Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) is pleased to present its submission respecting Bill C-49, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*. Bill-C49 amends the Immigration *and Refugee Protection Act* (IRPA) to address organized, irregular mass arrivals of refugee claimants. It follows two cargo ship landings on the West Coast in the past 13 months, which placed pressure on Immigration and Refugee Board and Canadian Border Services Agency resources and gave rise to a significant, negative public response.

Irregular mass arrivals of refugee claimants can affect processing resources, public support for the immigration and refugee system, and risk the safety of the passengers. The CBA Section understands the desire to enact legislation that will discourage further arrivals. However, little of Bill C-49 is directly aimed at deterring human smugglers from facilitating irregular mass arrivals. The principal targets of Bill C-49 are the refugee claimants themselves, whether genuine or not.

We support the amendment to IRPA s.117 to increase the penalties against human smugglers. However, the offence is not limited to persons who facilitate mass irregular arrivals. The s.117 offence would apply to anyone who has assisted the entry of "one or more" persons in contravention of IRPA.

Bill C-49 would impose multiple penalties on claimants and refugees who are designated as part of an irregular arrival. The penalties include:

- Mandatory detention without IRB Immigration Division review for 12 months;
- Denial of the right to apply for permanent resident status until five years have passed since favourable determination of the protection claim;

- Denial of access to relief based on humanitarian and compassionate grounds, temporary resident permits or refugee travel documents for five years or longer; and
- Denial of the right to appeal an unfavourable determination of protection claim to the Refugee Appeal Division (RAD).

The Minister's discretion to designate foreign nationals subject to the penalties is overly broad, not limited to mass arrivals, and may be applied retroactively to March 2009. Arrivals of two or more persons by irregular means could attract designation.

The Bill C-49 penalty scheme is a harsh and dramatic shift in policy respecting refugee protection determinations. The denial of detention reviews breaches the s.9 and s.10 *Charter* protections against arbitrary detention and right to prompt review of detention. The provisions for mandatory unreviewable detention and for denial of access to permanent resident status or travel documents conflict with Canada's obligations under the *Convention Relating to the Status of Refugees* and the *International Covenant on Civil and Political Rights*.

Bill C-49 makes amendments to IRPA that have no relation to the human smuggling issue. These amendments would affect permanent residents and foreign nationals regardless of how they arrived in Canada:

- Expand the grounds on which Port of Entry officers can detain permanent residents and foreign nationals;
- Expand the grounds on which a permanent resident or foreign national can be kept in detention while the Minister takes "reasonable steps to inquire" into suspicion of inadmissibility; and
- Remove RAD appeal rights from Refugee Protection Division decisions.

These significant amendments seriously affect existing liberties and legal entitlements. These amendments cannot be justified as being related to a human smuggling threat.

Because of these concerns, the CBA Section cannot support Bill C-49. The legislative scheme would punish designated claimants and refugees by denying liberty, legal rights and access to permanent resident status in a manner offensive to *Charter* protections and to international obligations. The amendments expanding the detention authority against all permanent residents and foreign nationals are not justified as being relevant to the human smuggling issue, or at all. The flaws of Bill C-49 cannot be rectified by modest amendments.

II. APPLICATION TO DESIGNATED FOREIGN NATIONALS

A. Minister's discretion to designate too broad

Bill C-49 would create "designated foreign nationals," foreign nationals who are part of a group whose arrival has been designated by the Minister as "an irregular arrival":

> 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
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> 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
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> (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.

There would be an exception for foreign nationals who can show that they arrived with necessary visas or other documents and that they are not inadmissible (amended s.20.1(2)). This will be a very rare circumstance.

Therefore, proposed s.20.1 will come into play in two circumstances: if further examination is required to determine identity or inadmissibility; or if there is suspicion of assistance from profiting smugglers, or smugglers connected to a criminal organization or terrorist group. The Minister can use either circumstance to justify designation.

The delegation authority is not precise:

- The term "group" is not defined. It might be as few as two people.
- Subsection 20.1(1) is not limited to arrivals involving a s.117(1) offence. S.117(1) may not be involved at all. The Minister can designate an "irregular arrival" solely on the basis that examination for identity or determining inadmissibility cannot be conducted in a timely manner.
- Subsection 20.1(1) is not limited to a particular method or point of arrival. It can apply to arrivals at a proper port of entry through normal commercial carriers.
- The s.20.1(b) reference to "for profit" is stand-alone. The person receiving the profit need not be part of a "criminal organization" or "terrorist group". It can be a person selling false travel documents to facilitate improperly documented entry.

