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Public Safety Canada

2014-2015 Horizontal Evaluation of the Immigration and Refugee Protection Act Division 9/National Security Inadmissibility Initiative

Final Report

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Canada

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EXECUTIVE SUMMARY

Evaluation supports accountability to Parliament and Canadians by helping the Government of Canada to credibly report on the results achieved with resources invested in programs. Evaluation supports deputy heads in managing for results by informing them about whether their programs, initiatives or policies are producing the outcomes that they were designed to achieve in a cost-effective manner. Evaluation also supports policy and program improvements by helping to identify lessons learned and best practices.

What we examined

This evaluation examined the relevance and performance of the *Immigration and Refugee Protection Act* (IRPA) Division 9/National Security Inadmissibility Initiative (hereafter referred to as the Initiative). The Initiative is defined by the combined activities of the following nine federal partners:

- Public Safety Canada (PS)
- Justice Canada (JUS)
- Canada Border Services Agency (CBSA)
- Canadian Security Intelligence Service (CSIS)
- Immigration, Refugees and Citizenship Canada (IRCC)
- Department of Global Affairs Canada (GAC)
- Courts Administration Services (CAS)
- Immigration and Refugee Board of Canada (IRB)
- Royal Canadian Mounted Police (RCMP).

The Initiative generally includes policy development and the management of cases that have one or more of the following characteristics:

- classified information[1] is used to determine whether a foreign national or permanent resident (non-citizen) is inadmissible to Canada as described in the IRPA;[2] and where this information cannot be disclosed because doing so would be injurious to national security or endanger the safety of any person;
- classified information is used in the context of a review of reasons for detention or of release conditions;
- prescribed conditions of release are imposed on non-citizens alleged or determined to be inadmissible on security grounds (section 34) using open and/or classified information;[3]

[1] The definition of classified information in this document is understood as information and other evidence that if disclosed would be injurious to national security or endanger the safety of any person. As defined in section 76 of the IRPA, "information" means "security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization."

[2] The grounds for inadmissibility are found in sections 34 to 42 of the IRPA. These grounds include, among others, security (section 34), human or international rights violations (section 35), serious criminality (sub-section 36.1) and organized criminality (section 37). It is important to note that classified information may be used to determine all the grounds of inadmissibility; however, it has most often been used in inadmissibility on security grounds (section 34).

[3] At the time of this evaluation, the relevant legislative provisions were not yet in force and associated regulations for prescribed conditions of release had not yet been established; therefore, no cases with this characteristic exist.

- enhanced diplomatic assurances against torture are sought and/or relied upon to facilitate the removal of an inadmissible foreign national from Canada.

The scope of the evaluation covered the activities that these partners have conducted since the last evaluation in February 2010.[4] Data collection for this evaluation was undertaken between March 2015 and August 2015.

It is noted that, in order to meet requirements of the *Financial Administration Act*, JUS carried out a component evaluation related to the Special Advocates Program (SAP), which is a transfer payment program managed by JUS. The evaluation team integrated relevant findings from the SAP evaluation into the overall horizontal evaluation report.[5]

Why it's important

Canada has specific requirements related to the entry and residence of non-citizens. Non-citizens can be denied a visa, refused admission, detained, or removed from Canada for a number of reasons, including inadmissibility on security grounds pursuant to section 34 of the IRPA, which states that a permanent resident or a foreign national is inadmissible on security grounds.

In some cases, it is necessary to rely on classified information to detain an individual or to determine an individual's inadmissibility. However, the disclosure of such information would cause injury to Canada's national security or endanger the safety of a person. For example, the disclosure of such information would jeopardize intelligence agencies' sources and/or tradecraft;[6] compromise ongoing and future intelligence and criminal investigations; damage relationships with allies, or endanger human sources. Though only used in exceptional circumstances, Division 9 of the IRPA, specifically section 77 (certificates) and sections 86 and 87 (applications for non-disclosure), provides a mechanism that allows the Government to rely on and protect classified information in immigration proceedings. As such, the Initiative is crucial to protecting and maintaining the integrity of Canada's immigration system.

What we found

Relevance

The original impetus for the Initiative when it was established in 2008 was to provide for the appointment of a special advocate to represent the interest of a person named in a security certificate[7] and to preserve the Government's ability to use and protect classified information in immigration proceedings through a *Charter*-compliant process. In 2015, these needs remain. Over the past five years, the Initiative has evolved to meet the changing immigration and threat environment. Terrorism and national security remain prevalent issues in Canada and abroad, and there is a continued need to use and protect certain types of information during immigration proceedings in order to preserve information sources and intelligence or law enforcement agencies' tradecraft. Several policy renewals have added new components and demonstrated the Initiative's ability to evolve with changing jurisprudence. The Supreme Court of Canada's 2014 ruling in *Canada (Citizenship and Immigration) v. Harkat (*2014 SCC 37, [2014] 2 S.C.R.

[4] http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/vltn-scrt-crtfct-2009-10/index-eng.aspx
[5] http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/2015.html
[6] In this context, "tradecraft" refers to intelligence collection and analysis methods.
[7] The term "security certificate" is used in this document to refer to a "certificate" as referenced in s. 77 of the IRPA.

33),[8] in which the constitutionality of Division 9 of the IRPA was upheld and IRPA's statutory framework was determined to be consistent with the *Canadian Charter of Rights and Freedoms* (the *Charter*), affirmed the continuing relevance of the Initiative.

In terms of future requirements for Initiative activities, it is anticipated that the Initiative's fluctuating levels of effort will continue into the foreseeable future. This observation is based on past trends and factors that could either increase or decrease the need for Initiative activities. International political upheaval and migration flows, as well as known and emerging national security issues and recent legislation such as the *Anti-terrorism Act, 2015,* could increase the need for Initiative activities and increase the number of Division 9 cases. On the other hand, the success of other programs such as: the Interactive Advance Passenger Information Initiative; the Beyond the Border Action Plan; and the presence of CBSA Liaison Officers oversees, which aim to prevent the entry of inadmissible foreign nationals to Canada, could decrease demand. These other security-related federal programs are complementary to the Initiative and, notwithstanding their impact, there will be a continuing need for the Initiative to process future cases.

