resident is mere criminality, a foreign national can be kept indefinitely in detention simply because the Minister satisfied an Immigration Division member that necessary inquiries are being made into whether she committed any crime.

Permanent residents who have been detained on a suspicion of serious or organized criminality will be subject to indefinite detention while the suspicion is investigated. However, as stated above, the threshold for "serious criminality" or "organized criminality" is far lower than what common-sense would dictate.

This is a substantial shift in Canadian law. Rather than having to be found guilty of a crime before being incarcerated, immigrants will be subject to indefinite incarceration if the Minister simply wants to inquire into whether or not they committed a crime. The Minister only needs to show a "reasonable grounds" for a "suspicion", not actual evidence the person committed a crime, and need only satisfy an Immigration Division member the Minister is making necessary inquiries to perpetuate the incarceration.

In addition to being in violation of ss. 7 and 9 of the Charter (as it allows for prolonged incarceration for a mere interest in inquiring into criminality), this subjects all immigrants to the possibility of arbitrary and prolonged incarceration.

Immigrants who assume this Bill will not impact on them because they did not arrive in Canada "irregularly" are sadly mistaken. Bill C-4 divides Canada, turning non-citizens into people under a heightened risk of incarceration, without proof or trial.

For designated foreign nationals the amendment also provides that the person will be incarcerated so long as:

(*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national has not been established.

This means the designated person can be detained indefinitely, even if the Immigration Division believes the person's identity has been established. It is notable that what this provision is designed to avoid is an Immigration Division member deciding that the Minister is not making reasonable efforts to determine the person's identity. In other words, the Minister is expressly being given the power to detain whether or not any effort to investigate is being made.

This violates ss. 7 and 9 of the Charter as it permits indefinite detention even after a tribunal has determined the issue. In light of the Supreme Court's decision in *Charkaoui* it is not conceivable that an indefinite incarceration which no adjudicator can bring an end to complies with the Charter.

In practice this may also lead to prolonged detentions which are not objectively reasonable – for example where objective evidence demonstrates a person's identity, but the Minister

refuses to admit this or even investigate this. For example, there are cases where an individual has given contradictory answers at a port-of-entry, objective evidence proves her identity but officers continue to dispute this clinging to doubt based on the original answers given. Under the new law it will not even matter if the Immigration Division considers the Minister's refusal unreasonable, and the Minister is making no effort at investigation.

IRPA s. 58 is further amended to include:

(4) If the Immigration Division orders the release of a designated foreign national, it shall also impose any condition that is prescribed.

This takes away any discretion from the Immigration Division member. Conditions prescribed may be excessive and punitive. Indeed the only purpose in ensuring that a Board Member should have no discretion would be that the government intends to impose conditions an adjudicator would find inhumane or unreasonable.

This provision must be understood in conjunction with the delay on permanent residence being extended by an additional year if conditions have not been complied with.

13 Amended IPRA s. 58:

This provision allows the Minister to release a designated person for "exceptional circumstances", but adds that the Minister can require any payment or guarantee the Minister considers "necessary". There is no definition of "exceptional circumstances", no linkage of this to objective factors, and no ability to have the bond demanded reviewed by an adjudicator.

It is not possible to anticipate what the Minister might consider "exceptional circumstances". Many humanitarian situations would not logically qualify as "exceptional". For example, if we already know that pregnant women and children arrive as refugee claimants, would that be classed as "exceptional"? If we already know people arriving "irregularly" might be sick when they arrive, would that be "exceptional"? While people may plead that various humanitarian situations are "exceptional", the provision leaves the decision on release arbitrary.

14 Amended IRPA s. 61(a):

IRPA s. 61(a) currently provides that the IPR Regulations may provide:

(*a*) grounds for and conditions and criteria with respect to the release of persons from detention;

For foreign nationals and permanent residents generally the amendment changes this to:

the type of conditions that an officer, the Immigration Division or the Minister may impose with respect to the release of a person from detention;

But for designated foreign nationals, this is changed to:

(*a.2*) the type of conditions that the Immigration Division must impose with respect to the release of a designated foreign national;

This reiterates that an adjudicator will be obligated to impose whatever type of conditions are set in the Regulations.

15 Amended s. 98:

Bill C-4 ensures a refugee's legal plight is not resolved when she is determined a Convention refugee.

98.1 (1) A designated foreign national on whom refugee protection is conferred under paragraph 95(1)(*b*) or (*c*) must report to an officer in accordance with the regulations.

(2) A designated foreign national who is required to report to an officer must answer truthfully all questions put to him or her and must provide any information and documents that the officer requests

In addition to creating an opportunity for delay of the accepted Convention refugee's permanent residence application, this gives the government another vehicle to question the refugee on potential arguments for vacation of the refugee's status.

Further amendment provides that:

98.2 The regulations may provide for any matter relating to the application of section 98.1 and may include provisions respecting the requirement to report to an officer

Essentially the government will be able, by regulation, impose any measure related to reporting. If the government's intent is to relentlessly go after the refugees, to deter other people from thinking of Canada as a nation refugees should flee to, those measures may be harsh.