- There is no definition of "for the benefit of" or "in association with". Both expressions are capable of far-reaching interpretations.

The Minister's discretion to designate irregular arrivals is cast in language that allows broad application. It also imposes low thresholds for the ability to exercise the discretion to be triggered. To exercise the discretion on the basis of the first arm, the Minister only needs to have an opinion that examinations to establish identity or determine inadmissibility cannot be conducted in a timely manner. There is no requirement for boats or mass entries to be involved. It could be two persons appearing at the port of entry. It is a low threshold.

To exercise the discretion on the basis of the second arm, the Minister need only have "reasonable grounds to suspect" that there has been a contravention of s.117 for profit, or related to a criminal organization or terrorist group. "Reasonable grounds to suspect" is a far lower standard to meet than "reasonable grounds to believe". Thus, under both arms, the discretion to designate an "irregular arrival" can be applied to situations far removed from the coastal landing of cargo vessels loaded with undocumented refugee claimants.

Most refugee claimants come to Canada using false documents obtained from agents or smugglers. The claimants have to obtain false documents because they could not otherwise make their way on commercial carriers. Any group of two or more claimants arriving with false documents is vulnerable to being designated, as their documents were sold "for profit" in breach of s.117(1). The Minister need not be satisfied on a balance of probabilities that the claimants were aided "for profit." The threshold is the bare "reasonable grounds to suspect", and most "groups" of refugee claimants arriving to Canada with false documents will be eligible for designation. It does not matter whether the claimants arrive at a proper port of entry and initiate their claim in the proper manner, on first arrival and without misrepresentation.

The designation of foreign nationals carries serious consequences for which there is no appeal, but only a limited Federal Court judicial review process. So long as the Minister considers relevant criteria in exercising the discretion, the decision would be upheld by the Federal Court regardless of whether it was well-founded.

B. Mandatory detention of designated foreign nationals

Once the Minister exercises discretion to "designate" a foreign national, there are three main consequences. The most immediate is mandatory detention. While detentions under IRPA

currently must be justified by considerations of inadmissibility and risk of flight or danger to the public, the Bill C-49 mandatory detention does not require justification.

Detention is mandatory simply as a consequence of being designated as a person in a group that arrived irregularly, under amended s.20.1. Upon designation, an officer must detain the designated foreign national either at port of entry (if they were designated on entry) or within Canada (if they were designated after entry into Canada).

Pursuant to amended IRPA provisions s.56(2) and s.57.1, these detentions are long term:

> 56 (2) Despite subsection (1), a designated foreign national who is detained under this Division must be detained until
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> *(a)* a final determination is made to allow their claim for refugee protection or application for protection;
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> *(b)* they are released as a result of the Immigration Division ordering their release under section 58; or
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> *(c)* they are released as a result of the Minister ordering their release under section 58.1.
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> 57.1 (1) Despite subsections 57(1) and (2), in the case of a designated foreign national who is in detention, the Immigration Division must review the reasons for their continued detention on the expiry of 12 months after the day on which that person is taken into detention and may not do so before the expiry of that period.
>
> (2) Despite subsection 57(2), in the case of a designated foreign national who is in detention, the Immigration Division must review again the reasons for their continued detention on the expiry of six months after the day on which the previous review was conducted — under this subsection or subsection (1) — and may not do so before the expiry of that period.
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> (3) In a review under subsection (1) or (2), the officer must bring the designated foreign national before the Immigration Division or to a place specified by it.

These provisions effectively ensure that designated foreign nationals are detained for a minimum of 12 months. Upon designation and detention, there is no Immigration Division review of the grounds of detention until twelve months have passed. During that period, the designated foreign national can only be released with a "final determination" to allow their claim or application for protection, or if the Minister has allowed release under s.58.

A release under s.56(2)(a) within 12 months would not likely occur, for practical and legal reasons. First, CBSA has vigorously litigated allegations of serious inadmissibility concerning mass arrivals, a process that prevents the refugee claim from proceeding in a timely manner.

Second, if there was a successful determination of a claim within the year, a ministerial challenge to that decision in Federal Court would prevent the determination from being "final" and the detention would continue. Third, while a positive, final determination would mean detention is no longer mandatory, it is not clear that this provision positively authorizes release, either by the Immigration Division or automatically. The Immigration Division must wait for the passage of 12 months and conduct the review of detention under s.57.1 before it can release detainees. An automatic release would likely require explicit wording.