Budget announcements and recent legislation demonstrate that the Initiative is well aligned with the Government of Canada's public safety priorities. National security and counter-terrorism efforts are among the government's top priorities. In order to deliver on these priorities through Initiative activities, the appropriate federal partners are actively engaged. The role of partners including the protection of public safety; determination of admissibility and conferring temporary or permanent immigration status; IRB and Federal Court proceedings and international activities are federal responsibilities that cannot be undertaken by the provinces or the private sector.

Performance

The Initiative has contributed to the achievement of its stated immediate and intermediate outcomes. In particular, the Initiative helped maintain the integrity of the security and intelligence system and mitigated risks to national security. Together, partners have demonstrated the ability to use and protect classified information in immigration proceedings. Risk has been mitigated by keeping non-citizens from accessing Canada, from gaining immigration status and by revoking status. Risk has also been mitigated through the imposition and monitoring of conditions of release on some individuals, and a number of individuals have been removed from Canada.

As attested by the Supreme Court of Canada's 2014 *Harkat* ruling, the Initiative has provided fair representation to individuals named under security certificates. In this case, the presence of a special advocate was found to provide a substantial substitute for the disclosure of information to the individual and to protect his interest in proceedings that were held in the absence of the public and the individual and his counsel. The post-*Charkaoui I* (*Charkaoui v Minister of Citizenship and Immigration)* legislative changes, which included the introduction of measures such as the Special Advocates Program have improved the procedural fairness of the regime and its compliance with the *Charter*.

With respect to horizontal governance and coordination, partners view PS's overall coordination and leadership role as positive. PS has been effective in bringing the partners together, and the implementation of the Interdepartmental Case Coordination Committee highlights this success. Horizontal information exchange among the partners, particularly the CBSA, IRCC, RCMP, and CSIS was found to be timely and useful for decision-making purposes. The efficiency of

[8] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13643/index.do

information sharing processes has improved in recent years. Other horizontal activities such as litigation services and advice provided by JUS were described as timely, useful, and of high quality. The consistency of the advice provided across government has improved in recent years.

In terms of efficient use of resources, partners have demonstrated overall cost containment, with funding levels reduced over the past five years. For some partners, allocations versus expenditures show a wide variance (under-spending). Performance information and interviewees indicate this is due, in part, to the fluctuating nature of the workload or case delay. Interviewees indicated that, despite underspending, they continue to feel funding pressure if they wish to remain in a state of readiness to respond to the unpredictable demand for their highly specialized services and expertise and to have infrastructure permanently ready for service delivery. Since the Initiative is funded under a special purpose allotment, unspent funds must be returned to the fiscal framework. These factors point to a need to track spending at an acceptable level of granularity to facilitate future resource allocations.

In examining alternatives to the Initiative, partners have exhibited due diligence in exploring and advancing policy and legislative options to reform certain aspects of the Division 9 mechanisms. These options included a consideration of approaches taken by other countries. The evaluation also found that the most cost-effective way to deal with inadmissible individuals is to prevent their access to Canada. However, it is noted that alternatives that prevent entry cannot address all cases of inadmissibility as, notwithstanding all best efforts, there will be cases where the reason for inadmissibility will not, or in certain cases, cannot be discovered until after the foreign national is already in Canada. Furthermore, alternative measures cannot address all cases because sometimes inadmissibility results from actions discovered while the non-citizen is in Canada or results from activity in Canada. In addition, permanent residents are allowed to enter. Canada even though alleged to be inadmissible. Thus, there is an ongoing need for the Initiative.

Outstanding Issues

Notwithstanding the above-noted conclusions, the evaluation has identified opportunities for improvement. For example, the *Faster Removal of Foreign Criminals Act,* which received Royal Assent in 2013, included provisions to support the imposition of mandatory minimum conditions on all non-citizens alleged or determined to be inadmissible on grounds of security. The regulations that would prescribe the specific conditions to be imposed are under development, and have not yet been introduced. Given that the objective of these legislative provisions is to ensure a consistent baseline for the control and monitoring of such individuals by the CBSA as long as they remain in Canada, the evaluation has identified this delay as an unmet commitment to address a previously identified risk.

For some partners, performance information was not readily available. Partners indicated that this was due to lack of resources/competing priorities at respective headquarters and challenges associated with outdated case management software. This was particularly true for country-wide information on the management and removal of inadmissible individuals, whose terms and conditions, where applicable, are imposed and monitored via CBSA regional offices.

Although efforts are being made to improve the efficiency of information sharing among partners, there remain information-sharing challenges. These include inconsistent access to secure electronic networks across departments/agencies and corresponding security-cleared personnel who are able to access the system as required.

Finally, there is a need to better understand Initiative costs in relation to activities/outputs.Tracking these costs would benefit partners by facilitating resource planning, both from a central agency and departmental perspective. Cost tracking may also increase partners' capacity to respond to fluctuating demand.

Recommendations

The evaluation recommends that:

1. Canada Border Services Agency implement regulations associated with the *Faster Removal of Foreign Criminals Act*. Current plans indicate that final Regulations will be published in the Canada Gazette in the 2016-2017 fiscal year; all efforts should be made to expedite this deadline.

2. Public Safety Canada lead a collaborative exercise with partners to update indicators and implement the horizontal performance measurement strategy. The strategy should:

    - identify the frequency of data collection;
    - clearly identify reporting responsibilities for each department/agency; and
    - incorporate performance indicators to track partners' spending by funded activity.

Management Response and Action Plan

All partners accept and support the evaluation and its recommendations and a management action plan will be implemented.

1. INTRODUCTION

This report presents the findings of the Public Safety Canada 2014-2015 Horizontal Evaluation of the *Immigration and Refugee Protection Act* (IRPA) Division 9/National Security Inadmissibility Initiative (hereafter referred to as the Initiative).

The evaluation was conducted to provide Canadians, parliamentarians, Ministers, central agencies, and the Deputy Ministers of the participating organizations with an evidence-based, neutral assessment of the relevance and performance (effectiveness, efficiency and economy) of this Initiative. It was conducted in compliance with Treasury Board of Canada *Policy on Evaluation*, which requires all departmental direct spending to be evaluated at least once every five years.

