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Canada's Implementation of Australian Immigration Detention Legislation

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Abstract
Since 2010, Canada has moved to implement three elements of migration policy that have existed in Australia for some time. Canada has proposed the introduction of provisional partner visas, which will require the holder of a spouse visa to remain in the relationship for two years in Canada before permanent residence can be granted (subject to exceptions for family violence and other matters beyond the control of the applicant). Canada's regulation of the immigration advice profession mirrors Australia's regulatory system closely. Finally, and most controversially, Bill C-4 of 2011 will, if enacted, bring in a form of mandatory immigration detention that closely follows Australia's first mandatory immigration detention laws, which were enacted in 1992. This paper compares Bill C-4 with the Australian *Migration Amendment Act 1992*, and demonstrates the considerable resemblance between them. I will then discuss the likely future of the Canadian legislation, which I will argue is likely to be significantly different to the fate of the Australian legislation, which was found to be constitutionally valid by the High Court of Australia in *Lim v Minister* for Immigration, Local Government and Ethnic Affairs, although contrary to Australia's international obligations in the UN Human Rights Committee opinion in *A v Australia*. Bill C-4, on the other hand, would be very likely to be found to be in breach of the Charter, especially given the precedent of *Charkaoui v Canada* (Citizenship and Immigration). Finally, I ask whether Canada, in a practical sense, even needs Bill C-4, given the fact that only two boats of unauthorised arrivals have reached Canada since the election of the current government in 2006.

Key words: Immigration law; Constitutional law; Comparative administrative law

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Since 2010, Canada has moved to implement three elements of migration policy that have existed in Australia for some time. Canada has proposed the introduction of provisional partner visas, which will require the holder of a spouse visa to remain in the relationship for two years in Canada before permanent residence can be granted (subject to exceptions for family violence and other matters beyond the control of the applicant)[1]. Canada's regulation of the immigration advice profession now mirrors Australia's regulatory system closely[2]. Finally, and most controversially, Bill C-4 of 2011 will, if enacted, bring in a form of mandatory immigration detention that closely follows Australia's first mandatory immigration detention laws, which were enacted in 1992, although not the current laws that provide for mandatory detention of all unlawful non-citizens in that country.

This paper compares Bill C-4 with the Australian *Migration Amendment Act 1992*, and demonstrates the considerable resemblance between them. I will then move on to discuss developments in Australian immigration detention legislation since 1992, and offer some suggestions as to why Canada has chosen to draft a Bill based on the older Australian legislation, and not the current laws.

I will then discuss the likely future of the Canadian legislation, which I will argue is likely to be significantly different to the fate of the Australian legislation, which was found to be constitutionally valid by the High Court of Australia in *Lim v. Minister for Immigration, Local Government and Ethnic Affairs*[3], although contrary to Australia's international obligations in the UN Human Rights Committee opinion in *A v. Australia*[4]. Bill C-4, on the other hand, would be very likely to be found to be in breach of the Charter, especially given the precedent of *Charkaoui v. Canada (Citizenship and Immigration)*[5]. Finally, I ask whether Canada, in a practical sense, even needs Bill C-4, given the fact that only two boats of unauthorised arrivals have reached Canada since the election of the current government in 2006.

The terms "illegal arrival" and "unauthorised arrival" are of course themselves loaded terms. This article will not discuss whether there is a "right to asylum" or a "right to seek asylum" in international law. Article 14 of the Universal Declaration of Human Rights states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution", and this could form the basis of an argument that asylum-seekers have a right at international law to take the actions they do. Compare this, however, to (for example) s.29 of the *Migration Act 1958*, which requires that all non-citizens entering Australia hold a valid visa, meaning that entry

[1] *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-227 October 25, 2012, P.C. 2012-1390 October 25, 2012. These regulations insert Regulations 72.1 – 72.4 into the *Immigration and Refugee Protection Regulations* SOR/2002-227.

[2] The central piece of legislation is s.91 of the *Immigration and Refugee Protection Act* (SC 2001, c 27), as amended by SC 2011 c 8.

[3] (1992) 176 CLR 1.

[4] Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L.

[5] [2007] 1 SCR 350.

to Australia by a non-citizen who does not hold a visa is contrary to Australian domestic law. Regardless of the arguments, I will use the term "unauthorised arrival" in this article because the meaning is well-understood in general discourse.

AUSTRALIAN LEGISLATION – THE *MIGRATION AMENDMENT ACT 1992*

Background

Prior to 1992, Australia detained persons unlawfully present in Australia on a basis of individual assessment. In other words, such persons were detained if they had serious criminal records or were perceived as a flight risk. Few cases challenging a decision to detain an unlawful non-citizen reached the courts, but the Federal Court in *Msilanga v. Minister for Immigration, Local Government and Ethnic Affairs*[6] found that the applicant, who had been served with a deportation order after serving a term of imprisonment for infliction of grievous bodily harm, was neither a flight risk or a danger to the public, and ordered his release subject to conditions.

The *Migration Amendment Act 1992*, which inserted a new Division 4B into Part 2 of the *Migration Act 1958*, was the first exercise of mandatory immigration detention in Australia. The provisions of this Act will be discussed shortly. The trigger for the legislation was undoubtedly a "wave" of boats carrying unauthorised arrivals to Australia, which began in 1989. There were no unauthorised maritime arrivals to Australia between 1982 and 1988, 26 in 1989, 198 in 1990, 214 in 1991 and 216 in 1992[7]. Most of these arrivals were from Cambodia, which was then still in the throes of a civil war. More particularly, the legislation was introduced into the House two days before the Federal Court was due to hear an application from a number of Cambodian boat arrivals for their release from detention[8].

There was clearly a view within the government at the time that the Cambodian boat arrivals were not refugees. A later case, *Mok v. Minister for Immigration, Local Government and Ethnic Affairs*[9], considered an argument of apprehended bias on the part of the Minister, and institutional bias within the Department of Immigration against Cambodian applicants for refugee status. At paragraph 17 of his judgement, Keely J reproduced the following extract from a TV interview conducted by the Prime Minister, Mr Hawke, on 6 June 1990.

> Wendt: We woke up this morning to read that we're asking the Cambodian Government to take back some of the Cambodian boat people who came to our shores. Why are we doing that?
>
> PM: For the obvious reason. I mean, we have - - a compassionate humanitarian policy which will stand comparison with any other country in the world. But we're not here with an open door policy saying anyone who wants to come to Australia can come. These people are not political refugees.

[6] [1991] FCA 68.

[7] Janet Phillips & Harriet Spinks, Boat Arrivals in Australia Since 1976, updated 29 January 2013, at 22. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals

[8] Mary Crock, *Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia*, (1993) 15 SYD L.R. 338 at 340.

[9] [1993] FCA 545.

Wendt: How can you be sure of that, Mr Hawke?

PM: Simply there is not a regime now in Cambodia which is exercising terror, political terror, upon its population.

Wendt: What do you make then of these hundreds of people –

PM: What we make –

Wendt: Who get on their tin boats and travel across - - -

PM: What we make of it is that there is obviously a combination of economic refugeeism, if you like. People saying they don't like a particular regime or they don't like their economic circumstances, therefore they're going to up, pull up stumps, get in a boat and lob in Australia. Well that's not on.

Wendt: And risk their lives to do it?

PM: Their lives is not, I mean, we have an orderly migration program. We're not going to allow people just to jump that queue by saying we'll jump into a boat, here we are, bugger the people who've been around the world. We have a ratio of more than 10 to 1 of people who want to come to this country compared to the numbers that we take in.

Wendt: And you personally have no qualms about that?

PM: Not only no qualms about it, but I will be forceful in ensuring that that is what's followed.

Migration Amendment Act 1992

The *Migration Amendment Act 1992* inserted Division 4B into Part 2 of the *Migration Act 1958*. Firstly, s.54K defined the term "designated person" as follows:

"designated person" means a non-citizen who:
(a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
(b) has not presented a visa; and
(c) is in Australia; and
(d) has not been granted an entry permit; and
(e) is a person to whom the Department has given a designation by:
  (i) determining and recording which boat he or she was on; and
  (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
and includes a non-citizen born in Australia whose mother is a designated person.

Section 54L then provided that a designated person must be "kept in custody" until either removed from Australia or granted an entry permit. Section 54N permitted an officer to detain a designated person not already in detention, without a warrant, and re-capture any escapee. Removal of designated persons from Australia was dealt with by s.54P, which provided for removal on written request of the person, when no application for an entry permit was made within two months of being detained, or when an application for an entry permit had been refused and all avenues of review had been exhausted.

The most confusing section was s.54Q, which purported to provide that a designated person could be detained for a maximum of 273 days (nine months). However, the 273-day "clock" could be "stopped" in the circumstances described in ss.54Q(3)(c) – (f), which provided as follows:

> (c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department;
> (d) the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person;
> (e) court or tribunal proceedings relating to the application have been begun and not finalised;
> (f) continued dealing with the application is otherwise beyond the control of the Department.

