THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-31: *Protecting Canada's Immigration System Act*

NATIONAL IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

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 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 Immigration Law Section of the Canadian Bar Association.

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EXECUTIVE SUMMARY

The Canadian Bar Association's National Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-31, the *Protecting Canada's Immigration System Act*, which was introduced in February 2012.

Streamlining the refugee determination process is an important goal. Equally important is the fairness of the system and its ability to properly determine applications by persons in need of protection or requiring humanitarian consideration. Fairness and accuracy require a hearing before an independent and competent decision maker with the possibility of an appeal on the merits. Such a determination process favours genuine refugees.

The CBA Section does not believe that Bill C-31 in its current form will meet the objectives of faster processing and administrative efficiency while still ensuring fairness and accuracy. In addition to concerns with the general nature of the Bill, the CBA Section believes significant provisions of Bill C-31 are unconstitutional and in violation of Canada's international obligations.

Given these serious reservations, the CBA Section recommends that the Bill be withdrawn. However, should Parliament adopt the Bill, we have suggested amendments to increase fairness and accuracy in determining applications by persons in need of protection or requiring humanitarian consideration.

1. General Concerns with Nature of Bill

The CBA Section is concerned with the omnibus nature of the bill, and the Minister's stated objective to pass the Bill on a very tight timeline. Given the scope of the changes, limited time for debate will not allow for adequate study of their impact. In the short time available, we have identified several serious problems with the Bill which, in our view, do not comply with the *Canadian Charter of Rights and Freedoms* or with Canada's international obligations.

The CBA Section is also concerned with the significant expansion of Ministerial authority under the Bill. The Bill removes Parliamentary oversight and consultation with experts. The Minister alone would make decisions affecting access to appeal rights, investigative arrest and mandatory detention, as well as the criteria on which such decisions are made. This approach erodes the transparency of government and, in turn, the rule of law.

2. Enforcement Issues

The bill would permit the introduction of biometric initiatives. With the potential for privacy breaches, the CBA Section recommends that the government provide greater clarity on the collection, use and storage of biometric data.

The Bill changes the wording of the *Immigration and Refugee Protection Act* (IRPA) on removals from "as soon as is reasonably practicable" to "as soon as possible". The government should express what is envisioned by the change, as the purpose of the amendment is not clear.

Investigative detention of foreign nationals and permanent residents – detention without warrant on the basis of mere suspicion – is currently limited to only the most serious grounds, such as threats to national security or commission of crimes against humanity. Under Bill C-31, these powers would expand to include investigative detention for organized criminality, serious criminality, or even mere criminality. Mere suspicion that an individual committed a crime such as shoplifting or using false identification to enter a bar can result in warrantless detention. The CBA Section recommends limiting use of investigative detention to only the most serious grounds of inadmissibility.

3. Refugee Reform

The CBA Section questions the fairness of several proposed changes to the refugee determination system. Bill C-31 proposes to further limit eligibility for making refugee claims, excluding individuals who committed criminal acts deemed "serious" under IRPA. This approach casts too wide a net, as outlined in some examples below. The CBA Section recommends removing this section of the Bill.

Bill-31 also amends the process leading to an initial hearing by the Refugee Protection Division (RPD). The government has announced that timelines for refugee claimants will be drastically shortened. Claimants making a refugee claim inside Canada will be required to provide their "Basis of Claim" document (BOC) at the eligibility interview with an officer from Citizenship and

Immigration Canada (CIC) or Canada Border Services Agency (CBSA). Claimants making a refugee claim at the port of entry will have 15 days to provide the document. The BOC will be extremely important as an information-gathering exercise. If the claimant omits information, it could result in an adverse inference later on. Refugee claimants may be suffering from post-traumatic stress disorder or face cultural and gender barriers to fully disclosing their fear of persecution to a CIC or CBSA officer. The current timeline to file a "Personal Information Form" is 28 days.

Claimants will then have their refugee hearing within 30 to 60 days. These compressed timelines do not allow sufficient time for applicants to retain counsel and prepare their case. Claimants must often obtain documents from their home country and have them translated prior to disclosure. In many cases expert witnesses such as psychologists and doctors need to be retained.

These compressed timelines severely compromise fairness to gain minor efficiencies. The CBA Section recommends provision of the BOC within 28 days and a hearing within four months. This would allow refugee claims to be heard within six months.

4. Refugee Appeal Division

The CBA Section has supported the creation of a Refugee Appeal Division (RAD) for many years. However, the CBA Section has concerns with provisions of Bill C-31 related to the RAD, including the limitations on the claimants who will have access to the RAD, the evidence that will be eligible to be evaluated by the RAD, and whether the procedures envisioned for the RAD meet the minimum requirements of procedural fairness.

Bill C-31 restricts access to the RAD for "designated country of origin" (DCO) claimants, designated foreign nationals, claimants who came to Canada via a safe third country and claimants whose refugee claims were found to be manifestly unfounded or have no credible basis. Restricting access to RAD for these claimants is unnecessarily punitive and arbitrary. The CBA Section recommends eliminating most of these exclusions.

The RAD creates a double standard for claimants and the Minister. Claimants are limited to filing new evidence at the RAD. The Minister is not. Claimants must fulfill detailed requirements to file an appeal. The Minister need not abide by similar rules. The CBA Section recommends removing this bias in favour of the Minister.

Similar to the refugee hearing process, it appears that the regulations will require a claimant to file and perfect an appeal within 15 working days. Claimants will be required to retain counsel,

obtain additional "new" evidence and prepare all submissions related to the appeal in this timeframe. This deadline is so unworkable that, in our view, it would be outside of the powers of the Governor in Council to promulgate the regulations. A constrained time limit would also work against administrative efficiency, as it would likely result in higher volume of applications for extensions, taking up additional time and resources. The CBA Section recommends adjusting this time limit to a more reasonable 45 working days.

Bill C-31 also states that, if credibility is central to the decision and could influence the outcome, an oral hearing "may" be held. The Supreme Court of Canada has said that it is difficult to conceive of a situation where it would be constitutional to make findings of credibility on the basis of written submissions. We recommend that an oral hearing "must" be held in such a situation.

5. Applications to Reopen

Under Bill C-31, the jurisdiction of the RPD and the RAD to reopen a refugee claim would be restricted, even if there has been a violation of natural justice. The tribunal is precluded from correcting an injustice or unfairness that occurred at the original hearing. These sections should be deleted from the Bill.

6. Denial of H&C access to refugee claimants

Bill C-31 would bar the Minister from considering humanitarian and compassionate (H&C) applications from anyone with a protection claim pending and for a further one year from rejection of the claim. The bar is even more severe for designated foreign nationals, who may not apply for at least five years from their designation or the finalization of their claim or application for protection.

H&C applications provide a vital safeguard to ensure a remedy in circumstances that do not meet the stringent test for refugee claims. By removing access to H&C applications, the Minister could not consider whether an individual would face unusual and undeserved hardship or a disproportionate hardship in their country of origin (the current test for an H&C). The CBA Section opposes this restriction and recommends other options for streamlining the H&C process.

7. Designated Countries of Origin

Under both the *Balanced Refugee Reform Act* (BRRA) and Bill C-31, the Minister would have authority to classify a country as a DCO. DCOs would be countries that, in the Minister's opinion,

do not normally produce refugees, respect human rights and offer state protection, and are therefore 'safe'. Claimants from those designated countries will experience serious limitations on their ability to claim refugee protection and to their appeal and review rights, compared to most claimants from countries that have not been designated. DCO claimants will also be denied various benefits to which most other claimants will be entitled.

Under Bill C-31, the Minister has wide-ranging authority to designate countries and decide the criteria under which countries would be designated. The Bill removes the requirement under BRRA to consult with experts prior to designating a country. The CBA Section is of the view that these changes should be eliminated or, at the very least, depoliticized. This could be done by requiring thresholds to be set through regulations and not by the Minister alone, engaging experts when making determinations and requiring continual review of countries on the "designated" list. Bill C-31 does not include these minimal safeguards.

8. Cessation and Loss of Permanent Resident Status

Bill C-31 proposes fundamental changes to the status of protected persons who already have permanent residence.

A protected person can lose their status through cessation if events since the determination demonstrate they would no longer be at risk in their country. No suggestion of misrepresentation is required, and in fact would not be relevant to a finding of cessation.

Bill C-31 dramatically changes the current law, adding that a person is "inadmissible" if it is determined that "their refugee status has ceased." Bill C-31 specifies that cessation also leads to loss of permanent resident status. As cessation only considers the current situation, the potential for loss of permanent residence could make protected persons who have lived in Canada legally for decades subject to removal. Given the other changes in Bill C-31, they could not appeal in the RAD or the Immigration Appeal Division (IAD), nor could they apply for humanitarian consideration or a temporary resident permit to overcome this new form of "inadmissibility".

A protected person can lose their status through vacation if the decision to confer status was obtained by directly or indirectly misrepresenting or withholding material facts. The Minister can present new evidence demonstrating the misrepresentation. In an application for vacation a person concerned cannot lead new evidence to show they are presently at risk. Those who lost status through vacation would not be eligible for a Pre-Removal Risk Assessment (PRRA) prior to removal.

The CBA Section is of the view that the provisions related to cessation and vacation are unconstitutional and should be removed from the Bill.

9. Designated Foreign Nationals

This portion of the Bill has been previously introduced as the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, in the last Parliament as Bill C-49, and in the current Parliament as Bill C-4. The CBA Section believes it is legitimate to target the activities of human smugglers who exploit the desperation of individuals to profit from facilitating irregular mass arrivals. Unfortunately, this part of Bill C-31 is primarily directed at refugee claimants and refugees, not smugglers.

Bill C-31 would impose multiple penalties on claimants and refugees who are designated as part of an irregular arrival. The penalties include:

- mandatory detention without review before the Immigration Division 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 a protection claim to the RAD.

The Minister would have extremely broad powers to designate a group as an "irregular arrival": if further examination is required to determine identity or inadmissibility; or on suspicion that smugglers involved in the arrival were profiting or linked to criminal or terrorist organizations. The Minister could use either circumstance to justify designation. The definition is so imprecise that a "group" may be as few as two people.

The consequences of being in a designated group are severe. The most immediate consequence is mandatory detention for one year, including for children over 16 years old.

Bill C-31 also penalizes designated foreign nationals by prohibiting them from applying for permanent resident status for five years from the determination of their application for refugee protection, or protection pursuant to a PRRA, whichever is later. These individuals have proven they would face a risk of persecution or death if returned to their country of origin.

Denial of access to permanent resident status and the related Bill C-31 provisions have many serious consequences, including the inability to sponsor family members from abroad. Refugees, who cannot return to their countries because of a proven risk of persecution, would be separated from family for six or seven years. The refugee or protected person would also be unable to travel outside Canada. For the six or seven years without permanent resident status, the person is vulnerable to loss of protected status through a Minister's application for cessation of status. 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."

Designated foreign nationals will also be unable to obtain a refugee travel document, between the successful determination of protection status and obtaining permanent resident status, even though this timeframe may be seven years or more. Without a travel document, a protected person is unable to leave Canada without the possibility of not being able to return.

The CBA Section cannot support this legislative scheme, which would punish designated claimants and refugees by denying liberty, legal rights and access to permanent resident status in a manner contrary to *Charter* protections and Canada's international obligations.

Conclusion

The objective of reforms to the refugee system ought to be to ensure the provision of fair, effective service to those who need it.