2. PROFILE

2.1 Background

Canada's history and its social, cultural and economic prosperity is dependent, to a large extent, on immigration and the orderly flow of people and goods across its borders. The IRPA has the dual objective of both facilitating the entry of immigrants and visitors to Canada, and of denying access to Canadian territory to non-citizens who are deemed to be inadmissible on specific grounds.[9]

Canada has specific requirements for non-citizens to enter and remain in the country. Non-citizens can be denied a visa, refused admission, detained, or removed from Canada for a number of reasons, including inadmissibility on security grounds pursuant to section 34 of the IRPA. Section 34 states that a permanent resident or a foreign national is inadmissible on security grounds for:

(*a*) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(*b*) engaging in or instigating the subversion by force of any government;

(*b.1*) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*), (*b.1*) or (*c*).

[9] These specific grounds are generally defined as those grounds for inadmissibility under certain sections of the *Immigration and Refugee Protection Act* and include: security (s. 34), war crimes (s. 35), criminality and serious criminality (s. 36(1)) or organized criminality (s. 37).

It is noted that, under the IRPA, "reasonable grounds to believe" are required to establish inadmissibility.

Normally, the admissibility to Canada of non-citizens is determined by immigration authorities using open source information and/or information that is known to the individual. In these instances, disclosure to the individual concerned or disclosure in public proceedings does not pose a risk to national security or the safety of any person. However, it is sometimes necessary to rely on classified information[10] to determine an individual's admissibility. In these cases, the disclosure of such information to the person concerned or the public could cause injury to Canada's national security or endanger the safety of a person. For example, the disclosure of such information would jeopardize intelligence agencies' sources and/or tradecraft;[11] compromise ongoing and future intelligence and criminal investigations; damage relationships with allies or have implications for the conduct of foreign relations~~,~~ or endanger human sources. Used in exceptional circumstances, Division 9 of the IRPA, specifically section 77 (security certificates) and sections 86 and 87 (applications for non-disclosure of information), provides a mechanism that allows the Government to rely on and protect classified information in immigration proceedings. Division 9 proceedings can involve special advocates who are qualified private sector lawyers with proper security clearance to review and handle classified information. Special advocates protect the interests of non-citizens during the ex parte portions of Division 9 proceedings.

Pursuant to section 77 of the IRPA, security certificates may be used to seek the removal from Canada of foreign nationals and permanent residents considered inadmissible on grounds of security, organized criminality, serious criminality, and human or international rights violations, when the determination is based on information that cannot be disclosed publicly or to the person who is the subject of the proceedings. In these situations, a certificate is signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Immigration, Refugees and Citizenship Canada and referred to the Federal Court, which then determines whether the certificate is reasonable. Under the IRPA, a finding of reasonableness is considered conclusive proof that the person named in the certificate is inadmissible to Canada. The security certificate also becomes a removal order that is in force. The Ministers may also issue a warrant for the arrest and detention of a person who is named in a certificate if they have reasonable grounds to believe that the person is a danger to the security of Canada or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

In the context of admissibility hearings and detention reviews or immigration appeals before the Immigration and Refugee Board of Canada (IRB), an application may be made pursuant to section 86 of the IRPA, which provides for the non-disclosure of information where necessary to protect national security or the safety of any person. Likewise, an application may be made pursuant to section 87 of the IRPA to protect information during a judicial review by the Federal Court of an immigration decision which involved the consideration of classified information.

Canada is a signatory to the *United Nations Convention against Torture*, which explicitly prohibits state parties from returning a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In addition,

[10] Classified information in this document refers to security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization, as well as other evidence that if disclosed would be injurious to national security or to the safety of any person.
[11] In this context, "tradecraft" refers to intelligence collection and analysis methods.

in *Suresh,*[12] the Supreme Court of Canada found that, barring exceptional circumstances, removal from Canada where there is a substantial risk of torture violates the *Charter*. However, the Court left open the possibility that, in an exceptional case, such deportation might be justified, either as a consequence of the balancing process mandated by section 7 or under s.1 of the *Charter*. The Initiative includes efforts to obtain enhanced diplomatic assurances to facilitate removal in the event that a non-citizen is believed to be at risk of torture, but there are reasons to proceed with removal despite that risk.

2.2 Initiative Scope

The combined activities of nine federal partners, as summarized in Table 1, form this horizontal Initiative.

Table 1: Partner Activities

Partner	Activities Summary
Public Safety Canada (PS)	• Leads and coordinates policy development and case management functions. • Provides advice on issues related to national security, immigration and the use of classified information in proceedings. • Co-leads with the Department of Global Affairs Canada (GAC) policy functions related to enhanced diplomatic assurances against torture. • Coordinates with partners on implementation, litigation-related developments and policy decision-making. • Leads horizontal evaluations as per the *Policy on Evaluation*.
Justice Canada (JUS)	• Provides legislative, litigation and legal advisory services. • Administers the contribution agreements for the special advocates who protect the interests of persons named in Division 9 proceedings of the Immigration and Refugee Board and the Federal Court. • Provides administrative support and resources to special advocates and professional development to members of the roster. • Administers the contribution agreements for the legal aid plans with respect to public counsel. • Participates in case coordination activities.
Canada Border Services Agency (CBSA)	• Conducts investigations and prepares reports on inadmissibility; represents the Minister of Public Safety and Emergency Preparedness in section 86 proceedings before the IRB. • Provides assessments to support the danger opinion process; and inputs evidence and testimony for proceedings before the Federal Court. • Participates in case coordination activities. • Monitors individuals subject to conditions. • Develops, imposes and monitors compliance with mandatory minimum conditions.

[12] In *Suresh v. Canada (Minister of Citizenship and Immigration) 2002*, the Supreme Court of Canada concluded that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter's* section 7 guarantee of life, liberty and security of the person.