In other words, the 273-day period only ran when the applicant had provided all relevant information to the Department. Paragraphs (d) and (f) in particular were very vaguely worded, and indeed could mean nearly anything. It was extraordinarily difficult, therefore, to determine whether a particular detainee's 273-day period of detention had expired or not.

Finally, the most controversial provision of Division 4B was s.54R, which provided that "a court is not to order the release from custody of a designated person". This was ultimately the only provision of Division 4B found to be unconstitutional.

Lim v Minister for Immigration

The constitutional validity of Division 4B of the *Migration Act* was upheld by the High Court in *Lim*[10]. In that case, the applicant argued that the division was unconstitutional on a number of grounds, including that orders for detention were inherently punitive in nature, and therefore amounted to an exercise of the judicial power of the Commonwealth by the legislature and/or the executive. The High Court found that ss.54L and 54N were valid, as they were powers exercised in accordance with s.51(xix) of the Constitution[11], and were not an exercise of judicial power. They could therefore be exercised by administrative decision-makers.

The leading judgement was given by Brennan, Deane and Dawson JJ. At paragraph 27 of their judgement, their Honours quoted from a Canadian case that proceeded on appeal to the Privy Council, *Attorney-General for Canada v. Cain*, in which Lord Atkinson stated as follows[12]:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

Brennan, Deane and Dawson JJ explained this decision as follows[13]:

[10] Lim, *supra* note 3.
[11] Paragraph 51(xix) permits the Commonwealth Parliament to make laws with respect to "naturalisation and aliens".
[12] [1906] AC 542 at 546.
[13] Lim, *supra* note 3 at paragraph 28 of the judgement of Brennan, Deane and Dawson JJ.

> The question for decision in *Attorney-General for Canada v. Cain* was whether the Canadian statute 60 and 61 Vict c11 had validly clothed the Dominion Government with the power to expel an alien and to confine him in custody for the purpose of delivering him to the country whence he had entered the Dominion. The Judicial Committee concluded that it had. As the emphasised words in the above passage indicate, the power to expel or deport a particular alien, and the associated power to confine under restraint to the extent necessary to make expulsion or deportation effective, were seen as prima facie executive in character.

At paragraph 29 their Honours noted that previous Australian cases, dating back to *Koon Wing Lau v. Calwell*[14] in 1949, had upheld the Constitutional validity of legislation providing for discretionary immigration detention, and that s.51(xix) permitted the Parliament to make laws that "extend to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective" – in other words, to ensure that the non-citizen cannot evade removal from Australia. Probably the key part of the judgement is set out in paragraph 30:

> It can therefore be said that the legislative power conferred by s.51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.

Brennan, Deane and Dawson JJ also regarded the fact that the detainee could bring their detention to an end by requesting their own removal as important. Their Honours stated at paragraph 34 of their judgement as follows:

> Section 54P(1) … provides that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed. It follows that, under Div.4B, it always lies within the power of a designated person to bring his or her detention in custody to an end by requesting to be removed from Australia. Once such a request has been made, further detention in custody is authorized by Div.4B only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal "as soon as practicable" … In the context of that power of a designated person to bring his or her detention in custody under Div.4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application. It follows that the powers of detention in custody conferred by ss.54L and 54N are an incident of the executive powers of exclusion, admission and deportation of aliens and are not, of their nature, part of the judicial power of the Commonwealth.

The result of this reasoning was that ss.54L and 54N of the Act were found to be valid. Section 54R, on the other hand, was struck down by Brennan, Deane and Dawson JJ because it could prevent a court from releasing a designated person who, by the terms of the Act itself, should have been released. Their Honours stated as follows at paragraph 37:

[14] (1949) 80 CLR 533.

> In fact, of course, it is manifest that circumstances could exist in which a "designated person" was unlawfully held in custody by a person purportedly acting in pursuance of Div.4B. The reason why that is so is that the status of a person as a "designated person" does not automatically cease when detention in custody is no longer authorized by Div.4B.

Brennan, Deane and Dawson JJ cited as examples of unlawful detention of designated persons situations where a designated person remained in detention despite making a written request to be removed from Australia, the 273-day limit had expired, or the person had not made an application for an entry permit within two months of the commencement of their detention. Their Honours summed up by stating that "[o]nce it appears that a designated person may be unlawfully held in custody in purported pursuance of Div.4B, it necessarily follows that the provision of s.54R is invalid"[15].

The High Court unanimously upheld the constitutional validity ss.54L and 54N of the *Migration Act*. Gaudron J agreed that s.54R was invalid[16], and her Honour would have read ss.54L and 54N somewhat more narrowly than the other judges[17], but her reasoning did not prevent the application of these sections to the applicants. Mason CJ, and Toohey and McHugh JJ, who each wrote separate judgements, upheld the validity of s.54R by reading it down to cover only those designated persons who were being lawfully detained under Division 4B[18].

As a concluding point, Division 4B, as were many other provisions of the *Migration Act*, was renumbered by the *Migration Reform Act 1992*, which came into effect on 1 September 1994, and is now Division 6 of Part 2 of the Act. This is despite the fact that since the introduction of s.189 of the Act, which provides for mandatory detention of *all* unlawful non-citizens, with effect from the same date, Division 6 of Part 2 is redundant and has never been used since that date. Even more strangely, s.54R, now renumbered as s.183, remains in the Act despite it being found to be invalid.

A v. Australia

It should be noted that the United Nations Human Rights Committee (UNHRC) has found that the then Division 4B of the Act contravened Articles 9(1) and 9(4) of the International Covenant on Civil and Political Rights (ICCPR) in *A v. Australia*[19]. These articles of the ICCPR provide as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

[15] Lim, *supra* note 3, at paragraph 37 of the judgement of Brennan, Deane and Dawson JJ.
[16] *Ibid* at paragraph 18 of the judgement of Gaudron J.
[17] *Ibid* at paragraphs 15-17.
[18] *Ibid* at paragraph 12 of the judgement of Mason CJ; paragraph 34 of the judgement of Toohey J; paragraph 35 of the judgement of McHugh J.
[19] *A v. Australia*, *supra* note 4.

Australia's argument was basically that "arbitrary" means "unlawful", and therefore A's detention could not have been unlawful, because only s.54R of the Act was found to be unconstitutional[20]. The UNHRC found that "there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum"[21], but then found as follows[22]:

> The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.

In other words, the UNHRC took the view that unless a decision was made to detain an unlawful non-citizen on an individual basis, that detention was arbitrary and contrary to Article 9(1) of the ICCPR. It followed more or less inevitably that A was also detained in breach of Article 9(4), because the courts had no power to release a person, despite the striking down of s.54R of the Act, other than in accordance with the formal requirements of the Act. There was certainly no power given to the courts to release a person because their detention was contrary to the requirements of Article 9(1). The UNHRC stated as follows[23]:

> In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his / her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law.

It should be noted that s.9 of the Canadian *Charter of Rights and Freedoms* ("the Charter") provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned". The issue of the interpretation of s.9, as compared to Article 9 of ICCPR, will be examined later in this paper.

DEVELOPMENTS IN AUSTRALIAN IMMIGRATION DETENTION LAW, 1994 TO PRESENT

Immigration Detention Generally

The consideration of the changes in Australian immigration detention law can form the basis of a paper in and of itself, and the discussion here will, by necessity, be brief. However, the former Division 4B of the Act (now renumbered as Division 6 of Part 2), has not been used since 1 September 1994. On that date, the *Migration Reform Act 1992* came into effect, and made a number of significant changes to the *Migration Act*. In the context of this paper, the most important amendment was the insertion of s.189, which provided for mandatory immigration detention of all

[20] *Ibid* at paragraphs 8.1 – 8.11.
[21] *Ibid* at paragraph 9.3.
[22] *Ibid* at paragraph 9.4.
[23] *Ibid* at paragraph 9.5.

"unlawful non-citizens" present in Australia. Section 13 of the *Migration Act* defines a "lawful non-citizen" as a non-citizen present in the "migration zone"[24] who holds a visa that is in effect. Subsection 14(1) then describes an unlawful non-citizen as a non-citizen in the migration zone, other than a lawful non-citizen.

Subsection 189(1) then provides that an officer who "knows or reasonably suspects" that a person in the migration zone is an unlawful non-citizen must detain that person. The term "immigration detention" is itself defined in s.5(1) of the Act, and includes a number of forms of detention other than the well-publicised Immigration Detention Centres (IDCs). The definition of immigration detention was further widened with the passage of the *Migration Amendment (Detention Arrangements) Act 2005*, which inserted Subdivision B, Division 7, Part 2 into the Act. Subdivision 7 provides for the making of "residence determinations", which despite being defined as a form of detention in the legislation[25] are really a form of conditional release from detention.

Under s.196 of the Act, an unlawful non-citizen must be detained until he or she is removed from Australia, deported or granted a visa. If a detainee requests removal from Australia, he or she must be removed "as soon as reasonably practicable" – s.198(1) of the Act. A detainee must also be removed if he or she fails to make a valid visa application within a certain period of time, or he or she has exhausted all avenues of merits review of a refusal or cancellation decision[26].