The CBA Section supports efforts to streamline the refugee system. It agrees that innovations are needed to make the system less attractive to those who make groundless refugee claims. However, fundamental fairness and individual rights must not be injured in the process.

I. INTRODUCTION

The Canadian Bar Association's National Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-31, the *Protecting Canada's Immigration System Act*, which was introduced in February 2012.

Bill C-31, in combination with the parts of the *Balanced Refugee Reform Act* (BRRA) and the *Immigration and Refugee Protection Act* (IRPA) not yet in force, incorporates significant portions of Bills previously before Parliament. The CBA Section commented on BRRA in May 2010[1], and on Bill C-49, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act,* in November 2010[2]. The CBA Section also commented on proposed *Immigration and Refugee Protection Regulations* amendments, published on March 19, 2011 in the *Canada Gazette*, Part 1[3]. Many of our comments on Bill C-31 are drawn from those submissions.

Although BRRA has positive features that could streamline the refugee determination process, the fairness of the proposed system and its ability to properly determine applications by persons in need of protection or requiring humanitarian consideration are equally important. This requires a hearing before an independent and competent decision maker with the possibility of an appeal on the merits. A fair, fast and efficient determination process favours genuine refugees.

We do not believe the Bill in its current form will meet the objectives of faster processing and administrative efficiency while still ensuring fairness and accuracy. The Bill is presented as an omnibus package with the intention that it be passed on a very tight timeline. Given the scope of the changes, a limited time for debate will not allow for adequate study of their impact. In the short time available, we have identified several very serious problems with the Bill, many of which are neither compliant with the *Canadian Charter of Rights and Freedoms* nor with Canada's international obligations. Given these serious reservations, the CBA Section recommends that the Bill in its current form be withdrawn.

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1 Canadian Bar Association: Bill C-11, Balanced Refugee Reform Act, Ottawa, May 2010. http://www.cba.org/CBA/submissions/pdf/10-33-eng.pdf

2 Canadian Bar Association: Bill C-49, Preventing Human Smugglers from Abusing Canada's Immigration System Act, November 2010. http://www.cba.org/CBA/submissions/pdf/10-78-eng.pdf

3 Canadian Bar Association: Letter to Jennifer Irish, CIC, *Re Immigration and Refugee Protection Regulations Amendments, Canada Gazette, Part I: Notices and Proposed Regulations, March 19, 2011*, May 2011. http://www.cba.org/CBA/submissions/pdf/11-25-eng.pdf (See Annex A)

Omnibus Nature of Bill and Lack of Consultation

This omnibus process is likely to limit appropriate careful Parliamentary study of the component parts of Bill C-31. The CBA Section is of the view that bundling several critical and entirely distinct immigration and refugee reforms into one omnibus Bill is inappropriate, and not in the spirit of Canada's democratic process. Some of these initiatives have received no Parliamentary committee consideration to date, yet contain significant shifts in Canada's approach to immigration and refugee law. The scope of the changes is massive, and an understanding of the reforms is further complicated by layering multiple sections of previous Acts which have yet to come into force. Merely setting out the proposed changes requires compiling the existing sections of IRPA, the portions of IRPA not yet in force, the amendments in BRRA along with the sections not yet in force and then cross-referencing the amendments in the Bill to IRPA, BRRA and other Acts.

The Minister wishes to pass the Bill prior to BRRA coming into force on June 29, 2012[4]. In that short time, it is unrealistic to expect that the unstudied proposals will receive the detailed and careful consideration appropriate for significant legislative change. For the bills previously studied, there was reason to object to their passage. Portions of the bills where changes were previously adopted by Parliament are now included in Bill C-31 without those considered amendments.

RECOMMENDATION

The CBA Section recommends that Bill C-31 in its current form be withdrawn.

Given concerns about the ability of stakeholders to implement the *Balanced Refugee Reform Act* in June 2012, the CBA Section recommends a stand-alone Bill to implement s.69 of Bill C-31.

Expansion of Ministerial Powers

Bill C-31 would give the Minister wide-ranging authority to shape the substance of the protective legislation. The CBA Section opposes the expansion of Ministerial discretion to designate countries and irregular arrivals, taking away Parliamentary oversight and access to an appeal process. Bill C-31 would remove the objective criteria introduced in BRRA for designated countries of origin and allows broad Ministerial discretion in the designated foreign national process, along with significant expansion of the powers of investigative arrest and detention.

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4 Comments of the Hon. Jason Kenney (Hansard: March 12, 2012 at 15:25).

Legislated entrenchment of Ministerial authority to make designations without prior public debate or opportunity for stakeholder input, and also to decide on the criteria for those designations lacks transparency and Parliamentary oversight. This risks eroding the rule of law, which requires governmental authority to be legitimately exercised only in accordance with written, publicly disclosed laws that are free from influence of arbitrary authority.

Canada's immigration system must be not only fair and just, but also seen to be so. When IRPA was debated in Parliament, several critics said the regulation-making power was too broad and most of the detail was left to regulation. In response, Parliament required many regulations under IRPA to be tabled in Parliament and referred to committee[5]. Proposed regulatory changes must also be pre-published in the *Canada Gazette*, to notify stakeholders and give an opportunity for input.

II. ENFORCEMENT ISSUES

Significant parts of Bill C-31 apply to all permanent residents and foreign nationals, not just designated foreign nationals. These amendments seriously impact liberty and legal entitlements and cannot be justified as being related to the human smuggling threat.

Biometrics and Privacy

The biometrics initiatives proposed in sections 6, 9, 30 and 47 of Bill C-31 raise privacy concerns about the use, access and ultimate distribution of information collected both domestically and internationally. Unfortunately, few details of the proposed scheme are available, and it is surprising to see the matter in the bill when the issue of biometrics is currently before the standing committee.[6]

The CBA Section supports the goals of preventing identity fraud, reducing mistakes in identity, and preventing previously-deported persons from re-entering Canada. However, we have concerns about the impact on privacy rights of persons interacting with CIC and the CBSA,

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5 IRPA s.5

6 The terms of reference for the Citizenship and Immigration Committee's current study, *Standing on Guard for Thee: Ensuring that Canada's Immigration System is Secure* state: "Areas of study would include biometrics, war criminals, security clearance checks, border security, visas, detention and removal." Minutes of Proceedings, December 8, 2011. http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5317763&Language=E&Mode=1&Parl=41&Ses=1

particularly the sharing of information with other partners or governments, which could result in an escalated risk of privacy breaches.

RECOMMENDATION

The CBA Section recommends that the government provide greater clarity on the collection, use, and storage of the biometric data.

Removals

Section 20 of the Bill proposes to amend the wording of IRPA s. 48(2) from "as soon as is reasonably practicable" to as "soon as possible". The factors to determine when removal is "possible" would be set by regulation, but no draft regulations are public at this point. The primary target of this change appears to be jurisprudence on the discretion of CBSA officers to defer removal in appropriate circumstances. It is unclear why the current situation is considered problematic, as the Federal Court has been deferential to decisions by officers and has not placed an onerous burden on them to justify decisions not to defer removal. It would be problematic if an officer at the removal stage had no discretion to defer removal in compelling circumstances.

The Government should express what is envisioned by the change and the legal significance so we might offer more informed comment.

Investigative Arrest and Detention

Sections 23 and 26 of Bill C-31 expand the grounds on which a permanent resident or foreign national could be arrested and detained for investigative purposes. The Minister could not only arrest and seek detention to investigate the most serious grounds of inadmissibility (security or violating human or international rights), but investigate inadmissibility for organized criminality, serious criminality, or even mere criminality. This is a significant expansion of Ministerial powers of arrest and detention, in particular given the deference the Federal Court has paid to the Minister's suspicions in security cases.

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 release from that detention so long as the Minister is taking necessary steps to inquire into the suspicion of inadmissibility.

This is unlike other IRPA detention provisions, allowing detention of permanent residents and foreign nationals without warrant, on 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 for "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 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 delegate) to justify an 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.

IRPA ss. 55(3) and 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 ports of entry on suspicion of "security" or "violation of human and international rights" was 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 this as "anti-terrorist" legislation. Inadmissibility for security or rights violations is seldom encountered. Most would be completely unfamiliar with port of entry detentions on these grounds.

Bill C-31 seeks to expand the scope of detention for investigative purposes to more common inadmissibility grounds of "criminality", "serious criminality" and "organized criminality" in amended s.55(3):

> A permanent resident or a foreign national may, on entry into Canada, be detained if an officer
> .....
> (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.

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;

"Serious" criminality need not be particularly serious to lead to inadmissibility under IRPA s. 36(1). The offence must carry the possibility of a 10 year maximum sentence under Canadian law, regardless of how it proceeds or the actual sentence imposed. Under s. 36(1)(c), serious criminality includes an act in another country that could be punished by 10 years' imprisonment if prosecuted in Canada, regardless of whether there was an arrest or prosecution in the foreign jurisdiction or whether prosecutors would deem the matter serious in Canada.

An example would be using false identification to enter a bar or other establishment with an age restriction, an offence under *Criminal Code* s. 368. Under the proposed amendments, a 20 year old permanent resident suspected of using fake identification to get into a bar while visiting the U.S. would be subject to detention with little or no recourse while the Minister investigated the suspicion.

The breadth of "criminality" is even greater, only requiring the offence to be equivalent to a Canadian offence that could be prosecuted by indictment, even hybrid offences[7] . This could include suspicion of crimes as minor as shoplifting or simple possession of narcotics even with no arrest or charges laid in the foreign jurisdiction. The suspected offence could have taken place many years ago. Allowing arrest and detention of individuals indefinitely to investigate a suspicion of criminal inadmissibility gives enormous discretion to officers and the Minister to detain foreign nationals at will.

Even organized criminality, which appears at first blush to be a serious matter, has been interpreted broadly by the CBSA and the Immigration and Refugee Board to include 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. This provision may have an expansive scope in practice, even though it defies what the public would consider "organized crime".

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7 Hybrid offences are offences which could be prosecuted either on summary conviction or by indictment.

IRPA (and, before IRPA, the *Immigration Act*) already provides for the arrest and detention of permanent residents as part of the process of determining inadmissibility. Warrants can be issued on reasonable grounds to believe that the permanent resident is inadmissible. The detention may be maintained if the permanent resident is a flight risk or a danger to the public. The current law operates effectively and strikes 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.

Expanding authority to detain permanent residents on mere suspicion of a common inadmissibility, without warrant and without consideration of flight risk or need to protect the public, does not respect the permanent resident's right of entry. The proposals compromise the civil liberties of permanent residents and foreign nationals. The CBA Section cannot see any circumstance that justifies expanding authority for arrest and detention. The threshold is too low. It is easy to envision abuse. Expanding authority to detain, particularly for permanent residents, is a serious erosion of civil and legal rights.

RECOMMENDATION

The CBA Section recommends that sections 23 and 26 of Bill C-31be deleted.

Alternatively, the CBA Section recommends that:

a) only the most serious grounds of inadmissibility be a subject for investigative arrest and detention;

b) the standard for investigative detention for criminal inadmissibility be higher than mere suspicion;

c) permanent residents not be subject to investigative detention on mere suspicion of criminal inadmissibility.

Organizing Entry

Bill C-31 proposes changing the nature of the offence of "organizing entry" under IRPA s.117. The offence is currently set out as:

> 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.

Bill C-31 proposes to significantly expand the scope of the section:

> 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.