Table 1: Partner Activities	
Partner	**Activities Summary**
Canadian Security Intelligence Service (CSIS)	• Conducts security screening and provides briefs to IRCC and the CBSA on persons of national security concern. • Prepares Security Intelligence Reports and unclassified summaries, redacts and summarizes classified documents in support of IRPA proceedings. • Testifies at reasonableness hearings, detention reviews, judicial reviews and other court proceedings. • Participates in case coordination activities.
Immigration, Refugees and Citizenship Canada (IRCC)	• Processes immigration files that may include the use of classified information for decision-making. • Pre-removal Risk Assessment (PRRA) and Danger Opinion process in collaboration with the CBSA. • Participates in case coordination activities.
Department of Global Affairs Canada (GAC)	• Negotiates and provides enhanced diplomatic assurances against torture in appropriate cases. • Provides legal advice on related international legal obligations. • Sustains international engagement with like-minded countries regarding best practices for negotiating enhanced diplomatic assurances. • Provides analysis and advice on related policy implications regarding security inadmissibility.
Courts Administration Service (CAS)	• Supports the hearings and proceedings of the Federal Court and Federal Court of Appeal. • Provides facilities for protection and review of secure material, and onsite support to special advocates.
Immigration and Refugee Board of Canada (IRB)	• Is an independent tribunal at arm's length from government. • Conducts immigration proceedings, including admissibility hearings and detention reviews, as well as imposing conditions of release. • Provides facilities for protection and review of secure material, and onsite support to special advocates.
Royal Canadian Mounted Police (RCMP)	• Participates in case coordination activities. • Conducts searches of police database holdings on an exceptional basis, in support of RCMP member attending case coordination meeting.

2.3 Initiative Governance

PS is responsible for overall leadership and coordination of the Initiative. PS fulfills its responsibilities through a formal governance structure led by the Assistant Deputy Minister (ADM) Steering Committee on Security Certificates. The Committee was established to oversee the implementation and operation of Division 9 related activities.

Three working groups report to the Steering Committee on Security Certificates.[13] The Policy Working Group is responsible for policy issues and comprises representatives from PS (chair), IRCC, JUS, GAC, CSIS, RCMP and the CBSA. The group first brings recommendations to an interdepartmental committee of Directors General (DGs), and then to the ADM Committee. The Interdepartmental Case Coordination Committee comprises representatives from PS (chair), IRCC, JUS, CSIS, the CBSA and RCMP. The Interdepartmental Committee on Enhanced Assurances against Torture consists of representatives from PS and GAC (co-leads), IRCC, JUS, and the CBSA.

All Initiative partners are responsible for ensuring that their individual activities are managed according to the internal governance requirements of their department or agency, and that their activities are conducted in accordance with their lawful mandates.

2.4 Resources

The Initiative began on April 1, 2008. Time-limited funding has been renewed four times. Table 2 lists funding allocations of partners for the last two funding cycles.

Table 2: Annual Funding Allocations ($ in millions)

Partner*	2010-11	2011-12	2012-13	2013-14	2014-15
PS	0.722	0.639	0.477	0.477	0.740
JUS	9.300	10.300	7.959	7.959	7.922
CBSA	5.259	5.010	4.516	4.516	4.479
IRCC	4.048	3.907	3.053	3.053	3.015
GAC	0.350	0.350	0.350	0.350	0.313
CAS	3.287	3.120	3.884	3.884	3.847
IRB	1.592	1.232	1.844	1.844	1.807
Total	**$24.558**	**$24.558**	**$22.083**	**$22.083**	**$22.123**

* CSIS information has been excluded from the table for national security reasons given the non-classified nature of the report.
* RCMP is not included in this table because it does not receive any funding under the Initiative.

2.5 Logic Model

The logic model, presented at Annex A, is a visual representation that links what a program is funded to do (activities) with what the program produces (outputs) and what the program intends to achieve (outcomes). It also provided the basis for developing the evaluation matrix, which gave the evaluation team a roadmap for conducting this evaluation.

[13] IRB, as an independent Tribunal, and CAS, as the administrative service of the Federal Court and Federal Court of Appeal, provide input on implementation issues but do not sit on committees reporting to the Steering Committee on Security Certificates.

3. ABOUT THE EVALUATION

3.1 Objective

This evaluation supports:

- Accountability to Parliament and Canadians by helping the Government to credibly report on the results achieved with resources invested in this Initiative;
- The Deputy Minister of Public Safety and Initiative partners in managing for results by informing them about whether the Initiative is producing the outcomes that it was designed to produce, at an affordable cost; and
- Policy and program improvements.

3.2 Scope

The Initiative generally includes policy development and the management of cases that have one or more of the following characteristics:

- classified information is used to determine whether a foreign national or permanent resident (non-citizen) is inadmissible to Canada as described in the IRPA; and where this information cannot be disclosed because doing so would be injurious to national security or endanger the safety of any person;
- classified information is used in the context of a review of reasons for detention or of release conditions;
- prescribed conditions of release are imposed on non-citizens alleged or determined to be inadmissible on security grounds (section 34) using open and/or classified information;[14]
- enhanced diplomatic assurances against torture are sought and/or relied upon to facilitate the removal of an inadmissible foreign national from Canada.

The scope of the evaluation covered the activities that these partners have conducted since the last evaluation in February 2010.[15] Data collection for this evaluation was undertaken between March 2015 and August 2015. Generally, the Initiative does not cover cases that do not rely on classified information because such cases do not fall within Division 9 of the IRPA and are considered the day-to-day business of the immigration system.

The exception to this is the imposition and monitoring of prescribed conditions imposed on non-citizens who have been reported or found inadmissible on security grounds (section 34), as well as the pursuance of enhanced diplomatic assurances in certain removal cases. Such cases can rely on open or classified information.

As part of the 2012-13 renewal of the Initiative, mandatory minimum conditions for all non-citizens alleged or determined to be inadmissible on grounds of security were to be legislated in the IRPA and subsequently prescribed in the *Immigration and Refugee Protection Regulations*. At the time of this evaluation, the relevant regulations had not yet been established. The CBSA's forward regulatory plan identifies these regulations as having a target coming into force

[14] At the time of this evaluation, the relevant legislative provisions were not yet in force and associated regulations for prescribed conditions of release had not yet been established; therefore, no cases with this characteristic exist.
[15] http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/vltn-scrt-crtfct-2009-10/index-eng.aspx

date of June 2016.[16] Despite this, in many cases, individuals have already been subject to conditions in order to manage the risks that they pose. These cases are included in the evaluation scope since they form part of the policy and legal context in the absence of mandatory conditions.