Bridging Visas

The statement that all unlawful non-citizens in Australia are detained is literally true, but may be misleading. It is misleading because visa overstayers (ie those people who enter Australia with a valid visa but who remain in Australia after its expiration) have much greater access to Bridging Visas (BVs) than unauthorised arrivals. A BV, in short, is a visa that keeps a non-citizen lawful while his or her substantive visa application is considered, while he or she pursues merits or judicial review of a refusal or cancellation decision, or arranges his or her departure from Australia.

For example, there are two classes of Bridging Visa E (BVE), these being subclasses 050 and 051. A subclass 050 BVE may be applied for only by an unlawful non-citizen who has been "immigration cleared"[27], which in effect means that the person originally entered Australia as the holder of a valid visa. It may be

[24] The term "migration zone" is defined by s.5(1) of the Act as follows:
"**migration zone**" means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:
(a) land that is part of a State or Territory at mean low water; and
(b) sea within the limits of both a State or a Territory and a port; and
(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;
but does not include sea within the limits of a State or Territory but not in a port.
This term is distinguished from the term "Australia", which includes Australian territorial waters. A vessel can therefore be in "Australia" but not in the migration zone if it is in Australian territorial waters but outside a port.

[25] See s.197AC of the Migration Act.

[26] Note that s.198 empowers the Minister to remove a detainee who has a current action before a court, unless an injunction prevents such removal (see also s.153). However, it is Departmental policy not to remove such detainees until all court proceedings are complete.

[27] This term is defined in ss.166 – 170 of the Migration Act.

granted on a number of bases, including making acceptable arrangements to depart Australia[28], an unresolved application for a substantive visa (including a Protection Visa)[29], various kinds of applications for merits or judicial review of a refusal or cancellation decision[30], or has sought the Minister's humanitarian intervention in relation to a refusal or that the applicant has sought[31]. A BVE can also be granted to an unlawful non-citizen in prison[32], as a means of ensuring that the State and Territorial correctional authorities have the duty of care in relation to the prisoner, not the Commonwealth.

However, compare this to the situation faced by an unauthorised arrival. A unlawful non-citizen who has not been immigration cleared may only make an application for a subclass 051 BVE. Such a visa may only be granted if the applicant meets one of the criteria specified in subregulations 2.20(7) – (11) of the *Migration Regulations 1994*. These criteria are that the applicant has made a valid application for a Protection Visa that has not been resolved, and in addition as follows.

> **Subregulation 2.20(7) –** The applicant is a person who:
> (c) who has not turned 18; and
> (d) in respect of whom a child welfare authority of a State or Territory has certified that release from detention is in the best interests of the non-citizen; and
> (e) in respect of whom the Minister is satisfied that:
> (i) arrangements have been made between the non-citizen and an Australian citizen, Australian permanent resident or eligible New Zealand citizen for the care and welfare of the non-citizen; and
> ii) those arrangements are in the best interests of the non-citizen; and
> (iii) the grant of a visa to the non-citizen would not prejudice the rights and interests of any person who has, or may reasonably be expected to have, custody or guardianship of, or access to, the non-citizen.
> **Subregulation 2.20(8) –** The applicant is over 75 years of age, and "the Minister is satisfied that adequate arrangements have been made for his or her support in the community".
> **Subregulation 2.20(9) –** The applicant "has a special need (based on health or previous experience of torture or trauma) in respect of which a medical specialist appointed by Immigration has certified that the non-citizen cannot properly be cared for in a detention environment" and "the Minister is satisfied that adequate arrangements have been made for his or her support in the community".
> **Subregulations 2.20(10)** and **(11) –** The applicant is the spouse or de facto partner of an Australian citizen or permanent resident, the Minister is satisfied that the relationship is "genuine and continuing", and the spouse or de facto partner nominates the applicant. Members of the family unit (such as dependent children) of such spouses or de facto partners are also covered.

Note that in each of these cases, the Minister must be satisfied of something, whether that is that there are suitable arrangements for the care of the applicant in the community, or that a relationship with an Australian citizen or permanent resident is a genuine one. Note also that for the purposes of subregulation 2.20(9)

[28] Subclause 050.212(2) of Schedule 2 of the *Migration Regulations 1994.*
[29] Subclause 050.212(3) of Schedule 2 of the *Migration Regulations 1994.* That is, an immigration detainee who was immigration cleared, becomes unlawful, and then makes a valid application for a Protection Visa in detention may be granted a BE subclass 050, regardless of the substantive merits of that application.
[30] Subclauses 050.212(3A) – (5A) and 050.212(9) of Schedule 2 of the *Migration Regulations 1994.*
[31] Subclauses 050,.212(5AA) – (6B) of Schedule 2 of the *Migration Regulations 1994.*
[32] Subclause 050.212(7) of Schedule 2 of the *Migration Regulations 1994.*

the medical practitioner in question must be appointed by the Minister, and not a practitioner of the applicant's choice. This gives the Minister great control over the grant of subclass 051 BVEs.

Changes in the Wake of the *Tampa*

Significant changes to immigration detention laws came into effect in 2001, around the time of the *Tampa* crisis. The facts of this event are well-known and will not be discussed here[33]. However, in the wake of the incident, s.189 was amended[34] to permit the discretionary unlawful non-citizens detected at sea, or who arrive in Australia at "excised offshore places"[35], as to allow their removal to a "declared country" for processing of their claims (if any) for refugee status, in accordance with at first s.198A of the Act and then s.198AA[36]. This is the basis of the so-called Pacific Solution, which became well-known internationally. The Pacific Solution need not be discussed further in this paper, as there is no actual or planned equivalent in Canadian legislation, not the least because Canada lacks external territories that could be designated as "excised offshore places". There is certainly no Canadian equivalent of Christmas Island, which is much closer to Indonesia than Australia.

Domestic Legal Challenges to the Australian Immigration Detention System

The *Al Masri / Al Kateb* Litigation

The Australian immigration detention system has survived a number of domestic legal challenges, the best-known being the *Al Masri / Al Kateb* litigation. In *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri*[37], the applicant was a stateless Palestinian who had been refused a Protection Visa. He requested removal from Australia in accordance with s.198(1). However, no country could be found to which he could be removed, meaning that had to remain in immigration detention. Al Masri challenged his continuing detention, arguing that *Lim* had found that immigration detention was justified for the purpose of ensuring the availability of an unlawful non-citizen for removal. If removal was impossible, detention was unlawful.

Both the Federal Court[38] and the Full Federal Court accepted these arguments. Black CJ, Sundberg and Weinberg JJ, writing a combined judgement in the Full Court, found as follows at paragraphs 120 and 121:

> [120] In our view, the language of s 196, either taken alone or in the context of the scheme as a whole, does not suggest that the Parliament did turn its attention to the curtailment of the right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent. On the contrary, the textual framework of the scheme suggests an assumption by the Parliament that the detention authorised by s 196 will necessarily come to

[33] For just one account of the Tampa incident, see Michael White, *MV Tampa Incident and Australia's Obligations – August 2001*, 122 Maritime Studies 7 (2002).
[34] *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.*
[35] This term is defined in s.5(1) of the Act, and applies to a number of external territories of Australia, most notably Christmas Island.
[36] Section 198A of the Act was inserted by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (*Cth*). Section 198A was repealed and replaced by ss.198AA – 198AD by the *Migration Legislation Amendment (Offshore Processing and Other Measures) Act 2011*.
[37] [2003] FCAFC 70.
[38] *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1009.

> an end. Section 196 contemplates a "period of detention", and that is how the section is headed. Whilst one purpose of the section is indisputably to authorise the detention of unlawful non-citizens, another purpose is to specify the circumstances in which the period of detention is to come to an end. The latter purpose assumes that the detention will have an end. The assumption is that the detention of unlawful non-citizens will come to an end by the actual occurrence of one of three events: removal, deportation or the grant of a visa.
>
> [121] The language of s 198(1) supports the conclusion that Parliament proceeded on an assumption that detention would, in fact, end rather than upon an understanding that detention might possibly be of unlimited duration … Indeed, as we have noted, the assumption made by members of the High Court about the scheme considered in *Lim* was that it had an element, the equivalent of the present s 198(1), that gave a person what was effectively a power to bring detention to an end[39].

The Court therefore ordered Mr Al Masri's release from detention. Somewhat ironically, he was successfully removed from Australia within a matter of weeks after the decision, which rendered the Minister's application for special leave to appeal to the High Court moot. However, another stateless Palestinian, Mr Al-Kateb, ended up in the High Court. Before the Full Federal Court decision in *Al Masri*, Mr Al-Kateb had been refused release from immigration detention by the Federal Court[40], in which von Doussa J had found that the Federal Court's decision in *Al Masri*[41] was wrongly decided. Mr Al Kateb's appeal was removed directly to the High Court.