16 Amended IRPA s. 110

The proposed amendment ensures designated foreign nationals cannot appeal against a decision that their refugee claim is rejected.

The proposed amendment also ensures that no Convention refugee can appeal against a decision that her Convention refugee status is vacated or ceased.

This obviates the agreement reached by the parties on appeal rights under Bill C-11.

This amendment ensures decisions will be made by the individuals appointed to serve as first-level decision-makers under Bill C-11. Designated refugee claimants and refugees will be subject to greater arbitrariness than other refugees. It also signals the government's intent to go after accepted refugees through vacation and cessation applications.

17 Amendments to the offence of "human smuggling" and terms of imprisonment:

Bill C-4 changes the definition of human smuggling to expressly lower the level of intent required to merely being "reckless" as to whether the person's entry into Canada is lawful.

117. (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.

In criminal law "recklessness" connotes subjective awareness of a risk something is the case rather than actual knowledge. Smuggling convictions have already been obtained under current provisions where courts have found willful blindness as to the existence of valid documents was sufficient to constitute the offence (R. v. Alzehrani [2008] O.J. No. 4422). The distinction between "recklessness" and "willful blindness" may be minimal.

IRPA s. 117 is amended to provide a minimum jail sentence of 3 years if the individual endangered the designated person's life or the assistance was for profit (or the benefit of a criminal or terrorist organization). This is increased to five years if a person was endangered and it was for profit or benefit. Minimum terms of imprisonment are increased to 5 and 10 years for groups of 50 or more.

The inclusion of minimum sentences takes away the discretion of judges to issue sentences which are appropriate in the real circumstances of a case. People who have induced or assisted in the travel of one person (the amendment applies to anything fewer than 50 people) can readily be accused of having endangered the person. Specious arguments can be made that refugee travel somehow benefits a movement or organization.

Mandatory sentencing has been criticized for over fifty years by the Canadian Sentencing Commission. Judges are best positioned to tailor a sentence to fit the offender's motive and individual circumstances. The appeal process is available to remedy inappropriate exercises of sentencing discretion. Minimum sentences tend not to impact on commission of offences, as it is the probability of detection which is the actual deterrent. Current sentencing maximums under the IRPA are so severe (up to life imprisonment) that the risk of prolonged incarceration is already law.

More broadly, this follows a general trend by this government to mistrust judicial authority and impose minimum sentences. This is a trend which undermines judicial authority, and will lead to higher costs and disruption caused by extended incarcerations. The premise that people committing offences expect to be caught and prosecuted is unrealistic. Minimum sentences have not had a measurable impact on crime in states where they are routinely applied. In practice people will be subject to minimum sentences which are excessive in their real circumstances.

Citizens as well as non-citizens should be concerned about the encroachment of the government on judicial discretion in sentencing. While citizens may be persuaded by anecdotal reports that people receive minimal sentences for serious crimes, they rarely have enough exposure to the justice system to be aware of people whose lives are disrupted by excessive terms of imprisonment. When they learn of real individuals who are detained for excessive periods, their sympathies shift. The minimum sentence ensures a term of imprisonment will not necessarily be appropriate, reasonable or just.

18 Amended IRPA s. 121:

The proposed amendment reads:

121. The court, in determining the penalty to be imposed under section 120, shall take into account whether

(*a*) bodily harm or death occurred, <u>or the life or safety of any person was endangered, as a result of</u> the commission of the offence;

It is troubling that it will no longer be necessary to show that a person actually was harmed. Instead it merely needs to be shown that safety was "endangered". This vague enough that prosecutors could seek application to simple travel without proper documentation.

22 Amended IRPA s. 133

Section 133 of the IRPA provides that:

"133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred."

This is to ensure that people are not charged criminally for fleeing persecution. The amendment reads:

<u>133.1 (1) A proceeding by way of summary conviction may be instituted at any time within, but not later than, five years after the day on which the subject-matter of the proceeding arose.</u>

This measure applies globally, not only to designated foreign nationals.

This alters criminal law procedure for refugee claimants to ensure they can be prosecuted for up to five years, rather than the limit applicable for summary proceedings. It also invites a delay in prosecution that well exceeds the principle of trial within a reasonable time. The purpose of this amendment will likely be to criminally prosecute and fine or incarcerate rejected refugee claimants, as opposed to simply deporting them. This could create a new layer of litigation, delay of deportation and costs –which is gratuitous if a person is being deported.

For people who have been granted permanent residence on grounds other than refugee status, a sentence would delay processing of a citizenship application.

Amendments to the Marine Transportation Act

The Marine Transportation Act is being amended to allow for prosecution and conviction of a "vessel". In other words if no individuals are apprehended, the boat itself can be prosecuted.

<u>(2) A vessel that contravenes a direction is guilty of an offence and liable on summary conviction, for a first offence, to a fine of not more than $100,000, and for any subsequent offence, to a fine of not more than $200,000.</u>

Transitional provisions:

The transitional provisions allow people who have arrived since March 31 2009 to be designated. This seems designed to retaliate against Tamils who arrived by boat.