As required by the Treasury Board *Policy on Evaluation*, the evaluation assessed the relevance of the Initiative. This included an assessment of its continued need, alignment with government priorities, and consistency with federal roles and responsibilities. The evaluation also examined the performance of the Initiative, which included the extent to which the Initiative achieved its expected outcomes and conducted its operations efficiently and economically.

3.3 Methodology

The evaluation was conducted in accordance with the Treasury Board *Policy on Evaluation*, the *Directive on the Evaluation Function*; the *Standard on Evaluation for the Government of Canada*; and the *Guidance on the Governance and Management of Evaluations of Horizontal Initiatives*. The evaluation was a goal-based, implicit design, and evaluators took into account the following factors in order to calibrate the evaluation effort, including the approach, scope, design and methods:

- Risks;
- Quality of past evaluations;
- Soundness of program theory;
- Longevity of the program; and,
- Contextual stability.

During the calibration exercise, senior management in all partner departments and agencies were consulted on their areas of focus for the evaluation. Overall, there was less interest in the issue of relevance and a desire to place more emphasis on performance, including efficiency and economy and the use of resources.

In addition, the team considered elements that were of higher risk or that were new to the Initiative: risk management of individuals through mechanisms such as mandatory or individualized conditions; and the activities of the Interdepartmental Case Coordination Committee. Given that the Initiative was evaluated in 2010 and some activities have remained stable, the team also used the previous evaluation as an input to the calibration exercise. The results of the calibration exercise are shown in Annex B.

It is noted that, in order to meet requirements of the *Financial Administration Act*, JUS carried out a component evaluation related to the Special Advocates Program (SAP),[17] which is a transfer payment program managed by JUS. The evaluation team integrated relevant findings from the SAP evaluation into the overall horizontal evaluation report.

The methodology for the evaluation included several lines of inquiry such as document/literature review, interviews, and analyses of performance and financial information. The evaluation assessed the Initiative's performance as a whole, as opposed to focusing on a single department/agency.

[16] http://www.cbsa-asfc.gc.ca/agency-agence/actreg-loireg/frp-ppr/07-eng.html
[17] http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/2015.html

3.3.1 Evaluation Core Issues and Questions

Based on the requirements of the *Directive on the Evaluation Function*, the following issue areas and evaluation questions were addressed in the evaluation:

Relevance

1. To what extent has the specific need persisted, and has the Initiative evolved to meet changing needs?

2. Is the Initiative consistent with current federal government priorities?

3. Are the appropriate federal partners involved in the horizontal initiative and are their roles and accountabilities clearly defined?

Performance

4. To what extent has there been identification of non-citizens on grounds of security inadmissibility; and mitigation of risks and threats to national security, including enforcement of conditions on individuals?

5. To what extent has the Initiative made it possible to protect classified information from public disclosure and to use classified information in security inadmissibility cases?

6. To what extent has the initiative supported fair representation of subjects?

7. Are foreign nationals and permanent residents inadmissible on security grounds denied status in Canada in a manner that respects international human rights and *Charter* obligations?

8. Is there effective horizontal governance and coordination?

9. Is the Initiative being delivered in an efficient manner?

10. What is the full cost of each partner's Initiative activities and how have these costs differed from the amounts that were allocated?

11. Are there lessons learned from other like-minded countries that could be applied in the Canadian context?

3.3.2 Lines of Evidence

The evaluation team used the following lines of evidence to conduct the evaluation: document and literature review, interviews, and a review of performance and financial data.

Document and Literature Review

The literature search included a comprehensive web-based search of public documents that were related to broad topics such as: immigration, inadmissibility, national security, and terrorism. This broad review provided insight into the evolving national security context and its implications for immigration.

The document review included proposed and enacted legislation such as the *Faster Removal of Foreign Criminals Act;* the *Protection of Canada from Terrorism Act* and the *Anti-terrorism Act, 2015*; case law; policy development documents and documents prepared for Cabinet's consideration; departmental performance reports; Speeches from the Throne; and recent evaluation reports and reviews.

Interviews

Table 3 shows that 43 interviews were conducted using guides tailored to each group.

Table 3: Stakeholder Groups and Number of Interviews

Stakeholder Group	Number of Interviews
Program Managers	10
Departmental Senior Management	8
Departmental Legal Services Unit	4
Regional Staff	4
External to Government	6
Other - SAP	11
TOTAL	**43**

Twenty-six of these interviews were with government officials from each of the partner organizations who are/were directly involved with the Initiative in different capacities. Eleven of the interviews were conducted by JUS as part of the Evaluation of the SAP and included: special advocates, Minister's counsel, public counsel, and program representatives. The remaining six interviews were with academics, retired government employees with operational experience, immigration lawyers, and counsel with expertise in civil liberties, administrative and constitutional law who also had an in-depth knowledge of the Initiative and issues related to national security. In selecting the interviewees, efforts were made to ensure that they represented a wide range of backgrounds and perspectives to capture a diversity of opinions and experiences. External interviewees were asked a limited number of relevant questions. Notable differences between internal and external to government interviewee perceptions are noted herein with context and nuances provided. All interviewees were given the option to review and validate their interview notes. In order to compile interview findings, the evaluation team recorded interviewee responses in an analysis matrix (a template of evaluation questions and indicators listed against the interview responses).

In most cases, the evaluation findings represent consensus among interviewees. However, when consensus was not present, the evaluation team used professional judgement in the identification of findings.

Review of Financial and Performance Information

Financial and performance information was also provided by partner organizations. To gather financial information, the evaluation team dovetailed their efforts with program renewal efforts that were underway by the program.

3.4 Limitations

The quality and availability of performance information varied among partners. For certain partners, performance information was not available in a timely way for the evaluation. Where performance information was lacking, the evaluation team used interviewee perceptions and document review to supplement the data.

The overall, high-level horizontal process for handling Division 9 cases is complex, and at the commencement of the evaluation was not well documented.[18] This made it difficult to identify the universe of potential cases and to determine the points at which classified information may be used in the process.

As indicated above, the evaluation included interviews with six experts external to the government. Some of the opinions expressed were of a broad policy and legislative nature and fell outside of the scope of this evaluation; therefore, it was not always possible to include these perspectives in the report.

3.5 Protocols

During the conduct of the evaluation, Initiative program representatives assisted in the identification of key stakeholders and provided documentation and data to support the evaluation. Collaborative participation greatly enriched the evaluation process.