The High Court[42], in a 4-3 judgement, overturned *Al Masri* and found that laws that may have the effect of imposing indefinite detention on unlawful non-citizens were constitutionally valid. A key passage can be found in the judgement of Hayne J at paragraph 268:

> It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, for the life of the detainee) is or will become punitive. The answer to that is simple but must be made. If that is the result, it comes about because the non-citizen came to or remained in this country without permission. The removal of an unlawful non-citizen from Australia then depends upon the willingness of some other country to receive that person. If the unlawful non-citizen is stateless, as is Mr Al-Kateb, there is no nation state which Australia may ask to receive its citizen. And if Australia is unwilling to extend refuge to those who have no country of nationality to which they may look both for protection and a home, the continued exclusion of such persons from the Australian community in accordance with the regime established by the *Migration Act* does not impinge upon the separation of powers required by the Constitution.

There was a split in the minority judgements. Gleeson CJ and Gummow J found that a law providing for indefinite immigration detention would be constitutionally valid, but that because s.196 did not expressly provide for this possibility, it had to be interpreted in such a way as to not permit it. Only Kirby J found that no legislation providing for indefinite immigration detention, no matter how clearly expressed, would be constitutionally invalid.

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[39] Referring to *Lim*, *supra* note 3, at paragraph 34 of the judgement of Brennan, Deane and Dawson JJ.

[40] SHFB v. Goodwin & Ors [2003] FCA 294. "Goodwin" is a typographical error – Mr Al Kateb brought an action against Philippa Godwin, the then Deputy Secretary of the Detention Services Division of the Department of Immigration.

[41] *Al Masri*, *supra* note 38.

[42] *Al-Kateb v. Godwin* (2004) 219 CLR 562.

Other Litigation

The High Court has, since *Lim*, considered a number of other cases in which the legality of immigration detention has been challenged. All have been unsuccessful.

Minister for Immigration and Multicultural and Indigenous Affairs v. B[43]: The High Court overturned a decision of the Full Bench of the Family Court[44], in which that court had found that s.67ZC of the *Family Law Act 1975* allowed the Family Court to make any orders it wished for the benefit of children. Having made this finding, it ordered a number of children from one family released from immigration detention. The High Court found on appeal that s.67ZC could only be invoked in the case of a "matrimonial cause", such as a divorce, and as no matrimonial cause existed in this case, s.67ZC did not apply and the Family Court had no jurisdiction.

Behrooz v. Secretary, Department of Immigration and Multicultural and Indigenous Affairs[45]: Mr Behrooz, a detainee in the particularly infamous Woomera IDC, was charged with escaping from that IDC under s.197A of the *Migration Act*. He sought to defend the charge by arguing that the conditions inside the Woomera IDC were so poor as to be punitive, and not purely for the purpose of ensuring his availability for removal, and therefore not an exercise of the power to detain unlawful non-citizens. The High Court disagreed, finding that he had been legally detained, and that his allegations of ill-treatment in detention could be resolved by an action in tort against the Commonwealth and the private contractors managing the centre on behalf of the government.

Re Woolley, ex parte M276/2003[46]: Mr Woolley was the Manager of the Baxter IDC in South Australia. The applicants were a number of children detained in the centre, who argued that they could not be detained because they lacked the legal capacity to request removal from Australia under s.198(1), and the inherent *parens patriae* jurisdiction of the court should be regarded as a constitutional principle that invalidated s.189 as far as it applied to children, or alternatively gave the court the power to release children from detention regardless of s.189. The High Court found that a minor child can be released from detention if their parent(s) request removal, and that the *parens patriae* role of the court was not a constitutional principle, and could be overruled by statute. McHugh J summed up the decision at paragraph 106 by stating that "[a]lthough it may be accepted that children who are unlawful non-citizens do not pose a flight risk and are not a danger to the community, the Parliament, acting constitutionally, is entitled to prevent any unlawful non-citizen, including a child, from entering the Australian community while that person continues to have that status". The applicants were unsuccessful once again.

Cases before the United Nations Human Rights Committee

On the other hand, Australia's immigration detention laws have been found by the UNHRC on no less than seven occasions to breach Articles 9(1) and 9(4). Given the conclusion in *A v Australia*[47], this is hardly a surprising conclusion. The cases

[43] (2004) 219 CLR 365.
[44] *B v. Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.
[45] (2004) 219 CLR 486.
[46] (2004) 225 CLR 1.
[47] *A v. Australia*, *supra* note 4.

decided since *A* are *C*[48], *Baban*[49], *Bakhtiyari*[50], *D and E*[51], *Shafiq*[52] and *Shams*[53]. The most recent UNHRC opinion, *Shams*, stated as follows at paragraphs 7.2 and 7.3:

> 7.2 As to the claim that the authors were arbitrarily detained, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification. In the present case, the authors' detention as unlawful non-citizens continued, in mandatory terms, until they were granted visas … [T]he State party has not advanced grounds particular to the authors' cases which would justify their continued detention for such prolonged periods. In particular, the State party has not demonstrated that, in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends … For these reasons, the Committee concludes that the authors' detention for a period of between three and over four years without any chance of substantive judicial review was arbitrary within the meaning of article 9, paragraph 1.
>
> 7.3 As to the authors' claims of a violation of article 9, paragraph 4, the Committee observes that the court review available to the authors was confined purely to a formal assessment of whether they were unlawful "non-citizen[s]" without an entry permit[54]. It observes that there was no discretion for a court to review their detention on any substantive grounds for its continued justification. The Committee recalls its jurisprudence that any court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may establish differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effect, real and not purely formal. By stipulating that the court must have the power to order release, "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or with any relevant provisions of the Covenant. In the authors' cases, the Committee considers that the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

In other words, immigration detention will be "arbitrary" under Article 9(1) if it is not justified in the case of the particular individual detainee, and Article 9(4) will be breached if the courts are not empowered to order the release of a person whose detention is "arbitrary" within the meaning of Article 9(1). As previously noted, the word "arbitrary" also appears in s.9 of the Charter, and it will be necessary to consider whether the two terms will be interpreted the same way.

Despite these decisions, Australia still provides for mandatory detention of unlawful non-citizens in the migration zone, and despite some liberalisation of the Bridging Visa regime in recent times, there are no signs that the laws related to detention will be changed at any time soon. Much academic ink has been spilled on the subject of Australia's mandatory detention laws, the overwhelming majority of it critical (some in almost hyperbolic terms), and there is really nothing more I could add to it here.

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[48] UN Doc CCPR/C/76/D/900/1999 (13 November 2002).
[49] UN Doc CCPR/C/78/D/1014/2001 (12 August 2003).
[50] UN Doc CCPR/C/79/D/1069/2002 (29 October 2003). Members of this family were also the defendants in the High Court decision of *MIMIA v. B* (*supra* note 43).
[51] UN Doc CCPR/C/87/D/1050/2002 (11 July 2006).
[52] CCPR/C/88/D/1324/2004 (13 November 2006).
[53] CCPR/C/90/D/1255 (11 September 2007).
[54] This is an error in the opinion – the *Migration Act* has not provided for entry permits since the *Migration Reform Act 1992* came into effect on 1 September 1994.

CANADIAN LEGISLATION

Bill C-49

Bill C-49, which was formally titled "An Act to amend the *Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act*", and has been given the title of the *Preventing Human Smugglers from Abusing Canada's Immigration System Act* in Parliament, was introduced into the House of Commons on 21 October 2010[55]. That Bill lapsed with the 2011 Federal election, and how now been revived as Bill C-4.

Second Reading Speech

The Minister for Citizenship and Immigration, Jason Kenney, gave the second reading speech for Bill C-49 in the House of Commons on 27 October 2010. He summarised the purpose of the Bill as follows[56]:

> Canadians are deeply concerned with a particularly pernicious crime, a crime that exploits vulnerable people in their dream to come to Canada, the dangerous crime of human smuggling.
>
> In the past year, it is well known that Canada has received two large vessels on our west coast, together carrying nearly 600 illegal migrants to our shores, people who, based on our intelligence, had paid criminal smuggling syndicates some $50,000 each in order to come to Canada in the most dangerous and exploitative way possible.
>
> The remarkable openness of Canada to immigration in general and refugee protection in particular, which makes possible our very generous approach to immigration, is dependent on public confidence in the system. I submit that Canadians demand an immigration system that is characterized by a sense of fair play and a rule of law. What disturbs them deeply about these mass illegal smuggling operations is precisely that they undermine those principles of fundamental fairness and the rule of law.
>
> The position of Canadians and the position of this government is and ought to be that we will be a country of openness, we will be a country that provides protection to those who are in need of it and we will lead the world in the moral obligation of refugee protection, but we will not be treated like a doormat by criminal networks that seek to profit from, frankly, encouraging people to come to this country illegally in a fashion that puts them and others in mortal danger. We know that every year hundreds and potentially thousands of people around the world fall victim to the dangerous ruse of smuggling syndicates.