TAB 2a

The Unconstitutionality of Bill C-4

Professor Audrey Macklin
Faculty of Law
University of Toronto

19th Annual Immigration Law Summit – Day Two

The Law Society of Upper Canada | Barreau du Haut-Canada

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Canadian Association of Refugee Lawyers

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The Unconstitutionality of Bill C-4

Submitted by donald.galloway on Mon, 10/24/2011 - 00:00

THE UNCONSTITUTIONALITY OF BILL C-4

Submission on the Preventing Human Smugglers from Abusing Canada's Immigration System Act

Prepared by: Canadian Association of Refugee Lawyers

October 2011

A. Executive Summary

Introduction

In presenting Bill C-4 to Parliament, the Government of Canada has expressed confidence in its constitutionality by certifying that it is Charter-compliant. This brief explains why this confidence is misplaced.

Bill C-4

Bill C-4, the Preventing Human Smugglers from Abusing Canada's Immigration System Act, authorizes the Minister of Public Safety to impose sanctions on "designated foreign nationals" who arrive in Canada as part of a group.

Despite the title of the bill, the people so designated may suffer these sanctions even if they have had no contact with a human smuggler. This could occur because the Bill authorizes the Minister to designate a group arrival as irregular either where he is of the opinion that the examination of members of the group cannot be conducted "in a timely manner" or if he has reasonable grounds to suspect that the arrival contravened the human smuggling provision in the Immigration and Refugee Protection Act (IRPA).

In other words, undefined bureaucratic convenience rather than any connection to smuggling may justify Ministerial action. The Minister is not required to justify his opinion nor the grounds for suspicion. Nor is any process established that would allow for input or objection prior to the designation being made. In addition, the Minister may exercise his designation power at any time between arrival and the granting of permanent residence status. Even successful refugee claimants may be designated, long after arrival and despite statutory provisions that exempt refugees from prosecution for entry without the requisite documents.

Bill C-4 is also retroactive. It is specifically aimed at identifiable individuals who arrived in Canada before the bill was even drafted.

The consequences of designation are severe, and include the following:

• Lengthy, mandatory, warrantless, unreviewable detention. No exception is made for children, despite a provision in IRPA prohibiting detention of children except as a measure of last resort.

• Designated foreign nationals - even those granted refugee status - will be denied the opportunity to regularize their status for at least five years. As a result, they will be condemned to an unforgiving limbo, unable to reunify with members of their family, or to obtain travel documents that would otherwise be allowed.

The Unconstitutionality of Bill C-4

These sanctions violate the Canadian Charter of Rights and Freedoms. Although the Minister of Citizenship and Immigration has tarred all opponents of Bill C-4 as "extremists", the arguments in this brief rely on authoritative opinions of the Supreme Court of Canada in recent, leading cases. These judgments support the contention that Bill C-4 infringes four sections of the Charter – sections 7, 9, 10 and 12.

Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The warrantless detention envisaged by Bill C-4 clearly violates the right to

liberty. Considering the context of vulnerable and potentially traumatized refugees (including children), the denial of access to family also violates the right to security of the person.

The Chief Justice of the Supreme Court of Canada has made it clear that in the immigration context, this section of the Charter requires that detention must be accompanied with both a meaningful process of ongoing review and opportunities to challenge the continued detention. Bill C-4 ignores these judicial warnings by providing neither. In addition, the detention provisions are inconsistent with the principles of fundamental justice insofar as they are both unduly vague and overbroad. The legal doctrine of overbreadth requires that a law be tailored carefully to its purposes. The haphazard swathe of Bill C-4 fails to meet this test.

In addition, the Supreme Court has made it clear that serious, state-imposed psychological stress, especially within the parent-child relationship, will violate the right to security of the person. The stresses inherent in family separation and the anxiety experienced by refugees are compounded by a vague, ongoing and unfettered requirement that designated individuals regularly report to the authorities and submit to questioning by an immigration officer.

The designation and detention in Bill C-4 also violate the Charter right not to be arbitrarily detained (Section 9), and the right to prompt review of detention through habeas corpus (Section 10(c)). These rights apply equally to foreign nationals and Canadians. While the Supreme Court has offered two different analyses of the concept of arbitrariness, Bill C-4 fails on either interpretation.

Section 12 of the Charter guarantees the right not to be subjected to any cruel and unusual treatment or punishment. The Supreme Court has offered a lucid gloss on this section by relying on a standard of "gross disproportionality".

Ultimately, the central thrust of this brief is that Bill C-4 is akin to a Bill of Attainder, a device used by despotic governments to penalize individuals without offering proper recourse to an independent judicial process and for purposes unrelated to or grossly disproportionate to any valid political aim.

B. Background

Bill C-4, The Preventing Human Smugglers from Abusing Canada's Immigration System Act was introduced in the House of Commons on June 16 2011. If passed, it would amend the Immigration and Refugee Protection Act (IRPA) in significant ways. The legislative summary attached to the Bill identifies fifteen distinct changes that the Bill would introduce.