The scope is expanded on two levels. First, the section would include not only aiding and abetting persons arriving without the required documents, but any entry in contravention of the Act. Second, the section will no longer require knowledge, as mere recklessness will be sufficient. This will create potential criminal liability in a wide range of situations not currently at risk of criminal charges. The responsibility of those transporting individuals to ports of entry is unclear. Under the current regime, a bus or taxi driver could face criminal sanctions only if they were knowingly involved in bringing persons to a port of entry without proper documents. Under the proposed amendments, would a taxi or bus driver be reckless and therefore criminally responsible for not verifying an individual's immigration status prior to driving them to a port of entry? Would a pilot or flight attendant be criminally liable if they failed to diligently check passenger documentation? Would a travel agent be liable for booking tickets without verifying immigration status? Until the standard of diligence is established by the Courts, there will be uncertainty as to the limits of "recklessness" in this context. This will be problematic for thousands who regularly help individuals to travel to Canada. Given the scope of the existing section, the government has not explained why the amendments are necessary.

RECOMMENDATION

The CBA Section recommends that s.41 of the Bill be deleted.

Alternatively, the CBA Section recommends that the words "or being reckless as to whether" be deleted from s.41 of the Bill.

III. REFUGEE REFORM

Eligibility

Bill C-31 proposes significant changes to the eligibility for making refugee claims in relation to criminality. Under IRPA s.101, a person is not eligible to make a refugee claim in certain circumstances. Two situations are relevant to the proposed changes.

The first is someone convicted of an offence in Canada. Currently, the person must be convicted of an offence that could be punished by 10 years, and actually be sentenced to two years or more. This reflects the gravity of denying access to refugee protection. The proposed change would remove the requirement of an actual sentence indicating the gravity of the offence, so someone receiving even a suspended sentence would be ineligible for protection.

The second is someone who has committed an offence outside Canada. Currently, the section requires the commission of the act prior to arrival in Canada, and also a finding by the Minister

that the individual poses a danger to the public in Canada. The proposed change would remove the requirement for a finding of danger, so anyone who had committed an offence deemed "serious" under IRPA would be ineligible to make a refugee claim.

Again, "serious criminality" as defined in IRPA s.36 may not be serious on the facts of a given case. An example would be paying a bribe to an official, which is a common part of life in many refugee producing countries. Under *Criminal Code* s.120, payment of bribes in Canada would be punishable by up to 14 years imprisonment. A person could be ineligible even if they had never been charged or prosecuted in the foreign jurisdiction.

Article 1F(b) of the *Refugee Convention* addresses the commission of serious non-political crimes prior to arrival in the country of refuge. However, unlike the test in Article 1F(b), Bill C-31 does not distinguish between political and non-political crimes. At the height of apartheid in South Africa, Nelson Mandela would have been ineligible to claim refugee status in Canada under this proposal, based on his conviction and admitted commission of offences.

The rationale for Article 1F(b) and the bar on eligibility for refugee protection is not to punish individuals for previous acts, but to protect Canadian society and not allow safe haven to fugitives fleeing prosecution in foreign jurisdictions. The current section strikes a fair balance between protection of the public and the rights of persons in need of protection. The proposed changes undermine that balance and may lead to unjust outcomes where individuals find themselves excluded from protection in contravention of Canada's obligations under the *Refugee Convention*.

RECOMMENDATION

The CBA Section recommends removing section 34 of Bill C-31.

Processing Eligibility and RPD Hearing

Currently, a CIC officer is required, within three working days after receipt of a refugee claim, to determine whether the claim is eligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board (RPD). If no determination is made within three days, IRPA deems that a claim was referred to the RPD.

Claimants have 28 days from the date of referral to submit a completed Personal Information Form (PIF) to the Board. The IRB then schedules a hearing.

This system has led to bottlenecks in three places.

1. Despite the deemed referral, IRB policy is not to consider cases until the CBSA signs off on eligibility, which relate mostly to security. In some instances, there have been delays of a year or longer while the CBSA does security clearances.
2. There are often delays and requests for extensions in presenting the PIF to the Board when claimants have difficulty retaining counsel.
3. There can be a delay of a year and a half between the initiation of the claim and the scheduling of a hearing.

BRRA sought to address these bottlenecks by replacing the PIF with an information-gathering interview. CIC officers, rather than the RPD, were to schedule the hearings. The interview would take place no earlier than 15 days from the date of referral. The hearing was to take place 60 days after the interview for DCO claimants or 90 days after the interview for all other claimants.

The CBA Section raised concerns about this compressed timeline in our submission on BRRA.

Bill C-31 compresses the timeline even further, providing that time limits for hearings are to be set by regulation. The Minister has indicated that hearings will be held within 30 days for inland DCO claimants and within 45 days for DCO claimants making claims at a port of entry. All non-DCO claimants are to have a hearing within 60 days[8].

There are, again, obvious concerns about implementing hearings within 30 to 60 days. These points were emphasized in the CBA Section's BRRA submission.

Applicants and counsel need time to prepare the case, disclose documents, and in many cases, retain expert witnesses such as psychologists and doctors. Credible expert opinion on psychological conditions often requires multiple meetings between the expert and applicant. In some cases, claimants require time to obtain documents from the country from which they fled, including identity documents, police and medical reports or other evidence to confirm the veracity of their claim. When this documentation is obtained, it often needs to be translated.

A rush to judgment will prejudice claimants with legitimate claims who are not able to adequately prepare. Important documentation may be missed because of the tight timelines. Without

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[8] Citizenship and Immigration Canada. "Backgrounder - Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration System Act." 2012-02-16
http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp

sufficient time, the IRB will be bogged down in adjournment requests. From a practical perspective, requiring hearings within four months will not result in any greater delay.

RECOMMENDATION

The CBA Section recommends that the operational requirements for the new process be changed to four months for the hearing for all claimants. This timeline would allow refugee hearings to be completed within six months of initiating a claim and is consistent with the goals of faster processing and administrative efficiency.

Basis of Claim Document

For claims made at a port of entry, a Basis of Claim document (BOC) would be submitted directly to the IRB within 15 days following referral of the claim to the IRB. For inland claims, the BOC would be submitted to the CIC or CBSA officer during the eligibility interview.

It will be difficult for the claimant to access counsel and have time to properly advance their case within 15 days. For those whose BOCs are due at the eligibility interview, there will be no time to consult with counsel or organize their thoughts or information pertaining to the claim.

An eligibility interview can be an intimidating process for refugee claimants. Refugees often come from countries where the authorities are agents of persecution, not protection. The CIC or CBSA officer in the interview determines whether the refugee claim will be eligible for processing, a decision with extremely important consequences for refugee claimants. Refugee claimants may suffer from post-traumatic stress disorder or face cultural and gender barriers to fully disclosing their fear of persecution to a CIC or CBSA officer. For example, the IRB Chairperson's Guidelines note that, "[w]omen from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their 'shame' to themselves and not dishonour their family or community." In addition, the definitions of a "Convention refugee" or "person in need of protection" under IRPA are not intuitive. Dozens of Federal Court and Federal Court of Appeal decisions interpret these provisions each year.

The BOC will be an important information-gathering exercise. If the claimant omits information, it could result in an adverse inference later on. Experienced counsel can assist the claimant in ensuring relevant information is clearly presented in the BOC.

The requirement to provide the BOC document immediately at the eligibility interview could severely prejudice a claimant's ability to coherently and accurately prepare this document.

A more appropriate time frame for all claimants to submit the BOC would be 28 days. At the very least, all claimants should have 15 days to submit their BOC to the IRB.

RECOMMENDATION

The CBA Section recommends that the operational requirements for the new process under the Bill allow 28 days for the submission of the Basis of Claim document for all claimants.

Public Servants and GIC Appointments

Clause 48 of Bill C-31 echoes BRRA: RPD members are to be public service employees, not Order in Council appointees. This would eliminate the possibility of political patronage, which has been endemic in the history of the Board.

Immigration Division appointments have been made through the public service application process. That procedure has been criticized for favouring those in the system who have long represented the Minister as an advocate and may be seen to be biased in favour of the Minister.

Some CBA Section members note that the rejection rate for PRRA by public servants is extremely high. This is similar to high negatives produced by public servants for refugee determinations in other countries. The reasons are complex. Many public servants come from enforcement agencies, or agencies concerned with economic, political and diplomatic considerations which should not be considered in the refugee determination context. Regardless, they have a background of delivering government policy, and it may be difficult to depart from that organizational perspective.

The CBA Section believes that the legislation must state that any application process is open, and those in the public service must not be given priority. This ensures fairness and quality decision-making. All appointments must be made on the basis that candidates are competent, judicially-minded and independent.

IV. REFUGEE APPEAL DIVISION

The CBA Section has supported the creation of a RAD for many years. However, the CBA Section has concerns with:

- the limitations on the claimants who will have access to the RAD;
- the evidence that will be eligible to be evaluated by the RAD; and
- whether the procedures envisioned for the RAD meet the minimum requirements of procedural fairness.

Bill C-31 maintains most aspects of the RAD envisioned by BRRA. It requires a written review based on the record and allows new evidence which arose subsequent to the decision or was not reasonably available at the time of the decision. It allows an oral hearing if credibility issues arise as a result of the new evidence. The CBA Section is encouraged to see that the RAD will be implemented, although we question some of the limitations proposed in the Bill.

Access to the RAD

The CBA Section recommends that most of the provisions restricting access to RAD be eliminated. Under BRRA, the only limitation on access to the RAD was for determinations that a refugee claim had been withdrawn or abandoned.

Under Bill C-31, access to RAD is significantly restricted. The following decisions cannot be appealed:

- A RPD decision allowing or rejecting the claim of a DCO claimant for refugee protection;
- A RPD decision allowing an application by the Minister for a determination that refugee protection has ceased;
- A RPD decision allowing an application by the Minister to vacate a decision to allow a claim for refugee protection;
- A RPD decision allowing or rejecting the claim for refugee protection of a designated foreign national;
- Claimants who came to Canada via a safe third country but had a RPD hearing by virtue of fitting into an exception to their ineligibility;
- Refugee claims found to be manifestly unfounded or have no credible basis;
- Refugee claims referred to the RPD before this section comes in force, even where the claim has been heard on redetermination after the Federal Court granted judicial review.

Bill C-31 also explicitly prohibits the RAD from hearing reopening applications. Even where a principle of natural justice has not been observed, the RAD has no jurisdiction to reopen.

The CBA Section submission on BRRA noted that restricting access to the RAD means the only review available to these claimants would be to seek leave to apply for judicial review in the

Federal Court. Applying for leave is complex and, even if granted, judicial review is highly constrained. The Federal Court cannot review factual issues. It cannot receive fresh evidence but must decide based on the evidence before the panel at the time of the hearing. As a result, the effectiveness of judicial review as a remedy to cure unjust decisions is extremely limited.

The CBA Section submission on Bill C-49 concluded that restricting appeal rights to designated foreign nationals was punitive.

RECOMMENDATION

The CBA Section recommends that section 110(1) and (2) of Bill C-31 be revised to read:

> **110. (1) Subject to subsection (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection, or a decision of the Refugee Protection Division to allow or reject an application by the Minister for a determination that refugee protection has ceased, or a decision of the Refugee Protection Division to allow or reject an application by the Minister to vacate a decision to allow a claim for refugee protection.**
>
> **(2) No appeal may be made in respect of a determination that a refugee protection claim has been withdrawn or abandoned.**

Evidence Considered by the RAD

Under both BRRA and Bill C-31, claimants may only present evidence on appeal that arose subsequent to the decision or was not reasonably available at the time of the decision. These restrictions on new evidence do not apply to the Minister.