This report was submitted to Program management and to the responsible ADMs for review and acceptance. A management response and action plan was prepared in response to the evaluation recommendations. These documents were presented for approval to the Deputy Ministers of all partner organizations and finally to the PS Departmental Evaluation Committee for consideration and for final approval by the Deputy Minister of Public Safety.

[18] In May 2015, a detailed horizontal process map was drafted by PS in collaboration with partners.

4. EVALUATION FINDINGS

4.1 Relevance

4.1.1 Ongoing Need for the Initiative

The Initiative was originally created in 2008, in response to the Supreme Court of Canada's decision in *Charkaoui v. Canada* (2007) (*Charkaoui I*: 2007 SCC 9, [2007] 1 SCR 350).[19] At that time, Parliament amended IRPA to bring the security certificate process (and other immigration proceedings that rely upon classified information) into compliance with the *Charter*. The 2010 evaluation report stated that the Initiative's purpose was "to support the Government in achieving what can be termed an essential balance between values of freedom, democracy and respect for human rights; and risks presented [by] inadmissible foreign nationals and permanent residents."

In 2015, the need for Initiative activities clearly remains. Terrorism is a prevalent global issue that poses a threat to Canada's national security. Evolving conflicts abroad continue, more than ever, to shape the nature of the threat to Canada's national security.[20] Over the past few years, this has manifested itself in a growing number of Canadians and foreign nationals residing in Canada engaging in activities that are considered counter to national security. This includes engaging in what is known as home-grown terrorist activities, and/or travelling abroad to engage in such activities. Given that many of these individuals have direct or indirect immigration links to Canada, the majority of interviewees noted an accentuated need for a national security aspect to immigration law and underscored the need for Division 9 mechanisms to process ongoing and future immigration cases relying on classified information.[21]

The majority of interviewees believe that without the Initiative, there would be a serious impact on the mitigation of risks to national security and the integrity of the immigration system. They further indicated that there is a continued need to protect certain types of information, including information sources and intelligence agencies' tradecraft. In their opinion, without the Initiative, some partners would not share and use classified information in immigration proceedings. This reluctance could weaken the government's cases or result in the government not being able to proceed with certain cases. This, in turn, could have grave risk implications, including allowing potentially inadmissible individuals to enter or remain in the country and even granting them immigration status or citizenship.

In terms of the Initiative's evolution, several policy renewals since 2010 have added new features and demonstrated the Initiative's ability to evolve alongside changing jurisprudence and legislation. For example, the application of the Supreme Court of Canada's ruling in *Charkaoui*

[19] On February 23, 2007, *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada found that the security certificate process did not comply with the *Canadian Charter of Rights and Freedoms*. The Court suspended its decision for one year to allow the government to bring the certificate process in line with the requirements of the *Charter*.

[20] It is important to note that, while in this report emphasis is placed on national security, Division 9 can be used in all inadmissibility cases. Thus, it is possible that in future there may be more cases based on non-security related inadmissibility categories. This is also a factor that underlines the continued need for the Initiative.

[21] Note that at least five out of six external interviewees questioned the relevance and appropriateness of using immigration law to address the issue of national security, given some of the new developments in recent years, including the engagement of an increasing number of Canadian citizens in terrorist activities both in Canada and abroad. From their perspective, this new development makes immigration law a partial solution to address national security risks.

v. Canada (2008) (*Charkaoui II:* ([2008] 2 SCR 326,2008 SCC 38*)* significantly increased the scope of the classified information that had to be retained and then provided to the Ministers for the issuance of the certificate; and then to the Federal Court and special advocates, once the certificate was issued and referred for a reasonableness hearing.[22],[23] Experience with the use of Division 9 led the government to advance new policy and legislative proposals including the *Anti-terrorism Act, 2015,* which includes allowing the Minister to appeal or seek judicial review of orders made during the proceedings to disclose information publicly. In addition, the *Faster Removal of Foreign Criminals Act* 2013 laid out provisions for mandatory minimum conditions to help manage the risks associated with all in Canada security inadmissibility cases (section 34), not simply those that used classified information.

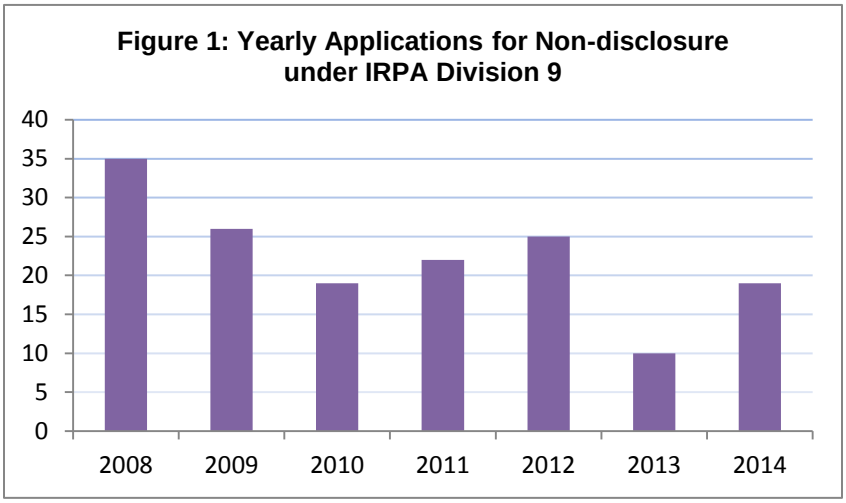
During the period under evaluation, relevant Initiative partners conducted a policy review that confirmed the Initiative's approach. The policy review included an examination of approaches and mechanisms used in other countries. The Supreme Court of Canada's 2014 *Harkat* ruling,[24] in which the Court upheld the constitutionality of Initiative activities and found its statutory framework to be consistent with the *Charter*, affirmed the continuing relevance of the Initiative.

Future Requirements for Initiative Activities

In determining continuing relevance, the evaluation examined potential demand for Initiative activities. The evaluation considered two key factors: the trend in past demand and the potential effect of other government efforts on future demand.