According to the title of the Bill, the objective of the legislation is to curtail what the Government represents as abuse of the immigration system. This consists of smuggling non-citizens to Canada, in contravention of visa requirements under IRPA. The existing definition of smuggling under s. 117 of IRPA is expanded to include a fault element of recklessness:

117. (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.

Bill C-4 also imposes minimum penalties for smuggling. The IRPA already provides for maximum penalties of $1 million dollars and life imprisonment for smuggling groups of more than ten people.
The bill seeks to do more than deter and punish smugglers. It also targets the people transported by smugglers. Smuggled persons may include foreign nationals who meet the definition of a refugee (persons with a well-founded fear of persecution on grounds of race, religion, nationality, membership in a particular social group or political opinion), as well as migrants who do not fall within the definition. Until a refugee claim is made and adjudicated, one cannot infer that a person who is smuggled is or is not a refugee.

Bill C-4 creates a separate regime for foreign nationals designated by the Minister of Public Safety as part of a group defined by their 'irregular arrival'. The main elements of the regime are as follows:

Designation

The Minister may designate a group (undefined) of foreign nationals as an "irregular arrival" either
a. if the Minister is of the opinion that the examination or investigation of persons in the group cannot be conducted "in a timely manner"; or
b. if the Minister has reasonable grounds to suspect that the arrival was or will be "a contravention of the smuggling provision of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group".

Note that designation is not limited to the context of alleged smuggling, but rather may hinge on the absence of sufficient bureaucratic resources to process arrivals. Bill C-4 makes designation and its consequences (apart from automatic detention) retroactive to March 2009

(in order to capture the passengers aboard the Sun Sea and the Ocean Lady). A foreign national may also be designated at any time after arrival and prior to acquisition of permanent resident status. This means that a person who has been recognized as a protected person but not yet granted permanent resident status may be designated, and designation will suspend any existing application for permanent residence.

No process is specified for designation, and it appears that neither notice nor opportunity to be heard is to be provided to affected foreign nationals prior to designation. This means that the Minister need not justify either his opinion regarding the impossibility of timely processing for one or more members of the group, or his suspicion of the contravention of s. 117, prior to exercising his discretion and triggering the consequences of that designation.

A foreign national who is a member of a designated group is automatically accorded "designated foreign national" status unless they carry the documents required by immigration law and unless they satisfy an officer that they are not inadmissible. This means that the consequences of designation apply to refugee claimants, even though s. 133 of IRPA exempts refugees from prosecution for offences related to entry without the requisite documents.

The Consequences of Designation

The consequences of designation will be severe.

Detention

Designated foreign nationals will be subject to automatic, warrantless detention for one year. A designated foreign national may (but not must) be released before one year if found to be a protected person, or upon the exercise of Ministerial discretion in exceptional circumstances, for which no criteria are specified.

The detention provision creates no exception for children, and so appears to conflict with s. 60 of IRPA, which states that "a minor child should be detained only as a measure of last resort, taking into account the ... best interests of the child".

Even though designation may be predicated on the inability to examine the group of foreign nationals in "a timely manner", the entire group of designated foreign nationals must be detained for one year, whether one, some or all examinations were or could have reasonably been completed earlier. The Immigration Division has no jurisdiction during this year to inquire into whether the objective grounds for detention actually existed, continue to exist, or whether the Minister has made reasonable efforts to complete examinations or investigations. Bill C-4 also adds a new ground for keeping designated foreign nationals in detention that does not apply to other foreign nationals – namely, that the Minister is of the opinion that the person's identity has not been established. The Minister is not required to show, as he or she is for other detainees, that reasonable efforts to determine identity have been made, nor may Immigration Division release a detainee who has cooperated in efforts to confirm identity. Since the Minister's opinion and not the Immigration Division's determination is conclusive, the effect is to permit the Minister to prolong detention indefinitely, regardless of the Immigration Division's determination regarding the person's identity.

It is revealing to compare the one year, unreviewable detention (followed by semi-annual review) of designated foreign nationals with the other detention provisions under IRPA. The Immigration Division reviews the detention of other foreign nationals within 48 hours of detention, one week after the first review, and once every thirty days thereafter. The Immigration Division reviews the detention of persons held under security certificates within 48 hours, and every six months thereafter.

Denial of Access to Permanent Resident Status, Denial of Humanitarian or Compassionate Consideration and Denial of Temporary Resident Permit

A designated foreign national, even if determined to be a refugee or a protected person, is barred from applying for either permanent resident status, humanitarian or compassionate consideration, or a temporary resident permit for a period of five years. Three consequences flow from this for 'designated' refugees and other protected persons. First, protected persons will be denied access to many entitlements that depend on holding a regularized status. Second, 'designated' refugees and protected persons will be unable to apply to have family members join them in Canada. Third, 'designated' refugees will be denied the travel document that refugees otherwise may obtain.