Note how the Minister appeals to a desire to stop organised crime, not specifically to preventing unauthorised arrivals to Canada. Possibly the most interesting comment came at page 1544 of the debate[57]:

> Some would have us believe that we can successfully deter the smuggling operations simply by focusing on the smugglers. How I wish that were true. How I wish it were true that we did not have to, at the same time, address the demand side of the equation in the smuggling enterprise. However, to pretend that is the case, to pretend that we can avoid disincentivizing the customers of the syndicates from paying $50,000 to come to Canada is naive in the extreme.

[55] http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=23&Type=0&Scope=I&query=7122&List=stat
[56] House of Commons Hansard, 27 October 2010, p.1539.
[57] *Ibid* at p.1544.

This is a remarkably honest admission by a government that it will penalise some asylum-seekers to prevent illegal entry to a country, even if it does use the linguistic atrocity "disincentivizing"!

The Legislative Summary for Bill C-49 stated that the principal amendments to be made by the Bill were as follows[58]:

> • Creates the new category of "designated foreign national" for members of a group which has been designated by the Minister as an "irregular arrival" to Canada with the resultant creation of a new detention regime; mandatory conditions on release from detention; restrictions on the issuance of refugee travel documents; and bars on certain immigration applications, applicable only to "designated foreign nationals";
>
> • Restricts the ability to appeal certain decisions to the Refugee Appeal Division (RAD), and adds to the powers of officers detaining persons upon entry to Canada for suspected criminality;
>
> • Amends the definition of what constitutes "human smuggling" under the *Immigration and Refugee Protection Act* (IRPA), introduces new mandatory minimum sentences for human smuggling, and adds new aggravating factors to be considered by the court when determining the penalties for the offences of "trafficking in persons" and "disembarking persons at sea"; and
>
> • Amends the *Marine Transportation Security Act* (MTSA) to increase the penalties for individuals and corporations who contravene existing laws, and creates new penalties to be imposed specifically on vessels involved in contraventions of the MTSA.

Bill C-4

Bill C-49 lapsed with the Federal election called for 2 May 2011. The Bill was reintroduced to the Parliament on 21 June 2011, now titled Bill C-4. This Bill was introduced by the Minister of Public Safety, Mr Toews, who stated that "all of us have heard a great deal about the importance of the legislation before us today, which our government first introduced October 2, 2010, as part of an overall strategy to help put an end of human smuggling"[59]. Mr Toews also drew a direct link between the introduction of the Bill and the arrival of the *MV Sun Sea* when he stated that "[t]he arrival of two migrant vessels from Southeast Asia over the past two years, the MV *Ocean Lady* and the MV *Sun Sea*, have proved the reach and determination of organized human smuggling networks in their efforts to target Canada"[60].

Mr Toews explained the impact of the Bill on unauthorised arrivals to Canada as follows[61]:

> As part of the legislation, designated arrivals would face mandatory detention for up to one year to allow Canadian authorities to determine admissibility and illegal activity. In short, the detention period would provide more time to identify those who had arrived in our country and whether they posed a threat to our national security.

This mandatory detention of unauthorised arrivals to Canada is the key element to be discussed in this paper.

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[58] http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7122&Session=23&List=ls

[59] House of Commons Hansard, 21 June 2011, p1729.

[60] *Ibid.*

[61] *Ibid* at p1730.

"Designated Foreign Nationals"

Item 4 of Bill C-49 introduces a new s.20.1 if the IRPA. Subsection 20.1(1) would provide as follows:

> 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.

A few features of this provision should be noted. Firstly, the Minister *may* designate a group of persons as an "irregular arrival" if that group falls within the provisions of s.20.1. That is, this is a discretionary power and not something that occurs by operation of law. Presumably the Minister will have to provide reasons for any designation.

A group can be designated as "irregular arrivals" if their identity cannot be readily established **or** they have been "smuggled" to Canada. The terms "criminal organisation" and "terrorist group" do not appear to be defined anywhere in the IRPA. However, they are defined in ss.467.1 and 83.01 respectively of the Canadian Criminal Code[62], and this is no doubt the definition that would be applied. It might also be noted that no minimum number to a "group" is provided – would a single family be regarded as falling within the new s.20.1?

Consequences of Designation

The principal consequences of being designated as an "irregular arrival" are as follows. Firstly, an irregular arrival may not apply for permanent or temporary residence status, or any Canadian travel document, until five years after any claim for refugee or other protection is made – ss.20.1(2) and (3) respectively. While the irregular arrival will remain a protected person and therefore will not be removed from Canada (unless the fall within a ground of admissibility that applies to protected persons), this means that they will not be eligible for most government benefits, and will not be able to sponsor family members from overseas until that five year period expires. This also has the effect that they cannot leave and return to Canada during that period.

Secondly, the new s.55(3.1) provides that designated foreign nationals *must* be detained. This is the first instance of mandatory immigration detention in Canadian history. The amended s.56 then adds that such a person *must* be detained until their claim for protection or refugee protection is approved, or they are released from detention by the Immigration Division.

Thirdly, the new s.57.1 provides that the Immigration Division must review the reasons for detention of a designated foreign national 12 months after they were first detained, and each six months thereafter. Compare this with the existing s.57, which provides that the Immigration Division of the Immigration and Refugee Board must review the reasons for detention of the person within 48 hours of

[62] *Criminal Code*, R.S.C. 1985, c. C-46

them being detained, and again within seven and then 30 days of detention. The grounds on which the Immigration Division may order the release of a person from immigration detention are set out in s.58, but they basically relate to Citizenship and Immigration Canada (CIC) or the Canada Border Security Agency (CBSA) being unable to substantiate their reasons for the decision to detain. Section 61 permits the Immigration Division to impose conditions on release from detention. Section 57.1 would instead provide for mandatory detention for at least one year, although the Minister (not the Immigration Division) may nevertheless release a designated foreign national from immigration detention at any time, in "exceptional circumstances" – new s.58.1.

Clause 34(1) of Bill C-4 has the effect that declarations of "designated person" status can be made retrospectively for unauthorised arrivals to Canada on or after 31 March 2009 – the date of the arrival of the *Ocean Lady*. However, clause 34(3) provides that the mandatory detention provisions of clause 57.1 do not apply to retrospectively designated persons.

The Legislative Summary provides the following useful table on detention provisions in the IRPA after the passage of Bill C-4[63]:

Mandatory Reviews of Reasons for Continued Detention	**Regime Applicable to Permanent Residents and Foreign Nationals (Section 57 of the IRPA)**	**Regime Applicable to Persons Detained Under the Authority of a Security Certificate (Section 82 of the IRPA)**	**Regime Applicable to "Designated Foreign Nationals" (New Section 57.1 of the IRPA Created by Bill C-4)**
First review	Within 48 hours of detention (section 57(1))	Within 48 hours of detention (section 82(1))	12 months after the day of initial detention, and no sooner (new section 57.1(1))
Second review	Within 7 days of the first review (section 57(2))	Within 6 months of the first review (section 82(2) or 82(3))	6 months after the day on which the first review was conducted, and no sooner (new section 57.1(2))
Subsequent reviews	At least once during every 30-day period after the second review (section 57(2))	At least once during the 6-month period following the most recent review (section 82(2) or 82(3))	6 months after the day of the most recent review, and no sooner (new section 57.1(2))

It seems fairly clear that Bill C-49 takes two former Australian policies and introduces them to Canada. The prohibition on a designated foreign national's status being regularised for a five-year period, with the result that they are ineligible to sponsor relatives and may not leave Canada during that period, is taken straight from the restrictions imposed on holders of Australian Temporary Protection Visas (TPVs)[64]. Secondly, the Minister's power to "designate" certain non-citizens, with

[63] http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c4&Parl=41&Ses=1&source=library_prb

[64] Temporary Protection Visas were provided for by Part 785 of Schedule 2 of the *Migration Regulations 1994*, which was repealed with effect from 9 August 2008 by the *Migration Amendment Regulations 2008* (No 5) (Cth). Only holders of permanent protection visas or offshore humanitarian visas were eligible to sponsor family members overseas for the grant of humanitarian visas (such as subclasses 200, 201 or 202).

the consequence of mandatory detention, is an almost exact copy of ss.54K, 54L and 54N of the *Migration Act 1958*.

The Australian precedent was noted by a number of MPs in the Canadian Parliament. To give one example, the MP for Vancouver Kingsway, Mr Davies, stated in Parliament as follows[65]:

> I would like to focus on Australia's example because it is instructive to the House. Australia had policies to lock up refugee claimants long-term and to deny them permanent status even when granted refugee status in an attempt to stop refugees coming to that country by boat. It is exactly what is happening here. The policies resulted in refugees, including many children, being traumatized by their experiences in detention.
>
> The Australian Human Rights Commission, an organization created by the Australian parliament, conducted a national inquiry into children in immigration detention and found that children in Australian immigration detention centres had suffered numerous and repeated breaches of their human rights.
>
> Far from deterring people, depriving refugees of the right to family reunification appears to have caused some people to arrive by boat, later bringing the wives and children of refugees in Australia who were unable to bring their families through legal channels[66]. This was a deeply divisive policy, with many people in Australia unclear as to what was the best approach. However, we do know that in the past three years Australia has moved away from its policies of detention and temporary status for refugees.