The Minister's discretion to order release is outlined in amended IRPA s.58.1:

> 58.1 The Minister may, on request of a designated foreign national, order their release from detention if, in the Minister's opinion, *exceptional circumstances exist* that warrant the release. The Minister may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that he or she considers necessary. [Emphasis added]

The provision sets no criteria for ordering release (except that circumstances be exceptional), a time frame for decision, or any procedure as to how application is made. Given that the Bill C-49 *prima facie* standard is no review of detentions for 12 months, and that the stated basis for the Minister granting relief from detention is exceptional circumstances, it would likely be exercised rarely.

The mandatory detention provisions would breach sections 9 and 10 *Charter* protections. The Supreme Court of Canada has held that warrantless detentions are not arbitrary, and therefore do not violate *Charter* s. 9, *if* there are "standards that are rationally related to the purpose of the power of detention."[1] Even where rational standards exist, however, *Charter* s.10(c) requires prompt review of detention. In *Charkaoui,* the denial of review of detention for 120 days pursuant to a security certificate was found to breach s. 9 and s. 10 protections.

The Bill C-49 mandatory detention is not based on any rational assessment of danger to the public, flight risk or necessary period of investigation of identity or inadmissibility. It appears to be imposed as a punishment for accessing Canada's inland refugee determination process through smuggler arranged arrivals. The denial of detention review for 12 months is unprecedented in immigration law, even in security certificate cases.

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1 *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 89

The Bill C-49 mandatory detention provisions (and other punitive measures) would also violate Article 31 of the *Convention Relating to the Status of Refugees*.[2] The Convention, ratified by Canada and more than 180 countries, sets out obligations for the treatment of refugees seeking protection within their borders. Article 31 prohibits the imposition of penalties against refugees on account of their illegal entry or presence without authorization.

The mandatory detention scheme has a significant impact on the ability of claimants to advance their claims. Detention means diminished or lack of access to family, community support, counsel, interpreters and the consequential inability to adequately prepare and advance their claim. The prejudice is physical, emotional and legal. The detention is punitive and criminalizes certain refugee claimants solely on the basis of their mode of arrival in Canada and without regard to the genuineness of their need for protection. The incarceration disables the claimant from mounting a proper advancement of their case.

C. Denial of Permanent Residence, Temporary Residence Permits, Humanitarian and Compassionate Consideration and Refugee Travel Documents

Bill C-49 also penalizes designated foreign nationals by prohibiting them from applying for permanent resident (PR) status for five years from the determination of their application for refugee protection or protection pursuant to a Pre-Removal Risk Assessment, whichever is later. In the event that a designated person does not apply for protection or refugee protection, the bar is five years from the date of their designation (amended IRPA s. 11).

These provisions, and concurrent provisions denying access to s. 24 temporary resident permits or s. 25 humanitarian and compassionate ground applications, have the effect of preventing a designated person from making *any* application for permanent residence for five years from the designation or from any application for protection, whichever is later. This includes any application as a sponsored spouse or dependent or under an economic class.

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[2] See article by law professors, Sean Rehaag (Osgoode), Sharryn Aiken (Queen's), François Crepeau (McGill), Catherine Dauvergne (UBC), Donald Galloway (Toronto), Gerald Heckman (Manitoba), Nicole LaViolette (Ottawa) and Audry Macklin(Toronto), "Legislation won't stop asylum seekers from using human smugglers", *Edmonton Journal* (November 2, 2010), online: http://www.edmontonjournal.com/news/Legislation+stop+asylum+seekers+using+human+smugglers/3762420/story.html

These are extremely punitive measures. Even designated foreign nationals successful in establishing a claim for protection cannot start their application for PR status for five years. The penalty period can be increased to six years if the designated foreign national has breached any conditions imposed upon determination of protection or release from detention (amended IRPA s. 98.1, s. 58(4), s. 58.1).

Given the usual processing periods, the passage of time between the successful determination of protection status and obtaining PR status may be seven years or more. During this time the designated foreign national is also unable to obtain a Refugee Travel Document. Bill C-49 provides that the designated foreign national is not "lawfully staying in Canada" during this time and so does not meet the entitlement to a travel document in Article 28 of the *Convention Relating to the Status of Refugees*.