Figure 1 illustrates the trend in applications for non-disclosure at the Federal Court and IRB under IRPA Division 9 from 2008 to 2014.[25] Note that these figures represent only the applications for non-disclosure filed in a given year. They do not take into account cases that have continued from one year to the next. The figures are not intended to represent the level of activity of the partners in a given year, but rather the fluctuations in new cases over the time period. The graph indicates fluctuations year over year from a low of 10 to a high of 35 cases.[26]

[22] In *Charkaoui v. Canada (Minister of Citizenship and Immigration)* II, the Supreme Court ruled that CSIS must disclose all information in its possession regarding the named person in a certificate.
[23] Following the Supreme Court's ruling in *Charkaoui v. Canada (Minister of Citizenship and Immigration)* II, the Federal Court ordered the disclosure of information to Mr. Charkaoui. Given that the disclosure of the information was deemed by the Ministers to be injurious to national security, the information was withdrawn from the Court's record, which led to the quashing of the Certificate against him.
[24] In *Harkat* (2014), the Supreme Court of Canada upheld the constitutionality of Division 9 when it found the statutory framework to be consistent with the *Charter*.
[25] Note that not all IRPA decisions are judicially reviewed. Consequently, the number of decisions where classified information was considered or relied upon may differ from the number of section 87 applications for non-disclosure received at the Federal Court.
[26] This graph was compiled based on the performance information provided by CAS. Note that at the Federal Court and the IRB, a Division 9 case is defined as any matter in which an application for non-disclosure is made. This applies to the IRPA section 86 for the IRB; and section 77 and 87 at the Federal Court. Information from IRB and CAS represents a minimum "Initiative-wide" caseload since these cases appear at the end of the Division 9 process. Many other cases could have been considered by partners and routed to a non-Division 9 process.



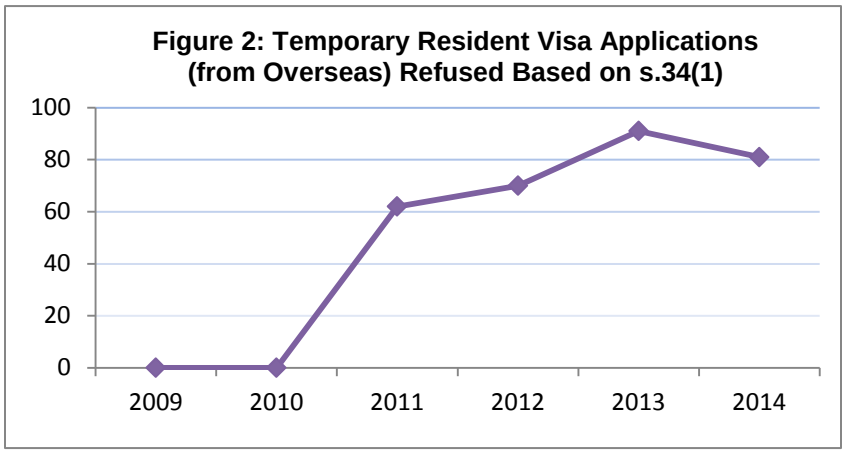
There are several factors that could increase or decrease demand for Initiative activities. In terms of increased future demand for Initiative activities, the national security environment faces continuing threats, as mentioned above, and new threats. For example, non-citizens with immigration status who travel abroad to participate in terrorist activities and return to Canada can pose a serious national security threat. The nature of their actions and the kinds of investigations required to uncover them could subsequently require the use of Division 9 provisions. Another factor is international political upheaval and migration flows. The legislative change to IRPA brought about by the *Anti-terrorism Act, 2015* may increase the number of cases that are brought under Division 9. Increased protections for human sources contained in the *Protection of Canada from Terrorism Act* are also likely to facilitate the use of Division 9 of the IRPA.

In terms of decreasing demand, related programs could have the effect of reducing the number of immigration cases that require the use of Division 9 provisions. For example, the "push the borders out"[27] concept is a multi-pronged approach that is meant to combat irregular migration and to ensure that people posing a risk to Canada's security are identified as far away from the actual borders as possible – ideally before they depart their country of origin. Some of the initiatives that contribute to the operationalization of this concept include the *Interactive Advance Passenger Information Initiative,* which will enable "board/no-board" decisions on all travelers flying to Canada prior to departure, and the *Canada-US Beyond the Border Action Plan*. Under *Beyond the Border: A Shared Vision for Perimeter and Security and Competitiveness,*[28] Canada and the United States are working on a number of initiatives to deny suspected terrorists the ability to use either country as a transit point to circumvent restrictions imposed by the other. To this end, the CBSA has adopted several approaches, including the harmonization of advanced electronic information and the enhancement of risk management systems. The CBSA also maintains Liaison Officers in locations abroad to interdict inadmissible individuals from boarding flights to Canada.

Conceptually, future success of the initiatives cited above and other *Beyond the Border* activities could lower the number of inadmissible entrants to Canada, which could in turn, contribute to a decrease in the number of cases under section 77 and section 86 of the IRPA. Another example of this potential effect is shown in statistics provided by IRCC. As displayed in Figure 2, the number of overseas visa applications that were refused based on security

[27] http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rslnc-gnst-trrrsm/index-eng.aspx
[28] http://www.publicsafety.gc.ca/cnt/brdr-strtgs/bynd-th-brdr/index-eng.aspx

grounds, in accordance with section 34 (1) of the IRPA, has increased in recent years.[29] As indicated above, this might lead to fewer section 77 and section 86 cases, but with a corresponding increase in the use of section 87 in Federal Court proceedings. The section 87 proceedings will likely be less costly individually, due to the resource requirements being lower in most cases, but more numerous for similar reasons. It is important to note that protection of information in section 87 cases involve costs to partners, which may, to a certain extent, offset savings from reduced application of inland Division 9 provisions.



Thus, despite the effect of these other efforts, it is important to note that a decline in the usage of Division 9 will not necessarily diminish the Initiative's relevance and may even increase its relevance in terms of the application of section 87 cases in visa offices outside of Canada. In serious cases where a non-citizen is considered a threat to national security, Division 9 may be the only mechanism available to prevent the individual from gaining access to Canada by obtaining a visa, permanent resident status and/or eventually citizenship and to enable his/her removal. As such, the capacity of partners to conduct these activities must be maintained.