The proposed RAD Rules set out requirements for the Notice of Appeal and the appellant's record. Specific documents, such as a transcript of the hearing and relevant legal authorities, were to be included in the appellant's record.

Bill C-31 would add IRPA s 110(1.1), that the Minister perfect an appeal by filing a Notice of Appeal and any supporting documents. The Minister would not have to abide by the same rules on what had to be included in the appellant's record. Bill C-31 would allow the Minister to intervene at a RAD proceeding at any time before a decision is rendered.

This double standard creates both a real and perceived bias in favour of the Minister, which has no place in a fair refugee determination process. The CBA Section recommends removing the imbalance in favour of the Minister.

RECOMMENDATION

The CBA Section recommends the removal of section 110(1.1) from Bill C-31.

The CBA Section's comments on RAD evidence under BRRA remain valid. Given the strict test for the RAD's receipt of new evidence, we continue to recommend that it be made clear that anything on the tribunal record is admissible at the RAD and not subject to this test.

We also recommend that the standard test for admitting evidence on appeal be incorporated into the legislation, to provide guidance to the RAD. This test should be applied liberally, given the fast timelines from initial claim to hearing at the RPD: only 30 or 60 days from making a claim to the hearing at the RPD. Many documents critical to establishing a claim – for example, medical reports and police reports from the applicant's home country – may not be ready in time for the hearing.

RECOMMENDATION

The CBA Section recommends that s.110(4) be revised to read:

> **On appeal, the person who is the subject of the appeal, in addition to the tribunal record which forms part of the record before the Division, may present only other evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.**

The CBA Section recommends that a new s.110(4.1) be added to Bill C-31:

> **When considering whether to accept the additional evidence, the Refugee Appeal Division shall consider, inter alia, the efforts that the subject of the appeal made at the time of the initial hearing to obtain the evidence, the relevance of the evidence to the appeal, and its importance to the determination of the appeal.**

Timelines

One of the most controversial aspects of the new legislation on the RAD is the constrained timelines. Section 159.95(1) of the proposed RAD regulations gives an appellant 15 working days

from receipt of the written decision from the RPD to file a Notice of Appeal and perfect the appeal by filing the appellant's record.

Although the regulations for Bill C-31 have not yet been published, it is likely that the 15 working days to file and perfect an appeal will remain. The CIC backgrounder included these timelines in the summary of the C-31 changes.

The CBA Section wrote to CIC in May 2011 on the proposed regulations[9], noting this timeline was unworkably short. The letter further outlined the law, which establishes, in our view, that this deadline would be *ultra vires* the powers given to the Governor in Council in IRPA. For ease of reference, the letter is attached as Annex A.

RECOMMENDATION

The CBA Section recommends the time limit be amended as follows:

> **159.95 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act, the time limit for a person or the Minister to file and perfect an appeal to the Refugee Appeal Division from a decision of the Refugee Protection Division is not later than 45 working days after the day on which the person or the Minister receives written reasons for the decision.**

The four month time limit for rendering a decision under s. 159.96(1)(b) indicates the anticipated complexity of appeals to the RAD. If proposed s.159.95(1) is amended to permit 45 days to file and perfect the appeal, the time to render an appeal decision under s.159.96(1)(b) could be reduced to three months to maintain the time frame the government has set for appeals.

Requirement for an Oral Hearing

Under both BRRA and Bill C-31, there may be an oral hearing before the RAD, although this will be the exception, not the norm. Oral hearings may be held when the documentary evidence raises a serious issue of credibility that, if accepted, would justify allowing or rejecting the refugee claim. The test is the same as the current test for convening an oral hearing for a PRRA in IRPA s. 113(b) and IRPR s. 167, except that a hearing is required in the PRRA context when the statutory criteria are met, and the language for oral hearings before the RAD is permissive.

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9 Supra, note 3.

We continue to recommend that the proposed section 110(6) be changed from "may" hold a hearing to "shall" hold a hearing if the stated criteria are met. We know of no circumstances where these criteria would be met – that the documentary evidence raises a serious issue of credibility central to the decision, and if accepted would justify allowing or rejecting the refugee claim – and it still would be appropriate or constitutional for the RAD to proceed without hearing from the appellant. As the Supreme Court of Canada noted in *Singh*:

> I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.[10]

RECOMMENDATION

The CBA Section recommends proposed s.110(6) be changed from "may" to "shall" hold a hearing.

Applications to Reopen

Clause 51 of Bill C-31 adds section 170.2 to *IRPA* so that, even with a violation of natural justice, the RPD will not have jurisdiction to reopen unless the person did not appeal the decision or seek judicial review. The RAD is likewise barred by s. 53 from reopening when there has been a violation of natural justice.

The Supreme Court of Canada decided in *Chandler v. Alberta Association of Architects* [11] that an administrative tribunal must have inherent jurisdiction to reopen a case if it failed to properly exercise its jurisdiction, which would include a breach of natural justice in the hearing. An exception to this principle is where the tribunal's enabling statute explicitly states it cannot reopen[12]. Bill C-31 seeks to abolish this common-law principle for refugees. In other words, no matter how unfair a hearing was, the decision cannot be reopened.

This is a severe curtailment of the RPD's jurisdiction, unique to refugees. It is exceptional for a person to persuade the RPD of a breach of natural justice requiring a new hearing. It is an important safeguard as it means the hearing was unfair and the person had not been able (for whatever reason) to get this remedied through litigation. In criminal law, courts have reopened many decisions where it was ultimately shown a person was wrongfully convicted. In refugee law

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10 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 59.

11 [1989] 2 S.C.R. 848.

12 Ibid, para 9.

this jurisdiction is more limited, as the RPD will only reopen if a breach of natural justice in the original hearing is established. Bill C-31 seeks to remove even that power. This can only promote injustice … injustice the tribunal could have been willing to correct.

RECOMMENDATION

The CBA Section recommends that clauses 51 and 53 be deleted from Bill C-31.

Denial of H&C Access

Clause 13 of the Bill bars the Minister from considering humanitarian and compassionate (H&C) applications from anyone with a protection claim pending and for a further one year from rejection of the claim. The bar is more severe for designated foreign nationals, who may not apply for at least five years from their designation or the finalization of their claim or application for protection.

The rationale is presumably to facilitate removal of failed refugee claimants by eliminating impediments to removal and to discourage persons who have other grounds for wishing to remain in Canada from making a refugee claim. However, an application to remain on H&C grounds can only impede removal if it forms the basis for an application for a stay of removal. The case law is clear that the application does not warrant a stay unless there are exceptional circumstances such as a lengthy delay in processing the H&C claim. In most cases, stays are denied. It may be counter-productive to adopt a one-year ban on other immigration procedures if the objective is prompt removal of failed refugee claimants. The one-year ban might encourage failed refugees to evade removal for one year so they can access the PRRA and H&C processes.

H&C applications provide a vital safeguard to ensure that persons have a remedy for rights violations in circumstances that do not meet the stringent test for refugee claims. Consider a person whose appeal to the RAD is rejected and who learns a week later that their home in their country of origin has been searched and police threatened their family that the appellant would be detained if apprehended. This information was not available at the time of the hearing. It is case-specific information that would not be covered by a Ministerial committee reviewing general country conditions. The person would be subject to the one-year bar and have no remedy. The *Charter* will likely dictate that a remedy be provided. The constitutionality of the one year bar on H&C applications is in serious question.

The changes in BRRA have restricted the scope of the humanitarian review to preclude overlap between refugee claims and humanitarian claims. Unfortunately, the lines between risk and hardship are not so easily drawn, and may shift with changing interpretations of issues such as generalized risk or state protection by the RPD or the Courts. It will place many vulnerable persons in a difficult position of choosing whether their case is best described as risk or hardship. Under the proposed scheme, one could presumably not change the choice even if conditions had significantly changed.

We commend the government on including exceptions to the one-year bar where there is risk to life due to lack of medical care or where the best interests of a child are directly affected, which is a significant improvement on previously proposed versions. While we continue to believe the bar is unfair and unnecessary, we would recommend at the very least expanding the exceptions to include other situations of risk to life and security of the person.

We propose two options for a fast, fair and efficient H&C process that comply with the *Charter* and meet concerns over delayed removals (notwithstanding that stays of removal are exceptional). The first is an expedited form of the current system with decisions over H&C applications remaining with CIC. The second grants jurisdiction to the RAD to consider these applications.

Option One: Streamline current system by emulating administrative mechanism used in inland spousal applications.

This option would merely require administrative changes under IRPA. Refugee claimants would continue to be entitled to make a concurrent H&C application, or withdraw their refugee claim and file a humanitarian application with procedural safeguards to ensure this remains a meaningful remedy in deserving cases.

If the H&C application were submitted before a final decision is rendered on the refugee claim, the claimant's removal would be automatically deferred while the application is being processed. Claimants could opt out of the refugee system without being subject to immediate removal.

Option Two: Grant H&C jurisdiction to RAD for claims that do not meet stringent test for refugee status, but still warrant some relief.

This is analogous to the IAD's jurisdiction to consider "all the circumstances of the case."

Over the past few years, the IRB has moved towards an "integrated Board." Tribunal officers and Board members flow between the RPD and the IAD. If the "integrated Board" approach is also

applied to the RAD, RAD members would have experience with H&C factors in their role as IAD members. The additional training required would be minimal.

Under BRRA and Bill C-31, the RAD will be a paper hearing in most cases. The additional time required to determine the limited H&C factors would be minimal. The limitation of this option is that it would exclude claimants from the designated countries, who would not have recourse to the RAD. On the other hand, it would eliminate the need for concurrent claims by those before the RPD. More importantly, there would be a single decision maker, and a single decision for refugee appeals and H&C claims, avoiding duplication of resources. Further, there would be only one potential judicial review application.

RECOMMENDATION

The CBA Section recommends that the one-year bar on H&C applications be withdrawn from the Bill.

The CBA Section's options should be considered for incorporation into the H&C application process.

If Option 2 is selected, the CBA Section recommends the following addition to clause 13(1), amending s.110(1):

> **The Refugee Appeal Division must also determine whether the person merits protection on the basis of humanitarian and compassionate grounds.**

Designated Countries of Origin

Under both BRRA and Bill C-31, the Minister would have the authority to classify a country as a "designated country of origin" (DCO). DCOs would be countries that, in the Minister's opinion, do not normally produce refugees, respect human rights and offer state protection, and are therefore 'safe'. Once countries are designated, refugee protection claimants from those countries will experience serious limitations on their ability to claim refugee protection and to their appeal and review rights that will not be shared by most claimants from countries that have not been designated. DCO claimants will also be denied various benefits to which most other claimants will be entitled.

Under Bill C-31, a designation applies to a country as a whole. There are no designations for part of a country, or for a class of nationals from a country, as previously permitted in BRRA.

The consequences of being from a DCO are severe:

- The RPD will hear claims from designated countries of origin on an expedited basis. The government proposes that public servant decision makers hear DCO claims within 30 days for claims made inland, and within 45 days for claims made at ports of entry.
- DCO claimants will have no appeal to the RAD if their claims are refused.
- DCO claimants will be ineligible to apply for work permits until their claims are allowed by the RPD or have been in the system for more than 180 days without a decision. They will also be ineligible for benefits available to claimants usually associated with employment in Canada, such as the GST credit, the Working Income Tax Benefit and Employment Insurance, all normally triggered by the issuance of a work permit.