Denial of access to PR status and related Bill C-49 provisions has many serious consequences:

- The refugee or protected person is unable to sponsor family members from abroad. They would be separated from family for six or seven years from successful protection determination.
- The refugee or protected person is unable to travel outside of Canada.
- For the six or seven year period that the person is without PR status, they are vulnerable to loss of protected status through the Minister's application for cessation of status under IRPA s. 108. At any time, the Minister can apply for protected status to be removed on the basis that "the reasons for which the person sought refugee protection have ceased to exist."

Bill C-49 accordingly creates a scheme for "temporary protection status." A successful refugee claimant is granted protection from return to the country of persecution, but is not allowed to obtain permanent resident status in Canada for six or seven years. If the circumstances that gave rise to the need for protection cease to exist in that period, the protected status can be removed, and the foreign national returned to their country of origin.

This temporary protection scheme is contrary to Canada's historic position of facilitating the rapid integration of successful inland claimants by allowing them to apply for PR status on being recognized as refugees or protected persons. It is also in violation of the obligation mandated by Article 34 of the *Convention Relating to the Status of Refugees* ("Naturalization"):

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

The Canadian government's recognition of this international obligation is reflected in Citizenship and Immigration Canada's Overseas Processing Manual (OP24), which 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.

Denying family reunification by denial of access to PR status is inconsistent with Article 23 of the *International Covenant on Civil and Political Rights*. Article 23 provides that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Canada has expressly stated in its reports to the United Nations on compliance with the Covenant that the IRPA and IRPR provisions allowing concurrent processing of family members of Convention refugees is intended to effect compliance with Article 23.

D. Denial of Appeal Rights

The current s. 110 of IRPA provides for an appeal (by the Minister or a person) to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject a person's claim for refugee protection. Bill C-49 removes this right of appeal with respect to designated foreign nationals. The loss of the appeal right applies to both the Minister and the designated foreign national. The Minister cannot appeal a favourable decision, and the designated foreign national cannot challenge an unfavourable decision. The removal of the appeal right further enhances the punitive nature of the provisions and the risk inherent in the broad discretion given the Minister to designate.

III. PROVISIONS APPLYING TO ALL PERMANENT RESIDENTS AND FOREIGN NATIONALS

Bill C-49 has significant provisions that apply to all permanent residents and foreign nationals and not just to designated foreign nationals. These amendments seriously impact liberty and legal entitlements and cannot be justified as being related to the human smuggling threat.

A. Detention at Port of Entry and Deferral of Release During Investigation of Suspicion of Inadmissibility

IRPA s. 55(3)(b) currently provides that an officer at port of entry can detain a permanent resident or foreign national on entry into Canada on suspicion of being inadmissible on grounds of security or violating human or international rights. IRPA s. 58(1) provides that the Immigration Division cannot order any release from such detention so long as the Minister is taking necessary inquiries to investigate the suspicion of inadmissibility.

These provisions are unlike the rest of the IRPA detention provisions because they allow detention of PRs and foreign nationals without warrant and on the basis of mere suspicion of possible inadmissibility. There is no requirement to consider whether the person is a flight risk or a danger to the public. There is no requirement to have "reasonable grounds to believe" that the person is inadmissible.

These provisions were contentious when introduced in IRPA in 2002. Similar provisions in the former *Immigration Act* (s.103.1) were limited to persons specifically suspected of espionage, subversion, terrorism, being a danger to security of Canada, war crimes, members of governments supporting terrorism, or suspected acts of violence endangering Canadians. The sections were rarely applied. The *Immigration Act* required an opinion from the Deputy Minister (or their delegate) to justify any initial arrest based on suspicion. Detention was justified for only seven days unless the Minister certified in writing that there was reason to suspect inadmissibility on these serious grounds and that additional detention was necessary for continued investigation.

These provisions (IRPA s.55(3), s.58(1)) were introduced in 2002 shortly after the terrorist events of September 11, 2001. The process for detaining permanent residents and foreign nationals at port of entry on suspicion of "security" or "violation of human and international rights" was greatly streamlined:

- The requirement for opinion of suspicion from the Deputy Minister was removed. An ordinary officer could detain on their own suspicion of possible inadmissibility on security or rights violation grounds.
- The need for written certification from the Minister after seven days was discarded, as was the limit on initial detention. The detention could be maintained indefinitely, so long as the Minister was taking "reasonable steps" to investigate the inadmissibility.