During the five year period, the designated foreign national will be subject to unspecified but mandatory reporting conditions (to be prescribed in regulation). Designated foreign nationals who are refugees are specifically required to report to an officer and "answer truthfully all questions put to him or her and must provide any information and documents that the officer requests". Bill C-4 does not delimit the scope of an officer's inquiry (personal, financial, third parties, etc.), the use to which the compelled answers and documents will be put (e.g. cessation or vacation of the designated person's or another person's refugee status, smuggling prosecution, etc.), or with whom the compelled data will be shared (e.g. CIC, CSIS, RCMP, foreign governments). If the officer considers that the designated foreign national "fails, without reasonable excuse, to comply" with the conditions imposed on him or her, the application for temporary or permanent

residence may be delayed for another year. This means that a designated foreign national may be prohibited from applying to regularize his or status and commencing the process of family reunification for at least five, and possibly six, years.

Denial of Appeals

Under Bill C-4 neither a decision by the Refugee Protection Division in relation to a claim for refugee protection, nor decision to vacate or cease the refugee status of a designated foreign national may be appealed to the Refugee Appeal Division.

Denial of Access to a Travel Document

Designated foreign nationals who are recognized as refugees or as protected person may not obtain travel documents until they have regularized their status. This means that they will not be able to travel outside Canada until they obtain permanent resident or temporary resident status. In tandem with the inability to reunite with family members in Canada, the consequence is to separate family members for a minimum of five years, plus the time required to process an application for permanent residence.

Bill C-4 also includes provisions that expand the power of the Minister to detain foreign nationals and permanent residents in circumstances entirely unrelated to the manner of arrival in Canada or administrative convenience. These provisions appear to have been inserted into the legislation as a matter of expedience.

C. The Unconstitutionality of Bill C-4

Designation and detention violate ss. 9 and 10(c) of the Canadian Charter of Rights and Freedoms

Section 9 of the Charter guarantees that "everyone has the right not to be arbitrarily detained or imprisoned".

Section 10(c) of the Charter provides that everyone who is arrested or detained has the right "to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful".

In Charkaoui v Canada, Chief Justice McLachlin expanded on the principle that underlies s. 10(c):

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. This principle is affirmed in s. 10(c) of the Charter. It is also recognized internationally: see Rasul v. Bush, 542 U.S. 466 (2004); Zadvydas v. Davis, 533 U.S. 678 (2001); art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 ("European Convention on Human Rights"); Slivenko v. Latvia [GC], No. 48321/99, ECHR 2003-X, p. 229.

In Charkaoui, the Chief Justice, citing Peter Hogg, the leading Constitutional Law authority, also noted that detention is arbitrary in the absence of "standards that are rationally related to the purpose of the power of detention".

In addition, she drew a connection between s. 9 and s. 10(c) of the Charter by illustrating when the lack of review would render a detention arbitrary. She stated:

The lack of review for foreign nationals until 120 days [the period imposed in relation to the security certificate process] 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. (emphasis added)

Recently, Chief Justice McLachlin has acknowledged that the law relating to arbitrariness is somewhat unsettled. In Canada (Attorney General) v PHS Community Services Society, she states:

The jurisprudence on arbitrariness is not entirely settled. In Chaoulli, three justices (per McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was "necessary" to further the state objective: paras. 131-32. Conversely, three other justices (per Binnie and LeBel JJ.), preferred to avoid the language of necessity and instead approved of the prior articulation of arbitrariness as where "[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation": para. 232. It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.

Under the necessity test, neither the designation nor the unreviewable mandatory detention of foreign nationals is necessary to prevent the acts that the government considers to be abusive of Canada's immigration system.

In the alternative, the mandatory unreviewable detention of designated foreign nationals is unrelated to a legitimate state interest. Even if the state has a legitimate interest in deterring and punishment smugglers, the state does not have a legitimate interest in punishing migrants (including refugees) through the use of the measures triggered by designation. Alternatively, punishing migrants (including refugees) is inconsistent with the state's interest and legal obligation to protect and not penalize refugees.

Bill C-4 permits designation, which in turn mandates detention, of two or more persons based on administrative convenience, or a 'reasonable suspicion' regarding the alleged mode of arrival. The criteria do not require, nor do they support a presumption, that detention is required to serve a valid purpose of immigration: to prevent flight, to facilitate impending removal, to protect the public or national security, to reasonably ascertain identity, or to complete an ongoing examination in respect of a specific individual. The criteria for detention under Bill C-4 cannot be linked to the advancement of any valid purpose served by detention, as measured against the criteria which are required to justify the detention of other foreign nationals.

Punishment and deterrence are not valid purposes of immigration detention in general, and are particularly inimical to Canada's obligation to protect refugees. Detention in furtherance of penalizing refugees who arrive through irregular means breaches the specific legal duty under the 1951 UN Convention on the Status of Refugees, which is incorporated in s. 133 of IRPA.