At first blush, designating a country list seems attractive because intuitively such countries could be easily identified. However, we see serious problems.

First, refugee determination is an individualized assessment. There may well be circumstances where a claim is founded even though it comes from a country we might consider democratic.

Of even greater concern, however, is the likelihood that the list will become politicized.

Under BRRA, the Minister could only designate a country, part of a country or class of nationals of a country, if:

- The number of claims for refugee protection made in Canada by nationals of the country is equal to or greater than the number set out in the regulations; and
- The rate of acceptance by the RPD of claims made by nationals of the country is equal to or lower than the rate set out in the regulations.

In making a designation, the Minister was required to take into account:

- The human rights record of the country as it relates to the factors in sections 96 and 97, and the international human rights instruments specified in the regulations and any other international instrument that the Minister considers relevant;
- The availability in the country of mechanisms for seeking protection and redress;
- The number of claims for refugee protection made in Canada by nationals of the country;
- The rate of acceptance by the RPD of claims made by nationals of the country and the rate of appeals allowed by the Refugee Appeal Division in respect of appeals made by nationals of the country in question; and
- Any other criteria set out in the regulations.

The proposed Regulations would allow the Minister to make a designation only if an advisory panel of experts established by the Minister, including at least two non-government human rights experts, recommended the designation. The Minister would not be required to consult the panel to cancel a designation.

Bill C-31 greatly increases the power of the Minister. The number of claims required for a designation under section 109.1(2)(a) would no longer be set by regulation, but by order of the Minister. The rate of acceptance required for a designation under section 109.1(2)(a) would no longer be set by regulation, but by order of the Minister. In Bill C-31, unlike BRRA, the rate of acceptance would lump rejected, abandoned and withdrawn claims together. Unlike BRRA, the Minister could designate a country if the rate of withdrawal and abandonment hit a particular threshold, set by order of the Minister and not regulations.

When the number of refugee protection claims did not meet the threshold set by Ministerial order, the Minister could still designate the country if, the Minister (alone) is of the opinion that, in the country:

- There is an independent judicial system;
- Basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed; and
- Civil society organizations exist.

There is no requirement to consult with experts in Bill C-31. The Minister need not consider the human rights record of the country in question as it relates to the factors set out in sections 96 and 97 or international human rights instruments. The Minister need not consider the availability in the country in question of mechanisms for seeking protection and redress.

There appear to have been no proposals on mechanisms for removing designation under C-31 if the human rights situation in a designated country seriously deteriorates.

The CBA Section recommends that this provision be eliminated.

However, if the DCO designation remains, the risk of politicization should be minimized. This could be accomplished by:

- reinstating the BRRA requirement that the regulations and not the Minister set out the required thresholds;
- having the list vetted by an advisory committee of human rights experts who ensure the list is restricted to situations that meet strict human rights and state protection criteria;

- subjecting the list to a "sunset clause," that would require reevaluation of each country's inclusion in the list after one year; and
- requiring public input into the process before the designation is final.

RECOMMENDATION

The CBA Section recommends that the regime for designated countries of origin be eliminated from the Bill.

If the regime remains, the CBA Section recommends that's. 109.1 be amended to read:

> **109.1 (1) The Minister may, by order, for the purposes of section 110(2) [denial of appeal] and section 111.1 [provision allowing regulations to allow for different rules for DCO and non-DCO claimants, for example, on timelines], designate a country**
>
> **(1.1) The Minister may make a designation only if**
>
> **(a) the number of claims for refugee protection made in Canada by nationals of the country in question is equal to or greater than the number set out in the regulations; and**
>
> **(b) the rate of acceptance by the Refugee Protection Division of claims made by nationals of the country in question is equal to or lower than the rate set out in the regulations.**
>
> **(1.2) In making a designation, the Minister must take the following criteria into account:**
>
> **(a) the human rights record of the country in question as it relates to**
>
> **(i) the factors set out in sections 96 and 97, and**
>
> **(ii) the international human rights instruments specified in the regulations and any other international instrument that the Minister considers relevant;**
>
> **(b) the availability in the country in question of mechanisms for seeking protection and redress;**
>
> **(c) the number of claims for refugee protection made in Canada by nationals of the country in question;**
>
> **(d) the rate of acceptance by the Refugee Protection Division of claims made by nationals of the country in question and the rate of appeals allowed by the Refugee Appeal Division in respect of appeals made by nationals of the country in question; and**
>
> **(e) any other criteria set out in the regulations.**
>
> **(2) An order referred to in subsection (1) is not a statutory instrument for the purposes of the Statutory Instruments Act. However, it must be published in the *Canada Gazette*.**

(3.1) A country shall not be designated under this section unless the number of claims by nationals of the country, exceeds in the three month period prior to the designation, ten percent of the total number of claims referred to the Refugee Protection Division during that period.

(3.2) A country shall cease to be considered to be designated pursuant to section 109.1 (1) one year after the date on which it was designated, unless the Minister designates the country again, pursuant to s.109(3.5), prior to the expiry of the anniversary of the designation.

(3.3) The Minister may only designate a country pursuant to this section if the Minister has received a recommendation from the Advisory Committee appointed under this section.

(3.4) Prior to designating a country pursuant to this section, the Minister must provide notice of his intention to do so and shall allow interested parties to make representations regarding the designation.

(3.5) For the purpose of determining whether or not a country ought to be designated under this section the Minister shall create an advisory committee. The Advisory Committee shall include two members who are Public Service employees who have expertise and experience in human rights law and two independent human rights experts designated in consultation with stakeholder groups. The Committee shall, at the request of the Minister, consider whether or not a country ought to be designated under this section and shall receive representations made pursuant to section 109.1 (3.4).

Cessation and Loss of Permanent Residence

Bill C-31 proposes fundamental changes to the impact of cessation for protected persons who have obtained permanent residence. Vacation and cessation are defined in IRPA ss. 108 and 109, and it is important to understand the fundamental distinction between the two concepts.

A protected person can lose status through **vacation** if the decision to confer status was obtained by directly or indirectly misrepresenting or withholding material facts. The Minister can present new evidence demonstrating the misrepresentation. On an application for vacation the person concerned cannot lead new evidence to show they are presently at risk. They can only lead evidence to rebut the argument that they engaged in a material misrepresentation to get status, and rely on evidence about objective conditions on record at the original hearing. The relevant point of analysis for vacation is the original decision to confer status; the present situation is not

relevant. Vacation of protected person status also leads to automatic loss of permanent resident status with no appeal to the IAD. An individual would even be at risk of losing citizenship following a vacation finding.

A protected person can lose their status through **cessation** if events since the determination demonstrate they would no longer be at risk in their country. No suggestion or implication of misrepresentation is required, and would not be relevant to a finding of cessation. The relevant point of analysis for cessation is the present; it is not relevant whether the status was originally obtained by fraud. If a protected person has received permanent resident status, a finding of cessation does not lead to loss of permanent residence.

With both vacation and cessation, the person concerned may make an H&C application under IRPA s. 25 if status is taken away. The person will also have the right to make a PRRA application before any actual deportation so that current risk can be assessed.

Again, a protected person who has become a permanent resident will only lose their status as a result of a vacation decision, as the status was originally obtained through misrepresentation. They are not at risk of losing their status through cessation.

The distinct impact of cessation and vacation on permanent residence reflects a value judgment of what permanent residence signifies and the distinction between refugee status based on a truthful claim and status obtained through misrepresentation. Even if conditions in a country change after the person has become a permanent resident, the person has moved on with their integration and should not be subjected to loss of status for events outside their control.

Bill C-31 dramatically changes the current law, devaluing permanent residence for refugees and leaving them in a precarious situation for many years until they become citizens. Section 18 of Bill C-31 amends IRPA s. 40, adding that a person is "inadmissible" once a final determination is made under ss. 108(2) that "their refugee status has ceased." It seems perverse that the amendment adds the inadmissibility to a section entitled "misrepresentation", when cessation neither requires nor implies any misrepresentation by the protected person. If misrepresentation could be demonstrated, the Minister would be free to proceed by way of vacation.

Clause 19 of Bill C-31 amends IRPA s. 46(1) so that cessation also leads to loss of permanent resident status. This change is fundamental, and has the potential to affect thousands of permanent residents who arrived in Canada as refugees and are contributors to Canadian society.

As cessation only considers the current situation, the potential for loss of permanent residence could affect protected persons who have made their lives in Canada for decades.

IRPA s.110 provides for RAD appeals of determinations to grant refugee status, to vacate refugee status or that refugee status has ceased. This jurisdiction of the RAD was established with BRRA in May 2010. Bill C-31 now amends IRPA s.110 to remove the RAD jurisdiction to review decisions on Ministerial applications that refugee status has ceased, or is vacated.

This amendment is not restricted to "designated foreign nationals" under Bill C-31. It applies to all refugees. The diminishment of RAD jurisdiction is inconsistent with the Parliamentary consensus achieved with passage of Bill C-11.

The other changes proposed in Bill C-31 would cut off all other recourses, making rapid removal all but inevitable. In particular, one could not apply for H&C consideration if less than 12 months have passed since an application for refugee protection was "rejected" (s.13 (3)). A person cannot apply for a PRRA if less than 12 months have passed since the application "for protection" was "rejected" (s.38). With BRRA changes already in force , there would also not be access to a temporary resident permit (IRPA s.24). As a decision ceasing or vacating status deems the decision to be rejected, a person who has lived for many years in Canada, even with permanent resident status, may be removed without any ability to make an H&C application or an application demonstrating their life is currently in danger. With the changes proposed to IRPA s.20, the removal would presumably be "as soon as possible".

Inability to make an H&C application would be significant in both cessation and vacation cases. In cessation cases the individual was rightly granted status and has been living in Canada for some time. Most often there will be substantial humanitarian grounds. In vacation cases, strong humanitarian grounds often exist, not only because of the person's establishment in Canada but because, in some cases, a misrepresentation may be sufficient to vacate status even if the scope of the actual fraud was quite limited.

Inability to apply for PRRA would be relevant in both situations, but particularly severe in vacation proceedings, as the person is not allowed to lead evidence of current danger at the hearing. If a misrepresentation could have influenced the initial decision, but there is evidence either not available or not presented at the original hearing that the person really will be in danger, they cannot prove this in any forum under IRPA as amended by Bill C-31. This would violate the person's right to security of the person under s. 7 of the *Charter*.

Bill C-31's provisions on cessation are contrary to Canada's international commitments under Article 34 of the *Refugee Convention*:

> 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 government has often stated that it recognizes this international law obligation. An Overseas Processing Manual (OP24) expressly states "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.

Making permanent residence an illusory status for refugees may breach s. 7 of the *Charter*, as it infringes the psychological security of permanent residents. The *Refugee Convention* recognizes the importance of letting refugees move on from the past by integrating into the host nation, signaling the importance of psychological well-being. This harm can extend to an entire community, such as the impact of the inability of Somali refugees to get permanent residence under the old *Immigration Act* (amended by the government on consent, following *Charter*-based litigation).

Refugees will be the only class of permanent residents for whom permanent residence is illusory. No other class of permanent resident risks having their status revoked if their situation changes. A person who immigrates as a doctor will not lose permanent residence if they become a successful businessperson. The concept is contrary to the very meaning of permanent residence and to the value of facilitating integration.