Mr Davies does not distinguish between the current detention provisions of the Australian *Migration Act* and its current provisions. On the other hand, the Minister of Immigration and Citizenship, Mr Kenney, was quite keen to point out the difference. He noted that Australia now requires detention of all unlawful non-citizens, and pointed out that Canada's laws, even with Bill C-4, are a good deal more restrained[67]:

> Let me point out by way of comparison, because there is a lack of perspective in context here, that most of our peer democracies, most other liberal democracies, including those governed by social democratic parties such as the Labour [sic – Labor] government in Australia, have mandatory detention for all or almost all asylum claimants, not just illegally smuggled asylum claimants, but all or almost all asylum claimants.
>
> That was the law adopted by the United Kingdom under the previous social democratic Labour government. That is the law in Australia under the social democratic Labour [sic] government.
>
> I remember Prime Minister Gillard of Australia congratulating the NDP on its 50th anniversary. She actually defends a policy that puts under permanent detention all asylum claimants until their status is resolved. This is, by comparison, a radically more modest approach which only addresses illegally smuggled migrants for a limited period of time until they receive status, which under the new system would be three months.

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[65] House of Commons Hansard, 19 September 2011, at pp 1219-1220.

[66] Mr Davies has a point here – TPVs came into effect in October 1999, by means of the *Migration Amendment Regulations (no 12) 1999 (Cth)*, which inserted Part 785 of Schedule 2 of the Migration Regulations 1994. The number of unauthorised boat arrivals in 1999 was 3721. There was a slight fall to 2939 in 2000, but then a large *increase* to 5516 in 2001. See PHILLIPS & SPINKS, *supra* note 7 at 22. It was the Pacific Solution, introduced in September 2001, which stopped the boats, not TPVs.

[67] *Ibid* at 1399.

The last sentence might be the key reason why the Canadian government has elected to adapt the "designated persons" provisions of the Australian *Migration Act* rather than the mandatory detention provisions of ss.189, 196 and 198. Adapting the less draconian laws gives the government a false appearance of moderation in its legislative program. I will argue at the end of this paper that even the designated persons provisions are most likely unconstitutional and unnecessary in Canada.

The reference to three months is a reference to the amendments made to the IRPA by the *Balanced Refugee Reform Act*[68], which according to Mr Kenney would have the effect that "bona fide asylum claimants will receive a positive protection decision and therefore permanent residency within about three months of making their claim". That is, Mr Kenney's argument is that designated persons who are genuine refugees will be found to be so, and granted permanent residence, well before the 12-month period expires.

Comment on Bill C-49

Certain non-government organisations have noticed the resemblance between the Australian legislation and Bill C-4 (or C-49), although again they have failed to notice that Bill C-4 closely mirrors earlier, superseded, legislation. The Canadian Civil Liberties Association (CCLA) has even included a photo of the Baxter Detention Centre in Port Augusta, South Australia in its website's comment on the Bill[69]. The CCLA comments on Bill C-49 include the following[70]:

> It is hard to understand what useful purpose is served by creating these hardships, and by prolonging the period of limbo, and making it more difficult for a person to whom Canada has granted refugee status to settle and integrate into their new home.
>
> If the idea is to stop smugglers, this Bill does little to deter them, as most live and function far away from Canada's borders. International cooperation and efforts may be far more effective. If the idea is to attempt to deter people from using the services of "smugglers" (including paper forgers and ticket sellers, as described above), recent history in Australia demonstrates what common sense would dictate: people fleeing for their lives do not have the luxury of considering what will happen to them once they reach a safe haven. In Australia, which instituted similar policies, these were proven ineffective, and ultimately changed[71].
>
> Furthermore, in recognition of the desperate plight of refugees that leads them to obtain false papers, or to trust their fate to rusty boats, international law has long required that refugees *not be made to suffer penalties* for their illegal entry into a country.

In a similar vein, the Canadian Council for Refugees notes the following on its website[72]:

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[68] Bill C-11 of 2010. This Bill received Royal Assent on 29 June 2010 but is yet to come into effect.

[69] http://ccla.org/our-work/focus-areas/bill-c-49/. (It might be noted that the Baxter IDC closed in August 2007 – see http://en.wikipedia.org/wiki/Baxter_Immigration_Reception_and_Processing_Centre.)

[70] *Ibid*.

[71] It is not clear which policies are being referred to here. The Pacific Solution, in its first incarnation in 2001, was an extraordinarily successful policy, as unauthorised boat arrivals fell from 5516 in 2001 to 1 in 2002 – see PHILLIPS & SPINKS, *supra* note 7 at 22. The morality of the policy may be another consideration.

[72] http://ccrweb.ca/en/bill-c49-faq

What is the purpose of Bill C-49?
The government has said the bill is about stopping smugglers bringing people illegally into Canada. But in fact the bill mostly contains changes that will punish not the smugglers, but instead the people they are smuggling, including refugees who need to get into Canada to save their lives.

How does Bill C-49 punish refugees?
Under Bill C-49, some refugee claimants, including refugee children, will be jailed for a year, without anybody reviewing whether they should be kept in detention or released. Also under Bill C-49, some refugees, even after they have been accepted as refugees by Canada, will be kept with a temporary status for 5 years. During these five years, they will not be able to bring their family (spouse and children) to Canada and they will not be able to travel outside Canada.

Which refugees are punished under Bill C-49?
Under Bill C-49, the Minister can "designate" a group as an irregular arrival. Clearly, the government would like to designate refugee claimants that arrive by boat, such as the Sri Lankan Tamils on the MV Sun Sea that arrived in British Columbia this summer. But the bill does not say that the refugee claimants must have arrived by boat in order to be designated. A group could be designated even if there was no smuggling involved. Once a group is designated, everyone in the group is punished.

A detailed comparison of the former Division 4B (and current Division 6 of Part 2) of the *Migration Act* and Bill C-4 can be found in the appendix.

CONSTITUTIONALITY OF BILL C-4

In my opinion, it is unlikely that Bill C-4, if enacted, would survive a constitutional challenge, unlike the Australian High Court's decision in *Lim*. In particular, it is very likely that the new s.57.1 of the IRPA would be found to be in violation of both ss.7 and 9 of the Charter.

Charkaoui

In *Charkaoui v. Canada (Citizenship and Immigration)*[73] the Supreme Court found that a number of provisions of the IRPA were invalid for inconsistency with the Charter. Principally at issue was s.77(1) of the IRPA, which permitted the Minister for Citizenship and Immigration and the Minister for Public Safety and Emergency Preparedness to sign a certificate declaring a non-citizen to be inadmissible. McLachlin CJ, writing for the court, described the statutory scheme as follows in paragraph 5 of the judgement:

> The *IRPA* requires the ministers to sign a certificate declaring that a foreign national or permanent resident is inadmissible to enter or remain in Canada on grounds of security, among others: s. 77. A judge of the Federal Court then reviews the certificate to determine whether it is reasonable: s. 80. If the state so requests, the review is conducted *in camera* and *ex parte*. The person named in the certificate has no right to see the material on the basis of which the certificate was issued. Nonsensitive material may be disclosed; sensitive or confidential material must not be disclosed if the government objects. The named person and his or her lawyer cannot see undisclosed material, although the ministers and the reviewing judge may rely on it. At the end of the day, the judge must provide the person with a summary of the case against him or her — a summary that does not disclose material that might compromise national security. If the judge determines that the certificate is reasonable, there is no appeal and no way to have the decision judicially reviewed: s. 80(3).

[73] *Charkaoui*, *supra* note 5.

Mr Charkaoui was a Moroccan citizen and a Canadian permanent resident who was the subject of a s.77(1) certificate, issued on the basis that he was inadmissible for security reasons. He was then detained and proceedings to deport him began. Mr Charkaoui argued that s.77(1) of the IRPA conflicted with s.7 of the Charter and was therefore invalid, or alternatively that he had been denied procedural fairness in the decision to detain and deport him. He also argued that provisions of the IRPA that dealt with detention of inadmissible non-citizens were constitutionally invalid.

The Supreme Court found that the action for habeas corpus was protected by s.7 of the Constitution. McLachlin CJ noted that Mr Charkaoui had been granted a hearing at the review of the certificate before a judge, but went on to find as follows[74]:

> Questions arise, however, on the other requirements, namely: that the judge be independent and impartial; that the judge make a judicial decision based on the facts and the law; and finally, that the named person be afforded an opportunity to meet the case put against him or her by being informed of that case and being allowed to question or counter it. I conclude that the *IRPA* scheme meets the first requirement of independence and impartiality, but fails to satisfy the second and third requirements, which are interrelated here.