Bill C-4 is akin to a Bill of Attainder, whereby the Minister prosecutes and convicts individuals based on mode of arrival or administrative convenience, and sentences them to up to a term in jail before the incarceration is even reviewed. The criteria of designation are arbitrary in relation to any valid purpose served by immigration detention.

Moreover, indiscriminate mandatory detention is inconsistent with the legislative aim expressed in s. 3(2)(a) of IRPA "to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted".

In addition to the arbitrariness of detention in relation to the valid purposes of immigration detention, detention under Bill C-4 is arbitrary in two other respects:
First, the length of the automatic detention is arbitrary; second, the absence of review for one year, followed by semi-annual review, shields the Minister from accountability for prolonged and severe liberty deprivations. The lack of accountability enables arbitrariness. Thus, it violates both s. 9 and s. 10 (c) of the Charter.

Bill C-4 countenances one year detention of individuals based on the inability of the Minister to process, examine or investigate the group 'in a timely manner'. The group-based trigger for detention may be entirely disconnected from the circumstances of the individuals assigned to the group. For example, the identity of a given foreign national who is part of the designated group may not be in doubt, but the designation mandates a year of detention anyway. The processing of a given foreign national may be completed in a few hours, but that person will remain in detention for a year. It is arbitrary to detain a given foreign national on the basis of factors that are not, or are no longer, apposite to him or her.

Prompt and independent review of the legality of detention is an important safeguard against arbitrary detention because it requires the state to justify the liberty deprivation to a third party. Bill C-4 deprives designated foreign nationals of access to independent review of the reasons for detention for one year. The validity of a Minister's self-serving assertion that his officials are unable to process foreign nationals 'in a timely manner', and the objective basis for the Minister's suspicions about smuggling, are shielded from external scrutiny. Non-designated foreign nationals who are detained are entitled to review within 48 hours, and those who are not under security certificates receive a review after a week, and then every 30 days. This comparison highlights the obvious fact that review after one year is the antithesis of 'prompt' and, further, that this lengthy denial of review to designated foreign nationals is arbitrary.

Unreviewable detention violates s.7 of the Canadian Charter of Rights and Freedoms

The same reasons that support the conclusion that the designation and mandatory, automatic and unreviewable detention violate ss. 9 and 10(c) of the Charter also sustain the conclusion that the measures violate s. 7. Section 7 of the Charter provides that:

Every one has the right to life, liberty and security of the person and the right not to deprived thereof except in accordance with the principles of fundamental justice.

Detention violates the right to liberty. Given the impact of detention on vulnerable people, including children and traumatized refugees, it also implicates security of the person. The arbitrariness of the detention and denial of prompt review do not accord with fundamental justice.

In Charkaoui Chief Justice McLachlin took pains to explain how the principles of fundamental justice are threatened by unreviewable detention. She stated:

The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process... "It is an ancient and venerable principle that no person shall lose his or her liberty without due

process according to the law, which must involve a meaningful judicial process": Ferras, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John.

She continued by explaining that the basic principles are as applicable in the immigration context as elsewhere:

The principles underlying Lyons [which involved criminal detention] must be adapted in the case at bar to the immigration context.... Drawing on them, I conclude that the s. 7 principles of fundamental justice ...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. (emphasis added)

Bill C-4 ignores both the letter and spirit of these judicial warnings. It neither provides a "meaningful process of individual review" nor does it allow for contextual, individualized assessment.

The "overbreadth" of the detention provisions in Bill C-4 violates s. 7 of the Canadian Charter of Rights and Freedoms

The Supreme Court of Canada has developed the doctrine of overbreadth to express the constitutional requirement that a law be tailored to its purposes. Failure to respect this principle is a violation of the principles of fundamental justice.

In R v Heywood, Cory J. outlined the basic tenets of the overbreadth doctrine:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.... However, before it can be found that an enactment is so broad that it infringes s. 7 of the Charter, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

The provisions requiring that designated foreign nationals be detained without review for a lengthy period infringe on the liberty of individuals. This infringement is in a manner that far exceeds what is necessary to meet the purpose of the legislation, namely deterring human smugglers from attempting to bring individuals to Canada by irregular means.

The vagueness of the detention provisions in Bill C-4 violates s. 7 of the Canadian Charter of Rights and Freedoms

In R v Nova Scotia Pharmaceutical Society, the Supreme Court of Canada held that it was a principle of fundamental justice that laws not be too vague. It identified that the "'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice." It also outlined the following as the proper test to apply when determining whether a law is deficient on grounds of vagueness:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

The legislative provision permitting the Minister to designate a 'group', in circumstances where the examination of persons in the group cannot be conducted in a timely manner, is unconstitutionally vague in the sense intended by the Supreme Court. It does not provide fair notice to those who are affected. Further, it fails to provide any standards in relation to which the decision may be made.

Moreover, the legislative provision allowing the Minister to designate a group when he or she has reasonable grounds to suspect that "...there has been a contravention of s.117(1) ... for the benefit of, at the direction of or in association with a criminal organization or terrorist group" is unconstitutionally vague. For a court to review the lawfulness of a designation it will need to determine the intended level of complicity with a criminal organization or terrorist group. The language of the provision fails to provide adequate assistance in this regard.