RECOMMENDATION

The CBA Section recommends that sections 18 and 19(1) (loss of permanent residence on cessation of protected person status) be deleted from the bill.

Alternatively, the CBA Section recommends that:

- **protected persons facing cessation proceedings have access to the Refugee Appeal Division;**
- **protected persons who lose status through cessation or vacation have access to the equitable jurisdiction of the Immigration Appeal Division;**
- **protected persons who lose status through cessation or vacation not be subject to the one year bar on applications on**

humanitarian and compassionate grounds, Temporary Resident Permits or a Pre-Removal Risk Assessments.

V. DESIGNATED FOREIGN NATIONALS

This portion of the Bill has been previously introduced as the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, in the last Parliament as Bill C-49, and in the current Parliament as Bill C-4. The earlier bills proposed amending IRPA, ostensibly to address organized, irregular mass arrivals of refugee claimants. The legislation follows two cargo ship landings on the West Coast since 2009, which placed pressure on IRB and CBSA 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-31 is directly aimed at deterring human smugglers from facilitating irregular mass arrivals. The principal targets are refugee claimants themselves, whether genuine or not.

It is legitimate to target the activities of human smugglers who exploit the desperation of individuals to profit from facilitating irregular mass arrivals. We do not oppose 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-31 would impose multiple penalties on claimants and refugees 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 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-31 penalty scheme is a harsh and dramatic shift in policy for refugee protection determinations. Denying detention reviews breaches s. 9 and s.10 *Charter* protections against arbitrary detention and the right to prompt review of detention. Mandatory unreviewable detention and denial of access to permanent resident status or travel documents conflict with Canada's obligations under the *Refugee Convention* and the *International Covenant on Civil and Political Rights*.

The CBA Section cannot support these sections of Bill C-31. The legislative scheme would punish designated claimants and refugees by denying liberty, legal rights and access to permanent resident status in a manner contrary to *Charter* protections and to international obligations. The flaws in these portions of Bill C-31 cannot be rectified by modest amendments.

Retroactive Nature of Amendments

Clause 81 of Bill C-31 allows for designation under IRPA s. 20.1 of any arrival after March 31, 2009. This would permit the designation of passengers on the Ocean Lady and the Sun Sea. It is troubling that punitive legislation would be retroactively targeted at an identifiable group of individuals. Targeting individuals already in Canada, some of whom are already found to be protected persons, would not achieve the stated purposes of Bill C-31. If the goal of these punitive measures is deterrence of future ships, it is difficult to see how punishing those who came before is fair or effective. The CBA Section is opposed to the retroactive application of punitive sanctions, in particular the designation of foreign nationals.

Minister's Discretion to Designate Too Broad

Bill C-31 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
>
> 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.

The exception for foreign nationals who can show they arrived with necessary visas or other documents, and that they are not inadmissible, 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. The term "timely manner" is not defined.
- S. 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(1)(b) reference to “for profit” is stand-alone. The person profiting 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 to trigger the exercise of discretion. To exercise 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. It could be two persons appearing at the port of entry.

To exercise 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 than “reasonable grounds to believe”. Under both arms, 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.

Many refugee claimants come to Canada using false documents obtained from agents or smugglers. They could not otherwise make their way on commercial carriers. This reality is recognized both by Article 31 of the *Refugee Convention* and IRPA s. 133. 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 "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, 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.

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, Bill C-31 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 at a port of entry (if they were designated on entry) or within Canada (if they were designated after entry into Canada).

Pursuant to amended IRPA ss. 56(2) and 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
> (a) a final determination is made to allow their claim for refugee protection or application for protection;
> (b) they are released as a result of the Immigration Division ordering their release under section 58; or
> (c) they are released as a result of the Minister ordering their release under section 58.1.
>
> 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.
> (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.

This effectively ensures that designated foreign nationals are detained for a minimum of 12 months. There is no Immigration Division review of the grounds of detention until 12 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 a claim was successfully determined 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 the provision positively authorizes release, either by the Immigration Division or automatically. The Immigration Division must wait for 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.

No criteria are set for ordering release (except that circumstances be exceptional), no timeframe for decision, or no procedure as to how application is made. Given that the *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 *Charter* ss. 9 and 10 . 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."[13] Even where rational standards exist, however, section 10(c) of the *Charter* 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 *Charter* ss. 9 and 10.

This mandatory detention is not based on a rational assessment of danger to the public, flight risk or 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.

The mandatory detention and other punitive measures would also violate Article 31 of the *Refugee Convention,* which prohibits the imposition of penalties against refugees on account of their illegal entry or presence without authorization.

The mandatory detention scheme – with diminished or lack of access to family, community support, counsel, interpreters – impedes the ability of claimants to adequately prepare and advance their claims. 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 impedes the claimant from properly advancing their case.

Designation and Minors

The CBA Section commends the Government on the explicit exclusion of minors under the age of 16 from the detention provisions for designated foreign nationals. While this is an improvement over previous versions of this legislation, we continue to have serious concerns about the effect of the mandatory detention provisions on minors.

No rationale is given for applying the mandatory detention provisions to minors between age 16 and 18 years. In both Canadian and in international law, persons under 18 years of age are minors and ought to be treated as such.

Although minors under 16 years will not technically be detained, the impact of the detention regime on their family will be devastating if parents or older siblings are designated foreign nationals. The children will either live in detention with their family or be taken into foster care.

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

The impact of designations for all minors would also include inability to apply for permanent residence, temporary resident permits or travel documents for many years, with serious consequences. A minor who becomes a designated foreign national at age 13 would almost certainly still not be a permanent resident by age 18 or 19. Their options for post-secondary study would be limited, and they would have been unable to travel throughout high school. Although their entire adolescence would have been spent in Canada, their status would remain precarious, a stress with them throughout their years of high school. It is particularly difficult to understand how these punitive measures applied to children assist in a fight against human smuggling.

Denial of Permanent Residence, Temporary Residence Permits and H&C Consideration

Bill C-31 prohibits designated foreign nationals from applying for permanent resident status for five years from the determination of their application for refugee protection or protection pursuant to a PRRA, whichever is later. If the designated person does not make a refugee claim or apply for protection, the bar is five years from the date of their designation (amended IRPA s. 11).

These provisions, combined with denying access to s. 24 temporary resident permits or s. 25 H&C applications, prevent a designated person from applying for permanent residence for five years from the designation or any application for protection, whichever is later. This includes any application as a sponsored spouse or dependent or under an economic class.

These are extremely punitive measures. Even designated foreign nationals who establish a claim for protection cannot apply for permanent resident status for five years. The penalty period can be increased to six years if the designated foreign national has breached any conditions imposed on determination of protection or release from detention (amended IRPA s. 98.1, s. 58(4), s. 58.1). The bill does not say who would determine that there has been a breach, or how serious the breach would need to be. A minor, technical breach (such as reporting late on one occasion) could allow the Minister to refuse to consider an otherwise meritorious application.

Denying access to permanent resident status and related Bill C-31 provisions have 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 permanent resident 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-31 creates a scheme for "temporary protection status." A successful refugee claimant is granted protection from return to the country of persecution, but cannot 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, protected status can be removed, and the foreign national returned to their country of origin. The new cessation provisions in Bill C-31 would add at least a further three years before the person would be eligible for citizenship even after becoming a permanent resident. During that time, the person could lose their status and be removed from Canada if the conditions in their country change. Taking into account processing times, the period of uncertainty and instability for a designated foreign national found to be a Convention refugee would be well over ten years after their arrival in Canada.

This temporary protection scheme is contrary to Canada's historic position of facilitating rapid integration of successful inland claimants by allowing them to apply for permanent resident status on being recognized as refugees or protected persons. It is also in violation of the obligation under Article 34 of the *Refugee Convention* ("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 permanent resident status is inconsistent with Article 23 of the *International Covenant on Civil and Political Rights,* that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Canada's reports to the United Nations on compliance with the *Covenant* state that the IRPA and IRPR provisions allowing concurrent processing of family members of Convention refugees is intended to effect compliance with Article 23.

Denial of Refugee Travel Documents

Given the usual processing periods, the time between the successful determination of protection status and obtaining permanent resident status may be seven years or more. During this time the designated foreign national is unable to obtain a refugee travel document. Bill C-31 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 *Refugee Convention*. This violates Canada's obligations under the Convention, and creates an unnecessary hardship for genuine refugees. Without a travel document, a protected person cannot leave Canada without the fear of not being allowed to return. Combined with the bars on obtaining permanent residence and family reunification, denying travel to a safe third country to visit with family members is unnecessarily punitive. Protected persons may also need to travel for work, study, cultural or religious reasons, none of which would be possible for many years.

Denial of Appeal Rights

IRPA s. 110 currently provides for an appeal (by the Minister or a person) to the RAD against a decision of the RPD to allow or reject a person's claim for refugee protection. Bill C-31 removes this right of appeal for designated foreign nationals and the Minister. The Minister cannot appeal a favourable decision, and the designated foreign national cannot challenge an unfavourable one. This is another element of the punitive nature and the risk inherent in the broad discretion given the Minister to designate.

Conclusion – Designated Foreign Nationals

It is legitimate to target the activities of human smugglers who exploit the desperation of individuals to profit from facilitating irregular mass arrivals. Unfortunately, little of Bill C-31 is directed at smugglers. It is directed at refugee claimants and refugees, some of whom may arrive in vessels and others who may not. The 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-31 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 these sections of Bill C-31.

RECOMMENDATION

The CBA Section recommends that the sections creating and referring to designated foreign nationals be removed from Bill C-31.

VI. CONCLUSION

The objective of reforms to the refugee system ought to be to ensure the provision of fair, effective service to those who need it.

The CBA Section supports efforts to streamline the refugee system. It agrees that innovations are needed to make the system less attractive to those who make groundless refugee claims. However, fundamental fairness and individual rights must not be injured in the process.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

VII. ANNEX 1: LETTER ON IMMIGRATION & REFUGEE PROTECTION REGULATIONS (DESIGNATED COUNTRY OF ORIGIN)

May 2, 2011

Via email: Jennifer.Irish@cic.gc.ca

Jennifer Irish
Director
Asylum Policy and Programs
Refugee Affairs Branch
Citizenship and Immigration Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Ms. Irish,

Re: Immigration and Refugee Protection Regulations Amendments, Canada Gazette, Part I: Notices and Proposed Regulations, March 19, 2011

On behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), I am writing to comment on the above-noted proposed regulations. The regulations seek to implement a "Designated Country of Origin Policy" arising out of amendments to the *Immigration and Refugee Protection Act* (IRPA) made by the *Balanced Refugee Reform Act,* which came into effect on June 29, 2010. Our main concern relates to the requirement in proposed s.159.95(1) that appeals to the new Refugee Appeal Division (RAD) be filed and perfected within fifteen working days from the date that the Refugee Protection Division (RPD) decision is communicated to the appellant. This time limit is too brief to permit counsel, whether acting for a refugee claimant or the government, to competently prepare submissions. Further, in our view, establishing this deadline would be *ultra vires* the powers given to the Governor in Council in IRPA.