The government justified the provisions as "anti-terrorist" legislation. Security and rights violation inadmissibilities are seldom encountered. Most lawyers and PRs would be completely unfamiliar with port of entry detentions on these grounds.

Bill C-49 seeks to amend these provisions and expand the scope of detention for investigative purposes. It seeks to expand investigative detention to the more common inadmissibility grounds of "serious criminality" and "organized criminality" within amended s.55(3):

> 55(3) A permanent resident or a foreign national may, on entry into Canada, be detained if an officer
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> …..*(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 or organized criminality."
>
> Amended 58(1) The Immigration Division shall order the release of a permanent resident or foreign national unless it is satisfied…that
>
> *(c)* the minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;

Despite the term "serious" implying gravity, criminal and serious criminality inadmissibilities need not be particularly serious. Criminality requires the offence to be equivalent to a Canadian indictable offence. This would include any theft, no matter the value of the item, as IRPA deems hybrid offences to be indictable: s.36. "Serious criminality" requires offences carrying a ten year maximum sentence under Canadian law. Personation is considered a serious criminal offence as it has a potential ten-year maximum sentence. Showing a parking officer a friend's disabled parking permit to get out of a ticket could be classed as personation. Offences which police and prosecutors do not see as especially "serious" can still be classified as "serious criminality" under IRPA. Acts a person committed outside Canada, for which they were never prosecuted, could also be classed as equivalent to serious criminality offences.

Organized criminality is interpreted by the CBSA as any series of crimes involving more than one person. For example, the CBSA has taken the position that buying and selling stolen property more than once is organized criminality as it involves a series of acts and more than one person. Therefore, this provision may have an expansive scope in practice, even though it defies what an ordinary member of the public would consider "organized crime."

Extending the authority to detain, particularly for permanent residents, is a creeping erosion of civil and legal rights. There is no apparent link of these provisions to the issue of human smuggling or any attempt to limit its application to circumstances of human smuggling. The expanded detention authority applies to all permanent residents and foreign nationals.

There already exists in IRPA (and, before IRPA, in the *Immigration Act*) provisions for the arrest, detention and process for determining the inadmissibility of permanent residents – including for inadmissibility for serious criminality or organized criminality. These provide for the issuance of warrants on reasonable ground to believe that the PR is inadmissible. The detention may be maintained if the PR is a flight risk or a danger to the public. The provisions operate effectively and strike an appropriate balance between the interests of the state to protect the public and integrity of the enforcement process and the individual's right to liberty.

The expansion of port of entry authority to detain PRs on mere suspicion of a common inadmissibility, without warrant and without consideration of any issue of flight risk or need to protect the public, does not respect the PR's right of entry and of the civil liberties of both PRs and foreign nationals. The CBA Section cannot conceive of any circumstance that justifies this attempt to broaden this contentious arrest authority. It is easy to envision abuse. We do not support any expansion of authority to detain on mere officer suspicion of possible inadmissibility. The threshold is far too low.

B. Removing rights of RAD appeal

IRPA s.110 provides for Refugee Appeal Division appeal of determinations to grant refugee status, to vacate refugee status or that refugee status has ceased. This jurisdiction of the RAD was established with Bill C-11 (*Balanced Refugee Reform Act*) in May 2010. Bill C-49 now amends IRPA s.110 to remove the RAD jurisdiction to review decisions on Minister applications that refugee status has ceased, or is vacated:

> 110(2) Despite subsection(1), no appeal may be made in respect of the following:
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> (c) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased; or
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> (d) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

This amendment is not restricted to "designated foreign nationals" under Bill C-49. It applies to all refugees. The diminishment of RAD jurisdiction is inconsistent with the Parliamentary consensus achieved with passage of Bill C-11.

IV. CONCLUSION

It is legitimate to target the activities of human smugglers engaged in facilitating irregular mass arrivals of desperate persons. Unfortunately, little of Bill C-49 is directed at smugglers. Instead, it is directed at refugee claimants and refugees, some of whom may arrive in vessels and others who may not. The Bill C-49 scheme of imposing imprisonment, denial of access to permanent resident status and loss of appeal rights on persons claiming protection violates *Charter* protections against arbitrary detention and prompt review of detention, as well as Canada's international obligations respecting the treatment of persons seeking protection. Bill c-49 also seeks to change the rules for detention of permanent residents and foreign nationals that have no relation to irregular mass arrivals. For these reasons, the CBA Section does not support passage of Bill C-49.