The Supreme Court accepted that "fundamental justice" does not always require that a person be informed of every detail of the case against him or her. For example, the Court cited *Chiarelli v. Canada (Minister of Employment and Immigration)*[75], which found that s.7 of the Charter did not require a potential deportee to be informed of the details of police investigations or the names of informers. A "summary" of the case against him was sufficient. However, the Court found in this case that the consequences for Mr Charkaoui – possible detention and deportation – were serious, and that this required a high standard of fundamental justice be afforded to him. McLachlin CJ noted that "it is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where the consequences are removal from the country or indefinite detention"[76]. The real crux of the judgement, however, is probably at paragraphs 63-64, which notes that the applicant in a s.77 proceeding would never know even the substance of the case against them, and that the judge, bound by the requirement that he or she not release certain information to the applicant, is left in a situation of "asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information"[77]. McLachlin CJ summed up as follows[78]:

> The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

[74] *Ibid* at paragraph 31.
[75] [1992] 1 SCR 711.
[76] *Charkaoui*, *supra* note 5 at paragraph 60.
[77] *Ibid* at paragraph 63.
[78] *Ibid* at paragraph 64.

The Court therefore found that s.77(1) of the IRPA was inconsistent with s.7 of the Charter and therefore invalid. The fact that the applicant could be deported from Canada on the basis that of information that was unknown to him or her meant that "fundamental justice" was not provided.

In relation to immigration detention, the Court did not find that immigration detention, even when potentially indefinite in duration, conflicted with ss.9 and 10 of the Charter. The Court found that detention pursuant to a s.77 certificate was not arbitrary, because it was "triggered" by the signing of the certificate, and that "the security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention"[79] – a finding that could support the Constitutional validity of new s.55(3.1), as set out in Bill C-4. The fact the detention was regularly reviewed under Division 6 Part 1 of the IRPA was also important[80]. However, a provision that prevented review of the detention until 120 days had elapsed *did* breach ss.9 and 10(c) of the Charter and was therefore invalid. McLachlin CJ conceded that "[i]t is clear that there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained"[81], but added as follows[82]:

> 93. However, this cannot justify the complete denial of a timely detention review. Permanent residents who pose a danger to national security are also meant to be removed expeditiously. If this objective can be pursued while providing permanent residents with a mandatory detention review within 48 hours, then how can a denial of review for foreign nationals for 120 days after the certificate is confirmed be considered a minimal impairment?
>
> 94. I conclude that the lack of timely review of the detention of foreign nationals violates s. 9 and s. 10(*c*) and cannot be saved by s. 1.

Given this decision, it is hard to see how the new s.57.1 could, if enacted, survive a Constitutional challenge. Note in particular the lack of any s.1 analysis of s.77 – McLachlin CJ seemed to regard the lack of "proportionality" in s.77 as obvious and did not think it necessary to undertake a detailed *Oakes* analysis of the provision[83]. While in any Charter challenge to Bill C-4 the government will undoubtedly have s.1 arguments ready, it seems that they would likely be given short shrift by the Supreme Court.

While Mr Kenney points out that many "designated persons" would have their application for refugee status dealt with well before the 12-month review period specified by s.57.1(1) arises, this does not seem to be the point. Indeed, McLachlin CJ pointed out in *Charkaoui* that the Minister "assert[ed] that when the provisions were drafted, it was thought that the removal process would be so fast that there would be no need for review"[84], but that "[t]his is more an admission of the excessiveness of the 120-day period than a justification"[85]. The fact is that McLachlin CJ in *Charkaoui* regarded a prohibition on reviewing the applicant's detention for 120

[79] *Ibid* at paragraph 89.
[80] *Ibid* at paragraph 110.
[81] *Ibid* at paragraph 93.
[82] *Ibid* at paragraphs 93-4.
[83] *R v. Oakes* [1986] 1 SCR 103.
[84] *Charkaoui*, *supra* note 5 at paragraph 92.
[85] *Ibid*.

days as a breach of s.9 of the Charter that could not be saved by s.1. When you also take into account the fact that serious allegations had been leveled at Mr Charkaoui, and no such allegations will usually be made in the case of an unauthorised boat arrival seeking refugee status in Canada, the 12-month prohibition on reviewing detention seems even more unjustified.

Finally on this point, the Canadian Bar Association cited the severity of the 12-month review prohibition in its submission to a Parliamentary Committee, arguing that Bill C-49 (as it then was) would be unconstitutional[86].

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

Arbitrariness

It is notable that both s.9 of the Charter and Article 9 of the ICCPR prohibit "arbitrary" detention. What does this term mean?

There is surprisingly little jurisprudence in Canada on this matter. In *Charkaoui*, McLachlin CJ, rejecting the proposition that detention of an inadmissible non-citizen was arbitrary in and of itself[87], stated as follows[88]:

> I would reject Mr. Almrei's argument that automatic detention of foreign nationals is arbitrary because it is effected without regard to the personal circumstances of the detainee. Detention is not arbitrary where there are "standards that are rationally related to the purpose of the power of detention": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 46-5. The triggering event for the detention of a foreign national is the signing of a certificate stating that the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The security ground is based on the danger posed by the named person, and therefore provides a rational foundation for the detention.

That is, detention is not "arbitrary" if it is both lawful and based on some "rational foundation". Mr Charkaoui's initial detention had some rational foundation because of the seriousness of the allegations involved, but the prohibition on reviewing his detention for 120 days did not. This reasoning appears to elaborate somewhat on the Supreme Court's previous leading decision on s.9 of the Charter, *R v. Latimer*, in which Lamer CJC, on behalf of the majority, stated that "Mr. Latimer's arrest was entirely lawful, and failing an attack against the legislative provision which authorized the arrest, I do not see how a lawful arrest can contravene s. 9 of the *Charter* for being arbitrary"[89].

The Ontario Court of Appeal also considered the relationship between legality and arbitrariness in *R v. Duguay*[90]. That case concerned the arrest of the applicant on suspicion of break-and-enter offences. The trial judge had found that the police

[86] Canadian Bar Association, Bill C-49, Preventing Human Smugglers from Abusing Canada's Immigration System Act (Nov. 2010) available at http://www.cba.org/cba/submissions/pdf/10-78-eng.pdf at 6.
[87] The UNHRC cases have taken the same approach – see for example *A v. Australia*, *supra* note 4, at paragraph 9.3.
[88] *Charkaoui*, *supra* note 5 at paragraph 89.
[89] [1997] 1 SCR 217 at 232.
[90] (1985) 18 CCC (3d) 289.

had arrested the applicant and two co-accused as a "means of conducting their investigation"[91], and not on the basis of probable cause. The trial judge found the arrest to be both unlawful and a breach of s.9 of the Charter. MacKinnon ACJO commented on the interpretation of s.9 as follows[92]:

> It cannot be that every unlawful arrest necessarily falls within the words "arbitrarily detained". The grounds upon which an arrest was made may fall "just short" of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.

In other words, it appears that the Ontario Court of Appeal has decided that detention will be arbitrary if there is no objective justification for it. Detention may be illegal without being arbitrary if those responsible for the detention had a reasonable, even if incorrect, belief that the detention was lawful.

James Stribopoulos, in an article published shortly after the *Charkaoui* decision was handed down, has noted the following aspects of the *Duguay* reasoning[93]:

> A conclusion that each [the terms "unlawful" and "arbitrary"] is synonymous would have far-reaching implications beyond unjustified detentions and arrests. For instance, if it were established that a police officer arrested in circumstances where he or she was obligated not to under the *Criminal Code* or failed to release someone following an arrest as the Code required the resulting unlawful detention would be characterized as arbitrary and unconstitutional. Similarly, a failure on the part of police to bring an accused before a justice within 24 hours of an arrest would necessarily be unconstitutional – regardless of any good explanation for the delay.

Stribopoulos goes on to note[94] that the courts seem to "fear being required to characterize as 'arbitrary' – and unconstitutional – unlawful detentions resulting from 'a technical error of process'"[95]. In other words, there is no clear indication from Canadian courts that s.9 of the Charter is to be interpreted in the same way that the UNHRC interpreted Article 9(1) of the ICCPR in *A v. Australia*[96] and later cases, that is, that detention is arbitrary unless it is both lawful and justifiable on an individual basis.

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[91] *Ibid* at 296.
[92] *Ibid*.
[93] James Stribopoulos, *The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning*, (2008) 40 Supreme Court L.R. 211 at 232.
[94] *Ibid*.
[95] *R v. Simpson* (1994) 88 CCC (3d) 377 at 388 (Newfoundland and Labrador Court of Appeal). This decision is basically in accord with Duguay, *supra* note 91.
[96] *Supra* note 4.

If the *Duguay* analysis is applied to Bill C-4, and in particular new s.57.1, what is the result? It would be difficult to argue that a CIC officer who detained a person who had been designated under the new s.20.1(1) could *not* have a reasonable belief, at the time, that the detention of the designated person was lawful – unless we are to impute a knowledge of international law to CIC decision-makers. A court would have to find that:

1. The officer knew or suspected that mandatory detention of designated persons contravened Article 9(1) of the ICCPR; and

2. The officer knew or suspected that a breach of Article 9(1) would mean that detention under s.57.1 would be unconstitutional and unlawful.