Preparation of an appeal requires ordering and listening to the recording of (often) hours of testimony from the RPD, analysis of the documentary evidence and the law, and preparation of detailed submissions. Refugee claimants must find counsel to represent them on the appeal and, if it is available, applying for legal aid. The process to get legal aid approval is often a month for judicial review litigation. This is barely manageable under the current system, which permits fifteen days to register

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc** : 613.237.0185 | info@cba.org | **www.cba.org**

notice of the Federal Court application, and a further 30 days to complete arguments. A fifteen day deadline to file and perfect a RAD appeal also does not adequately take into account the many barriers refugees often face in tribunal proceedings, such as traumatization, language limitations, lack of access to qualified counsel or funding for litigation. For government, it is also unlikely that Justice Canada lawyers can be notified of a contentious decision, obtain the recording and prepare competent submissions within 15 days. To provide meaningful access to the RAD, we recommend adopting the existing practice in Federal Court, namely, permitting 15 days to file notice, and an additional 30 days for submissions to be completed.

In our view, the proposed narrow time limits are so extreme that they defeat the purpose of the legislation, and are therefore *ultra vires*. In other words, a 15 day time period for filing *and* perfecting the appeal is so arbitrary and unrealistic so as to make the appeal itself nugatory. Either appeals would not be filed in time, or crafted so hastily so as not to constitute a true appeal on the merits. It is therefore beyond the authority of the Governor in Council to enact it. The RAD would effectively become a tribunal with no substantive function if appeals to it cannot be competently prepared and filed within the required time frame.

Generally speaking, the courts will defer to the Governor in Council in promulgating regulations. There is a presumption that regulations are valid, but they can be reviewed by the Courts to determine whether they are inconsistent with the purpose of the statute or where some condition precedent to the issuance of the regulation has not been met.[1]

There are several examples where courts have struck down time limits for these reasons. In *Re Attorney-General of Canada and Public Service Staff Relations Board* (1977), 74 D.L.R. (3d) 307 (Fed. C.A.), the Federal Court of Appeal set aside a time limit that fettered or hindered the substantive ability of a tribunal to hear appeals. In *Re Cardona Alvarez and Minister of Manpower and Immigration* (1978), 89 D.L.R. (3d) 77 (Fed. C.A.), the Court of Appeal held that where a rule setting a time limit "purports to have been made in the exercise of this [*legislative*] authority" but "is inconsistent" with the legislation's purpose, it is *ultra vires*. In *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53 the Nova Scotia Court of Appeal held that:

> [T]here is strong judicial authority for the proposition that regulations cannot impose time limits which have the effect of taking away rights conferred by the parent legislation.

The Court of Appeal further noted that a remedial statutory purpose should be taken into consideration in analyzing the lawfulness of the regulation. As the purpose of having a RAD is to allow parties to present substantive arguments on the merits of a refugee determination, an unrealistic time limit would likely be recognized as beyond the legitimate authority of the Governor in Council.

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1 *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)* [2002] O.J. 1445 (Ont. C.A.); *De Guzman v. M.C.I.,* 2004 FCJ 1557 (F.C.A.).

The issues raised at the RAD will be similar to those currently raised before the Federal Court. The material required will be the same, as in both cases it is anticipated that the application initially will be in writing. There is no principled reason why the time limits at the RAD should be dramatically shorter than those at the Federal Court. We have not found such constrained time limitations in other tribunal appeals with similarly complex records and issues. Even appeal tribunals and courts with arguably simpler factual records generally have more generous time limits.

The proposed provision does permit some discretion to deviate from the 15 days:

> **159.95** (2) If, for reasons of fairness and natural justice, the appeal cannot be filed and perfected within the time referred to in subsection (1), the Refugee Appeal Division may extend the time limit for filing and perfecting the appeal by the additional number of working days that is appropriate in the circumstances.

The proposed provision makes clear that that the 15 day deadline would ordinarily be applied, subject to exceptions on the basis of fairness and natural justice. Discretion to extend the time in exceptional cases cannot make a regulation that is fundamentally inconsistent with the purpose of the legislation lawful. A constrained time limit would also work against administrative efficiency, as it would likely result in higher volume of applications for extensions taking up additional resources and time, whether the extensions were granted or not.

Therefore, the CBA Section recommends that the time limit be amended as follows:

> **159.95** (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act, the time limit for a person or the Minister to file and perfect an appeal to the Refugee Appeal Division from a decision of the Refugee Protection Division is not later than 45 working days after the day on which the person or the Minister receives written reasons for the decision.

The four month time limit for rendering a decision under s. 159.96(1)(b) is indicative of the anticipated complexity of appeals to the RAD. In the event that proposed s.159.95(1) is amended to permit 45 days to file and perfect the appeal, the time to render an appeal decision under s.159.96(1)(b) could be reduced to three months to maintain the time frame the government has set for appeals.

We would be pleased to discuss our submission with you in greater detail and answer any questions you may have.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section

THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-31: *Protecting Canada's Immigration System Act*

Executive Summary

NATIONAL IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

April 2012

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

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 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 Immigration Law Section of the Canadian Bar Association.

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Bill C-31: *Protecting Canada's Immigration System Act*

EXECUTIVE SUMMARY

The Canadian Bar Association's National Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-31, the *Protecting Canada's Immigration System Act*, which was introduced in February 2012.

Streamlining the refugee determination process is an important goal. Equally important is the fairness of the system and its ability to properly determine applications by persons in need of protection or requiring humanitarian consideration. Fairness and accuracy require a hearing before an independent and competent decision maker with the possibility of an appeal on the merits. Such a determination process favours genuine refugees.

The CBA Section does not believe that Bill C-31 in its current form will meet the objectives of faster processing and administrative efficiency while still ensuring fairness and accuracy. In addition to concerns with the general nature of the Bill, the CBA Section believes significant provisions of Bill C-31 are unconstitutional and in violation of Canada's international obligations.

Given these serious reservations, the CBA Section recommends that the Bill be withdrawn. However, should Parliament adopt the Bill, we have suggested amendments to increase fairness and accuracy in determining applications by persons in need of protection or requiring humanitarian consideration.

1. General Concerns with Nature of Bill

The CBA Section is concerned with the omnibus nature of the bill, and the Minister's stated objective to pass the Bill on a very tight timeline. Given the scope of the changes, limited time for debate will not allow for adequate study of their impact. In the short time available, we have identified several serious problems with the Bill which, in our view, do not comply with the *Canadian Charter of Rights and Freedoms* or with Canada's international obligations.

The CBA Section is also concerned with the significant expansion of Ministerial authority under the Bill. The Bill removes Parliamentary oversight and consultation with experts. The Minister alone would make decisions affecting access to appeal rights, investigative arrest and mandatory detention, as well as the criteria on which such decisions are made. This approach erodes the transparency of government and, in turn, the rule of law.

2. Enforcement Issues

The bill would permit the introduction of biometric initiatives. With the potential for privacy breaches, the CBA Section recommends that the government provide greater clarity on the collection, use and storage of biometric data.

The Bill changes the wording of the *Immigration and Refugee Protection Act* (IRPA) on removals from "as soon as is reasonably practicable" to "as soon as possible". The government should express what is envisioned by the change, as the purpose of the amendment is not clear.

Investigative detention of foreign nationals and permanent residents – detention without warrant on the basis of mere suspicion – is currently limited to only the most serious grounds, such as threats to national security or commission of crimes against humanity. Under Bill C-31, these powers would expand to include investigative detention for organized criminality, serious criminality, or even mere criminality. Mere suspicion that an individual committed a crime such as shoplifting or using false identification to enter a bar can result in warrantless detention. The CBA Section recommends limiting use of investigative detention to only the most serious grounds of inadmissibility.

3. Refugee Reform

The CBA Section questions the fairness of several proposed changes to the refugee determination system. Bill C-31 proposes to further limit eligibility for making refugee claims, excluding individuals who committed criminal acts deemed "serious" under IRPA. This approach casts too wide a net, as outlined in some examples below. The CBA Section recommends removing this section of the Bill.

Bill-31 also amends the process leading to an initial hearing by the Refugee Protection Division (RPD). The government has announced that timelines for refugee claimants will be drastically shortened. Claimants making a refugee claim inside Canada will be required to provide their "Basis of Claim" document (BOC) at the eligibility interview with an officer from Citizenship and

Immigration Canada (CIC) or Canada Border Services Agency (CBSA). Claimants making a refugee claim at the port of entry will have 15 days to provide the document. The BOC will be extremely important as an information-gathering exercise. If the claimant omits information, it could result in an adverse inference later on. Refugee claimants may be suffering from post-traumatic stress disorder or face cultural and gender barriers to fully disclosing their fear of persecution to a CIC or CBSA officer. The current timeline to file a "Personal Information Form" is 28 days.

Claimants will then have their refugee hearing within 30 to 60 days. These compressed timelines do not allow sufficient time for applicants to retain counsel and prepare their case. Claimants must often obtain documents from their home country and have them translated prior to disclosure. In many cases expert witnesses such as psychologists and doctors need to be retained.

These compressed timelines severely compromise fairness to gain minor efficiencies. The CBA Section recommends provision of the BOC within 28 days and a hearing within four months. This would allow refugee claims to be heard within six months.

4. Refugee Appeal Division

The CBA Section has supported the creation of a Refugee Appeal Division (RAD) for many years. However, the CBA Section has concerns with provisions of Bill C-31 related to the RAD, including the limitations on the claimants who will have access to the RAD, the evidence that will be eligible to be evaluated by the RAD, and whether the procedures envisioned for the RAD meet the minimum requirements of procedural fairness.

Bill C-31 restricts access to the RAD for "designated country of origin" (DCO) claimants, designated foreign nationals, claimants who came to Canada via a safe third country and claimants whose refugee claims were found to be manifestly unfounded or have no credible basis. Restricting access to RAD for these claimants is unnecessarily punitive and arbitrary. The CBA Section recommends eliminating most of these exclusions.

The RAD creates a double standard for claimants and the Minister. Claimants are limited to filing new evidence at the RAD. The Minister is not. Claimants must fulfill detailed requirements to file an appeal. The Minister need not abide by similar rules. The CBA Section recommends removing this bias in favour of the Minister.

Similar to the refugee hearing process, it appears that the regulations will require a claimant to file and perfect an appeal within 15 working days. Claimants will be required to retain counsel,

obtain additional "new" evidence and prepare all submissions related to the appeal in this timeframe. This deadline is so unworkable that, in our view, it would be outside of the powers of the Governor in Council to promulgate the regulations. A constrained time limit would also work against administrative efficiency, as it would likely result in higher volume of applications for extensions, taking up additional time and resources. The CBA Section recommends adjusting this time limit to a more reasonable 45 working days.

Bill C-31 also states that, if credibility is central to the decision and could influence the outcome, an oral hearing "may" be held. The Supreme Court of Canada has said that it is difficult to conceive of a situation where it would be constitutional to make findings of credibility on the basis of written submissions. We recommend that an oral hearing "must" be held in such a situation.

5. Applications to Reopen

Under Bill C-31, the jurisdiction of the RPD and the RAD to reopen a refugee claim would be restricted, even if there has been a violation of natural justice. The tribunal is precluded from correcting an injustice or unfairness that occurred at the original hearing. These sections should be deleted from the Bill.

6. Denial of H&C access to refugee claimants

Bill C-31 would bar the Minister from considering humanitarian and compassionate (H&C) applications from anyone with a protection claim pending and for a further one year from rejection of the claim. The bar is even more severe for designated foreign nationals, who may not apply for at least five years from their designation or the finalization of their claim or application for protection.