Because a consequence of designation is the internment of the designated foreign nationals, these provisions violate s. 7 of the Charter by restricting the right to liberty in a manner that is inconsistent with the principles of fundamental justice.

The denial of access to the Refugee Appeal Division for designated foreign nationals is also arbitrary and thus inconsistent with principles of fundamental justice. The mode of arrival or administrative convenience do not supply a rationale for denying an appeal to a subset of refugees and refugee claimants that is available to other refugee claimants and refugees.

Withholding access to status violates s. 7 of the Canadian Charter of Rights and Freedoms

For purposes of this argument, we focus on the situation of designated foreign nationals found to be refugees or protected persons. The starting position with respect to refugees and protected persons is that they have been found by the Refugee Protection Division to have a well-founded fear of persecution in their country of nationality. IRPA provides that those who used irregular means of arrival shall not be charged with an offence in relation to their mode of entry. Thus, the refugee who arrives via a smuggler has committed no offense under Canadian law. Rather, they have demonstrated on a balance of probabilities that they are entitled to Canada's protection. Nevertheless, Bill C -4 selectively prohibits them from applying for permanent resident status, obtaining a travel document, or reunifying with family members for a minimum of five years. Bill C-4 also grants CBSA officers unlimited power to compel refugees and protected persons to report, answer questions, and supply information. The withholding of permanent resident status for five years, the inability to reunite with family members in Canada, the refusal of a travel document, and subjection to limitless reporting requirements, deprive refugees of security of the person in a manner that does not comport with principles of fundamental justice.

The Canadian Council for Refugees has identified clearly the most serious consequences faced by those who find themselves in a position of limbo.

No Permanent Residence
Without permanent residence, Convention Refugees cannot benefit from family reunification, they face discrimination in access to education, employment and social assistance and they cannot travel abroad.

No family reunification
Family reunification, including reunification of spouses and children, is tied to permanent residence. Convention refugees who have not been landed cannot bring their spouses and children (let alone other family members) until they become permanent residents.

Disruption of family unity
Refugees who left spouses and dependent children behind, sometimes in situations of great danger or in a refugee camp in the first country of asylum, often have difficulties communicating with them. When communication does occur, the dependents left behind do not understand why the reunification process is so lengthy (there are frequently reports of stress in the husband-wife relationship as some spouses cannot believe the process is so long and think that they have been abandoned). Moreover, in the long term, disruption of family unity can destroy the family connection and make family reunification impossible.

Psychological problems
Refugees separated from their families often suffer from depression. Family separation increases post-traumatic stress disorders often experienced by refugees. Refugees in limbo waiting for family reunification for many years suffer from anxio-depressive symptoms.

Financial problems
Refugees in general face certain difficulties in finding a job, and worries about the family they left behind makes it even harder. Family separation also increases the financial problems faced by refugees as they frequently have to send money abroad to assist the family left behind.

Barriers to integration
The stress caused by family separation and the absence of family support makes it very difficult for refugees to integrate into a society they are not familiar with.
The ongoing and unfettered reporting requirements imposed under Bill C-4 can exacerbate and compound the anxiety and fear among those who escaped repressive regimes, especially because the purpose of the questioning and the use to which the information will be put are not specified.

The Supreme Court of Canada has recognized that security of the person is jeopardized by measures that impose serious psychological stress on the individual. The Court has specifically adverted to interference with the integrity of the parent-child relationship as a cause of serious psychological stress and, therefore, a deprivation of security of the person.

In Blencoe v British Columbia (Human Rights Commission), Bastarache J. states:

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in G. (J.), supra. ... State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate sphere of the parent-child relationship (at para. 61) ... Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in Morgentaler, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (G. (J.), at para. 59).

The consignment of refugees to a minimum five year limbo, with the attendant consequences of heightened social and economic vulnerability, separation from family members, inability to travel outside Canada (even to see family in a third country) infringes the right to security guaranteed by s. 7 of the Charter.
These infringements on security of the person fail to comport with the principles of fundamental justice because they are arbitrary, grossly disproportionate, overbroad and vague.
They are arbitrary because they deny a subset of refugees access to permanent residence, family reunification, and a travel document based on their mode of arrival or administrative convenience. There is no legal basis for treating refugees so designated as less worthy of refugee protection, more suspicious, or less deserving of the incidents of refugee protection available to other refugees.
The Supreme Court of Canada has determined that grossly disproportionate restrictions on the right to life, liberty and security of the person will contravene the principles of fundamental justice. As explained by the Court in Canada (Attorney General) v PHS Community Services Society:

Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.