I would argue that it would be excessive to dispute this much knowledge to a CIC decision-maker[97], and that detention under s.57.1 could not be found to contravene s.9 of the Charter on this basis. Instead, the *Charkaoui* argument would have to be used – very likely successfully, as I have already argued – to strike down s.57.1. The *Charkaoui* route would be a preferable approach anyway, because it would invalidate s.57.1 rather than attacking each and every administrative decision made under it.

Is Bill C-4 Even Necessary?

Many Australian lawyers would be stunned to think that Bill C-4 is even necessary. Canada has had two (admittedly large) boatloads of unauthorised arrivals in the life of the current government, totaling 568[98] people. Compare those figures to the numbers of arrivals in Australia since 2009[99]:

Year	Number of Boats	Crew	Passengers
2009	60	141	2726
2010	134	345	6555
2011	69	168	4565
2012	278	392	17202

From an Australian point of view, one wonders why Canada is so fixated on a miniscule number of unauthorised boat arrivals that the government intends to introduce legislation that, especially given the *Charkaoui* decision, is almost certain to be found in breach of the Charter. Nothing in the numbers of unauthorised arrivals statistics for Canada could justify such a move.

[97] This situation is vaguely similar to the Australian High Court decision in *Ruddock v Taylor* (2005) 221 ALR 32. This case turned on the interpretation of s.189(1) of the *Migration Act 1958*, which relevantly provides that "[if] an officer knows or reasonably believes a person … to be an unlawful non-citizen, the officer must detain that person". Mr Taylor was a permanent resident of Australia whose visa was cancelled in 2001 after he was convicted of a number of sexual offences against children. He was then detained in the Villawood Immigration Detention Centre in Sydney. Taylor successfully challenged the cancellation, on grounds that are immaterial here, in an earlier High Court case, *Re Patterson ex parte Taylor* (2001) 207 CLR 391. The successful challenge meant that Taylor's visa was taken never to have been cancelled, and he was never an unlawful non-citizen. He then sued the Commonwealth for false imprisonment. The High Court unanimously found that the officers who detained Taylor could not have had anything other than a reasonable belief that he was an unlawful non-citizen, as there was no way they could have known that he would successfully challenge the cancellation of his visa.

[98] House of Commons Hansard, Tuesday 20 September 2011, at 1029.

[99] Phillips & Spinks, *supra* note 7, at 22.

CONCLUSION

In summary, the mandatory detention provisions of Bill C-4, which borrow heavily from Division 6 of Part 2 of the Australian *Migration Act 1958* (formerly Division 4B of Part 2) would be unlikely to survive a constitutional challenge. In particular, s.57.1, if enacted, would very likely be struck down under s.9 of the Charter. The Bill almost certainly also represents a breach of Articles 9(1) and 9(4) of the ICCPR, particularly given that the UNHRC has found that the Australian precedent was in breach of these articles. All in all, it is difficult to see why unlawful boat arrivals to Canada, who are vanishingly few in number compared to Australia, cannot simply be dealt with by the processes that currently exist in the IRPA for detaining, and reviewing the detention of, non-citizens unlawfully present in Canada.

APPENDIX -- COMPARISON OF DETENTION PROVISIONS OF FORMER DIVISION 4B OF THE *MIGRATION ACT* AND BILL C-4

Migration Act	Bill C-4	Comments
Section 54K – Definitions "designated person" means a non-citizen who: (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and (b) has not presented a visa; and (c) is in Australia; and (d) has not been granted an entry permit; and (e) is a person to whom the Department has given a designation by: (i) determining and recording which boat he or she was on; and (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat; and includes a non-citizen born in Australia whose mother is a designated person	**Clause 5 – new s.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 contra-vention 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 new s.20.1(1) would be more restrictive than the former s.54K in Australia. Under s.54K, the mere fact of unauthorised arrival in Australia by boat was sufficient for a designation to be made. Under s.20.1(1), the Minister must be satisfied that the unauthorised arrivals cannot be identified in a timely fashion, or that an offence under s.117(1) appears to have been committed ("people smuggling), and that the offence has been committed for profit, or by a "criminal organisation or terrorist group". However, s.20.1(1) is not restricted to unauthorised boat arrivals – unauthorised air arrivals are covered if they arrive as a "group".
	Clause 5 – New s.20.1(2) (2) When a designation is made under subsection (1), a foreign national — other than a foreign national referred to in section 19 — who is part of the group whose arrival is the subject of the designation becomes a designated foreign national unless, on arrival, they hold the visa or other document required under the regulations and, on examination, the officer is satisfied that they are not inadmissible.	There is no direct equivalent to this provision in the *Migration Act*, but the new s.20.1(2) would make it clear that a designation applies to each and every individual in a designated group.
Subsection 54L(1) – Mandatory Detention (1) Subject to subsection (2), after commencement, a designated person must be kept in custody. **Subsection 54N(1) – Detention after initial entry** If a designated person is not in custody immediately after commencement, an officer may, without warrant: (a) detain the person; and (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L.	**Subclause 9(2) – New s.55(3.1)** If a designation is made under subsection 20.1(1), an officer must: (*a*) detain, on their entry into Canada, a foreign national who, as a result of the designation, is a designated foreign national; or (*b*) arrest and detain without a warrant a foreign national who, after their entry into Canada, becomes a designated foreign national as a result of the designation, or issue a warrant for their arrest and detention.	These are the key mandatory detention provisions of the respective legislation. Note the lack of discretion on the part of any decision-maker in detaining designated persons on arrival, although s.54N(1) of the *Migration Act* appears to provide for discretionary detention of unauthorised arrivals who become "designated persons" *after* their entry to Australia.

Migration Act	Bill C-4	Comments
Subsections 54L(2) and (3) – Release from Detention (2) A designated person is to be released from custody if, and only if, he or she is: (a) removed from Australia under section 54P; or (b) given an entry permit under section 34 or 115. (3) This section is subject to section 54Q.	**Clause 11 – new s.56(1)** 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 applic-ation 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.	The Canadian provision is again slightly wider than the Australian provision. Under Bill C-4, designated persons can be ordered to be released by the Immigration Division or by the Minister. Under Division 4B, designated persons could be released only if they are expelled from Australia or granted an entry permit.
Removal from Australia – ss.54P(1) – (3) 54P.(1) An officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed. (2) An officer must remove a designated person from Australia as soon as practicable if: (a) the person has been in Australia for at least 2 months or, if a longer period is prescribed, at least that prescribed period; and (b) there has not been an entry application for the person. (3) An officer must remove a designated person from Australia as soon as practicable if: (a) there has been an entry application for the person; and (b) the application has been refused; and (c) all appeals against, or reviews of, the refusal (if any) have been finalised.	Bill C-4 does not amend existing provisions with respect to removal or deportation from Canada.	Subsection 54P(1) was very important to the High Court in *Lim*, because it meant that the detainee could in fact bring their detention to an end at any time, if they were prepared to return to their home country[100].

To be continued

[100] Lim, *supra* note 3, at paragraphs 33 and 34 of the judgement of Brennan, Deane and Dawson JJ.

Migration Act	**Bill C-4**	**Comments**
Time Limits on Detention – ss.54Q(1) – (3) (1) Sections 54L and 54P cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application custody after commencement for a continuous period of, or periods whose sum is, 273 days. (2) Sections 54L and 54P cease to apply to a designated person who was not in Australia on 27 April 1992, if: (a) there has been an entry application for the person; and (b) the person has been in application custody, after the making of the application, for a continuous period of, or periods whose sum is, 273 days. (3) For the purposes of this section, a person is in application custody if: (a) the person is in custody; and (b) an entry application for the person is being dealt with; unless one of the following is happening: (c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department; (d) the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person; (e) court or tribunal proceedings relating to the application have been begun and not finalised; (f) continued dealing with the application is otherwise beyond the control of the Department	**Time Limits on Review by the Immigration Division – Clause 12, new s.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.	These provisions are markedly different, because Australia lacks any authority that can review and order the release of a detainee. Instead, s.54Q purported to place a legislative time limit on the duration of the detention of a designated person. However, because the 273-day "clock" was "stopped" whenever the Department or the designated person sought information from an external source, or the designated person commenced court proceedings, it was frequently impossible to determine whether a person's maximum period of detention had ended. Because of the unworkability of s.54Q, Australia has never reintroduced a maximum period of detention. The Canadian legislation is much simpler, and amends the power of the Immigration Division to review a person's detention. The detention of a designated person cannot be reviewed until they have been detained for one year, and each six months thereafter.
	Discretion to release from Detention – subclause 13(2), new s.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.	There is no direct equivalent to the new s58.1 in the *Migration Act*. Provisions relating to the grant of a Bridging Visa E[101], and "community detention" in the form of a "residence determination"[102] may cover some of the same ground, but there is no discretionary power in the Act to simply release a designated person or other unlawful non-citizen from detention.

[101] Item 1305 of Schedule 1 and Part 051 of Schedule 2 of the *Migration Regulations 1994*.

[102] Part 2, Division 7, Subdivision B of the *Migration Act 1958*. A "residence determination" is defined by the Act as a form of detention, but is effectively a form of release from detention on the condition that the non-citizen resides in a specified location.