H&C applications provide a vital safeguard to ensure a remedy in circumstances that do not meet the stringent test for refugee claims. By removing access to H&C applications, the Minister could not consider whether an individual would face unusual and undeserved hardship or a disproportionate hardship in their country of origin (the current test for an H&C). The CBA Section opposes this restriction and recommends other options for streamlining the H&C process.

7. Designated Countries of Origin

Under both the *Balanced Refugee Reform Act* (BRRA) and Bill C-31, the Minister would have authority to classify a country as a DCO. DCOs would be countries that, in the Minister's opinion,

do not normally produce refugees, respect human rights and offer state protection, and are therefore 'safe'. Claimants from those designated countries will experience serious limitations on their ability to claim refugee protection and to their appeal and review rights, compared to most claimants from countries that have not been designated. DCO claimants will also be denied various benefits to which most other claimants will be entitled.

Under Bill C-31, the Minister has wide-ranging authority to designate countries and decide the criteria under which countries would be designated. The Bill removes the requirement under BRRA to consult with experts prior to designating a country. The CBA Section is of the view that these changes should be eliminated or, at the very least, depoliticized. This could be done by requiring thresholds to be set through regulations and not by the Minister alone, engaging experts when making determinations and requiring continual review of countries on the "designated" list. Bill C-31 does not include these minimal safeguards.

8. Cessation and Loss of Permanent Resident Status

Bill C-31 proposes fundamental changes to the status of protected persons who already have permanent residence.

A protected person can lose their status through cessation if events since the determination demonstrate they would no longer be at risk in their country. No suggestion of misrepresentation is required, and in fact would not be relevant to a finding of cessation.

Bill C-31 dramatically changes the current law, adding that a person is "inadmissible" if it is determined that "their refugee status has ceased." Bill C-31 specifies that cessation also leads to loss of permanent resident status. As cessation only considers the current situation, the potential for loss of permanent residence could make protected persons who have lived in Canada legally for decades subject to removal. Given the other changes in Bill C-31, they could not appeal in the RAD or the Immigration Appeal Division (IAD), nor could they apply for humanitarian consideration or a temporary resident permit to overcome this new form of "inadmissibility".

A protected person can lose their status through vacation if the decision to confer status was obtained by directly or indirectly misrepresenting or withholding material facts. The Minister can present new evidence demonstrating the misrepresentation. In an application for vacation a person concerned cannot lead new evidence to show they are presently at risk. Those who lost status through vacation would not be eligible for a Pre-Removal Risk Assessment (PRRA) prior to removal.

The CBA Section is of the view that the provisions related to cessation and vacation are unconstitutional and should be removed from the Bill.

9. Designated Foreign Nationals

This portion of the Bill has been previously introduced as the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, in the last Parliament as Bill C-49, and in the current Parliament as Bill C-4. The CBA Section believes it is legitimate to target the activities of human smugglers who exploit the desperation of individuals to profit from facilitating irregular mass arrivals. Unfortunately, this part of Bill C-31 is primarily directed at refugee claimants and refugees, not smugglers.

Bill C-31 would impose multiple penalties on claimants and refugees who are designated as part of an irregular arrival. The penalties include:

- mandatory detention without review before the Immigration Division 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 a protection claim to the RAD.

The Minister would have extremely broad powers to designate a group as an "irregular arrival": if further examination is required to determine identity or inadmissibility; or on suspicion that smugglers involved in the arrival were profiting or linked to criminal or terrorist organizations. The Minister could use either circumstance to justify designation. The definition is so imprecise that a "group" may be as few as two people.

The consequences of being in a designated group are severe. The most immediate consequence is mandatory detention for one year, including for children over 16 years old.

Bill C-31 also penalizes designated foreign nationals by prohibiting them from applying for permanent resident status for five years from the determination of their application for refugee protection, or protection pursuant to a PRRA, whichever is later. These individuals have proven they would face a risk of persecution or death if returned to their country of origin.

Denial of access to permanent resident status and the related Bill C-31 provisions have many serious consequences, including the inability to sponsor family members from abroad. Refugees, who cannot return to their countries because of a proven risk of persecution, would be separated from family for six or seven years. The refugee or protected person would also be unable to travel outside Canada. For the six or seven years without permanent resident status, the person is vulnerable to loss of protected status through a Minister's application for cessation of status. 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."

Designated foreign nationals will also be unable to obtain a refugee travel document, between the successful determination of protection status and obtaining permanent resident status, even though this timeframe may be seven years or more. Without a travel document, a protected person is unable to leave Canada without the possibility of not being able to return.

The CBA Section cannot support this legislative scheme, which would punish designated claimants and refugees by denying liberty, legal rights and access to permanent resident status in a manner contrary to *Charter* protections and Canada's international obligations.

Conclusion

The objective of reforms to the refugee system ought to be to ensure the provision of fair, effective service to those who need it.

The CBA Section supports efforts to streamline the refugee system. It agrees that innovations are needed to make the system less attractive to those who make groundless refugee claims. However, fundamental fairness and individual rights must not be injured in the process.

I. SUMMARY OF RECOMMENDATIONS

1. The CBA Section recommends that Bill C-31 in its current form be withdrawn.

   Given concerns about the ability of stakeholders to implement the *Balanced Refugee Reform Act* in June 2012, the CBA Section recommends a stand-alone Bill to implement s.69 of Bill C-31.
2. The CBA Section recommends that the government provide greater clarity on the collection, use, and storage of the biometric data.
3. The CBA Section recommends that sections 23 and 26 of Bill C-31be deleted.

   Alternatively, the CBA Section recommends that:

a) only the most serious grounds of inadmissibility be a subject for investigative arrest and detention;

b) the standard for investigative detention for criminal inadmissibility be higher than mere suspicion;

c) permanent residents not be subject to investigative detention on mere suspicion of criminal inadmissibility.

4. The CBA Section recommends that s.41 of the Bill be deleted.

   Alternatively, the CBA Section recommends that the words "or being reckless as to whether" be deleted from s.41 of the Bill.

5. The CBA Section recommends removing section 34 of Bill C-31.

6. The CBA Section recommends that the operational requirements for the new process be changed to four months for the hearing for all claimants. This timeline would allow refugee hearings to be completed within six months of initiating a claim and is consistent with the goals of faster processing and administrative efficiency.

7. The CBA Section recommends that the operational requirements for the new process under the Bill allow 28 days for the submission of the Basis of Claim document for all claimants.

8. The CBA Section recommends that section 110(1) and (2) of Bill C-31 be revised to read:

   > 110. (1) Subject to subsection (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection, or a decision of the Refugee Protection Division to allow or reject an application by the Minister for a determination that refugee protection has ceased, or a decision of the Refugee Protection Division to allow or reject an application by the Minister to vacate a decision to allow a claim for refugee protection.
   >
   > (2) No appeal may be made in respect of a determination that a refugee protection claim has been withdrawn or abandoned.

9. The CBA Section recommends the removal of section 110(1.1) from Bill C-31.

   The CBA Section's comments on RAD evidence under BRRA remain valid. Given the strict test for the RAD's receipt of new evidence, we continue to recommend that it be made clear that anything on the tribunal record is admissible at the RAD and not subject to this test.

10. The CBA Section recommends that s.110(4) be revised to read:

    > On appeal, the person who is the subject of the appeal, in addition to the tribunal record which forms part of the record before the Division, may present only other evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

11. The CBA Section recommends that a new s.110(4.1) be added to Bill C-31:

    > When considering whether to accept the additional evidence, the Refugee Appeal Division shall consider, inter alia, the efforts that the subject of the appeal made at the time of the initial hearing to obtain the evidence, the

relevance of the evidence to the appeal, and its importance to the determination of the appeal.

12. The CBA Section recommends the time limit be amended as follows:

    159.95 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act, the time limit for a person or the Minister to file and perfect an appeal to the Refugee Appeal Division from a decision of the Refugee Protection Division is not later than 45 working days after the day on which the person or the Minister receives written reasons for the decision.

13. The CBA Section recommends proposed s.110(6) be changed from "may" to "shall" hold a hearing.

14. The CBA Section recommends that clauses 51 and 53 be deleted from Bill C-31.

15. The CBA Section recommends that the one-year bar on H&C applications be withdrawn from the Bill.

    The CBA Section's options should be considered for incorporation into the H&C application process.

    If Option 2 is selected, the CBA Section recommends the following addition to clause 13(1), amending s.110(1):

    The Refugee Appeal Division must also determine whether the person merits protection on the basis of humanitarian and compassionate grounds.

16. The CBA Section recommends that the regime for designated countries of origin be eliminated from the Bill.

17. If the regime remains, the CBA Section recommends that's. 109.1 be amended to read:

    109.1 (1) The Minister may, by order, for the purposes of section 110(2) [denial of appeal] and section 111.1 [provision allowing regulations to allow for different rules for DCO and non-DCO claimants, for example, on timelines], designate a country

    (1.1) The Minister may make a designation only if

    (a) the number of claims for refugee protection made in Canada by nationals of the country in question is equal to or greater than the number set out in the regulations; and

    (b) the rate of acceptance by the Refugee Protection Division of claims made by nationals of the country in question is equal to or lower than the rate set out in the regulations.

    (1.2) In making a designation, the Minister must take the following criteria into account:

    (a) the human rights record of the country in question as it relates to

    (i) the factors set out in sections 96 and 97, and

    (ii) the international human rights instruments specified in the regulations and any other international instrument that the Minister considers relevant;

    (b) the availability in the country in question of mechanisms for seeking protection and redress;

    (c) the number of claims for refugee protection made in Canada by nationals of the country in question;

(d) the rate of acceptance by the Refugee Protection Division of claims made by nationals of the country in question and the rate of appeals allowed by the Refugee Appeal Division in respect of appeals made by nationals of the country in question; and

(e) any other criteria set out in the regulations.

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

(3.1) A country shall not be designated under this section unless the number of claims by nationals of the country, exceeds in the three month period prior to the designation, ten percent of the total number of claims referred to the Refugee Protection Division during that period.

(3.2) A country shall cease to be considered to be designated pursuant to section 109.1 (1) one year after the date on which it was designated, unless the Minister designates the country again, pursuant to s.109(3.5), prior to the expiry of the anniversary of the designation.

(3.3) The Minister may only designate a country pursuant to this section if the Minister has received a recommendation from the Advisory Committee appointed under this section.

(3.4) Prior to designating a country pursuant to this section, the Minister must provide notice of his intention to do so and shall allow interested parties to make representations regarding the designation.

(3.5) For the purpose of determining whether or not a country ought to be designated under this section the Minister shall create an advisory committee. The Advisory Committee shall include two members who are Public Service employees who have expertise and experience in human rights law and two independent human rights experts designated in consultation with stakeholder groups. The Committee shall, at the request of the Minister, consider whether or not a country ought to be designated under this section and shall receive representations made pursuant to section 109.1 (3.4).

18. The CBA Section recommends that sections 18 and 19(1) (loss of permanent residence on cessation of protected person status) be deleted from the bill.

    Alternatively, the CBA Section recommends that:

    - protected persons facing cessation proceedings have access to the Refugee Appeal Division;
    - protected persons who lose status through cessation or vacation have access to the equitable jurisdiction of the Immigration Appeal Division;
    - protected persons who lose status through cessation or vacation not be subject to the one year bar on applications on humanitarian and compassionate grounds, Temporary Resident Permits or a Pre-Removal Risk Assessments.

19. The CBA Section recommends that the sections creating and referring to designated foreign nationals be removed from Bill C-31.