In Suresh v Canada (Minister of Citizenship and Immigration), the Court offered additional comments on the importance of this doctrine:

The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are per se disproportionate to any legitimate government interest... (emphasis in original)

Bill C-4 includes measures that are so extreme as to be disproportionate to any legitimate government interest. In tandem with the detention provisions, Bill C-4's five year limbo, denial of family reunification, refusal of a travel permit, and expansive post-claim authority to demand attendance and question refugees, construct a harsh and punitive regime. As noted earlier, punishment and deterrence of refugees is not a valid immigration purpose. To the extent that the purpose of precarious status is to prevent settlement and to facilitate eventual cessation or vacation of refugee status, the measures are grossly disproportionate. The IRPA already permits the Minister to commence vacation proceedings against refugees, even if they have acquired permanent resident status. If denial of a travel document is intended to prevent refugees from returning to their country of origin, it is grossly disproportionate in its effect because it prohibits any travel outside Canada. In combination with the bar on family reunification, the denial of a travel document enforces family separation of at least five years. Ironically, one of the few ways in which a refugee may be reunited with desperate family members is if the family members also resort to smugglers to bring them to Canada, and risk an additional year of incarceration in Canada prior to release. Thus, it is conceivable that the bar on family reunification will provide an incentive to do precisely what Bill C-4 ostensibly seeks to discourage. This would make the enforced family separation inconsistent with the state interest animating Bill C-4.

The reporting requirements imposed on designated refugees are vague and overbroad as those terms have been judicially interpreted and applied. They do not specify the purpose of the reporting, the scope of the officer's authority to demand information or documents, the use to which the information will be put, or with whom the information will be shared. Does the reporting constitute an evidence-gathering process for future cessation or vacation proceedings? Will refugees' precarious status be used to exploit them as informants? Can the officer inquire into non-immigration matters on behalf of law enforcement or CSIS? Will information be shared with other government bodies, or foreign governments? The answers to these questions may precipitate further constitutional concerns. The failure of Bill C-4 to circumscribe the officer's power to compel information breaches the constitutional proscription on vague and overbroad laws. The reporting provisions fail to provide fair notice to the designated refugee nor do they impose any limit on the enforcement discretion of the state official. Refugees subject to the reporting requirement will already be in a deliberately precarious position, and this renders them both vulnerable to abuses of power and reluctant to assert their rights for fear of further jeopardizing their fragile status.

Bill C-4 violates s.12 of the Canadian Charter of Rights and Freedoms

Section 12 of the Charter provides that:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Supreme Court of Canada has offered a lucid gloss on the phrase "cruel and unusual" by again relying on the notion of "gross disproportionality". In R. v. Smith, it held that a minimum seven year sentence for importing a narcotic was grossly disproportionate. Relying on the reasons provided above, it is our opinion that the mandatory detention required by Bill C-4 is cruel and unusual treatment.

Can Bill C-4 be saved under s. 1 of the Canadian Charter of Rights and Freedoms?

Section 1 of the Charter provides that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court jurisprudence reveals that the burden of persuading the Court that a limitation on a right is reasonable, prescribed by law and demonstrably justifiable in a free and democratic society lies on the Government. The Government has the burden of proving on the balance of probabilities that a limitation on the right is justifiable.

The Government offers its justification for Bill C-4 in the title. The state's objective is to "stop smugglers from abusing Canada's immigration system". To the extent that it deploys immigration law to arbitrarily and harshly punish smuggled persons (including refugees), and to deter future refugees, it pursues its end through unconstitutional means. The IRPA already contains provisions that prohibit entry without requisite documentation (visas etc.). These apply to non-refugees and protected persons, and provide the person concerned with the right to a fair process and adjudication before an independent judge.

The Government has not yet shown and will not in the future be able to show that such justification for the infringements on rights effected by Bill C-4 exists. The consequences imposed on designated foreign nationals are severe. They are inconsistent with values espoused in open societies. They are wholly disproportionate to the goals that the government is seeking to address. They are not rationally connected to the aims of the legislation. They are not sufficiently tailored and adequately crafted to minimally impair the rights of those affected.

Peter Hogg has observed that the s.1 justification of a breach of s.7 of the Charter has never been upheld by a majority of the Court. He also notes in relation to s.12:

It may simply be the failure of my imagination but I find it difficult to accept that the right not to be subjected to any "cruel and unusual treatment or punishment" could ever be justifiably limited. This may be an absolute right. Perhaps it is the only one.

D. Conclusion

In presenting Bill C-4 to Parliament, the Government of Canada has expressed its confidence that the bill is Charter-compliant and constitutional. The Government has chosen not to articulate any basis for its confidence. Since recent judicial pronouncements from the Supreme Court of Canada directly contradict the Government's position, it is our opinion that this confidence is misplaced. The drafters of the bill have paid insufficient attention to the carefully worded doctrines that the Supreme Court of Canada has developed to express the basic principles of our Constitution. The government has haphazardly cast an unconstitutionally harsh, wide and arbitrary net in order to deter and punish human smuggling. The consequences inflicted on these individuals who are caught in the net will be dramatic, painful and undeserved. It is our hope that the unconstitutionality of the Bill will be recognized before it is enacted as law. If this hope is dashed, it is our hope that it will be recognized by judicial authorities. However, it is our worry that, should we need to rely on the Courts to provide the needed remedy, much hardship will be endured in the interim.

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