4.1.2 Alignment with Federal Priorities

The federal government has identified national security and the fight against terrorism in Canada and abroad as among its top priorities. This is reflected in budget statements and recent legislation.[30]

Most recently, Budget 2015 stated that "The Government's foremost responsibility is to ensure the safety and security of Canadians and defend our sovereignty. Canadians want to feel safe and secure in their homes, online and in their communities…Canada is not immune to the threat of terrorism. This was tragically demonstrated by last October's attacks in Saint-Jean-sur-Richelieu and Ottawa. Economic Action Plan 2015 proposes to provide additional resources to counter terrorism…".[31]

In a speech delivered on January 30, 2015, the Prime Minister said, "The highest responsibility of our Government, of any Canadian government, is to keep Canadians safe and to keep our

[29] This figure was compiled based on the performance information provided by IRCC and represent Temporary Resident visa applications only
[30] Note that this report was written prior to government transition (November 2015).
[31] Budget 2015, page 325.

country secure… Here at home, we've also taken steps to protect Canadians. In 2013, our Government brought forward the *Combating Terrorism Act*, creating new criminal offenses for leaving or attempting to leave Canada for terrorist purposes. We've also made important amendments to the *Citizenship Act*, enabling us to revoke citizenship for dual citizens and to deny it to permanent residents who are convicted of terrorist offences."

Legislation introduced over the past several years, such as the *Faster Removal of Foreign Criminals Act (2013),* the *Protection of* Canada *from Terrorism Act* (2015), and the *Anti-terrorism Act, 2015* illustrate alignment of the Initiative at the highest levels. The *Faster Removal of Foreign Criminals Act* focuses on inadmissibility-related provisions of the IRPA. The *Protection of Canada from Terrorism Act* provides for greater protection of CSIS's human sources and confirms the jurisdiction of the Federal Court to issue warrants that have effect outside Canada. The *Anti-terrorism Act,* 2015 is intended to improve the use and protection of classified information in immigration proceedings; to allow the Minister of Public Safety to appeal or seek judicial review of public disclosure orders during proceedings and to provide another opportunity to demonstrate before the Federal Court or in appeal that the release of classified information would be harmful. It also clarifies what information forms part of security certificate cases before the Federal Court and cases involving classified information before the IRB.

National security, border control and immigration are interconnected under the IRPA as stated in the Initiative's ultimate outcome: the "integrity of the immigration system is maintained, national security is safeguarded and Canada's borders are secured." These notions are well stated in IRCC's *Report on Plans and Priorities* 2013-14 which states that "It is essential for IRCC to safeguard program integrity across the immigration and citizenship continuum and manage access to Canada while protecting the health, safety and security of Canadians…IRCC will also continue implementing the Canada–United States *Beyond the Border Action Plan*, which will help enhance security in the continental perimeter shared with the United States, while speeding up legitimate trade and travel across the border." Document review and interviews demonstrate that the Initiative is aligned with this agenda, as it is designed to enable the government to mitigate risks to national security through the use and protection of classified information in immigration proceedings.

4.1.3 Duplication and Synergy

The role of partner departments/agencies such as: the protection of public safety; screening, determining admissibility and conferring temporary or permanent immigration status; IRB and Federal Court processes and international activities are federal responsibilities that cannot be undertaken by the provinces or the private sector. The majority of the interviewees confirmed that the appropriate partners are involved and that their roles and responsibilities are well defined. As well, it is appropriate that the IRB and the RCMP have been added as partners since the last evaluation.

In terms of synergy among partners, mitigation of risks to national security involves many federal departments and agencies. Cooperation and seamless information sharing within and between various players, particularly security intelligence agencies and law enforcement are essential to effectively address national security threats. At the front end of the process, IRCC, CSIS and the CBSA play key roles in determining whether permanent residents or foreign nationals applying for temporary or permanent resident status meet admissibility requirements. For example, CSIS provides security advice that informs decision-making by its partners on

questions of inadmissibility, while the authority and responsibility for decision-making remain with IRCC and the CBSA.[32] However, challenges exist in ensuring that coordination of these roles is effective and supports decision-making. To address these challenges, all partners are making a concerted effort to increase the effectiveness of their working relationships. A concerted effort is also being made by all operational partners to minimize differences and to increase the level of coordination and integration.[33]

As mentioned above, other major anti-terrorism initiatives are being undertaken by the Government of Canada on the legislative, legal and enforcement fronts that address national security risks. A number of government initiatives are intended to stop the entry to Canada of suspected terrorists or mitigate terrorist threats before they get to the borders. Document review and interviews show that these initiatives are complementary to the efforts of those under the Initiative.

4.2 Performance – Effectiveness

Identifying the Initiative's "Case Universe"

The identification of individuals who pose a risk to national security falls under the core mandates and day-to-day operations of Initiative partners, and provides an essential foundation to trigger IRPA Division 9 activities. Identification is accomplished through initial screening, normally done by IRCC staff, the results of which are subsequently forwarded to the CBSA for further investigation. Working collaboratively, IRCC, CSIS and the CBSA play a key screening role. CSIS screens applicants and subsequently provides the CBSA with advice on individuals who may be inadmissible to Canada. The effective and timely exchange of accurate and complete information among CSIS, IRCC and the CBSA enables the identification of inadmissible individuals.

It must be noted that at the outset of the identification process, partners cannot predict the number of individuals who will eventually be identified as Division 9 cases. There is a "funnel" effect as the process proceeds; that is, out of the large number of potential cases, only some are eventually processed as Division 9 and the remaining are processed using other avenues. For example, identification of cases that may fall under the Initiative can begin when CSIS sends security advice or when the CBSA writes an inadmissibility report under section 44 of the IRPA. Between 2009-2010 and 2013-2014, CSIS sent close to 4,300 security advice briefs to the CBSA and IRCC for consideration. During that time period, the CBSA prepared 288 section 44 reports alleging inadmissibility on grounds of security (s.34). It is important to note that, for various reasons, not all of the security advice received by the CBSA will result in the preparation of a section 44 report. Nor will all the section 44 reports lead to a proceeding involving the

[32] Decision-making for inadmissibility rests with CBSA for some grounds of inadmissibility at ports of entry and inland and with the IRB, Immigration Division for the remainder of the grounds.

[33] Documents reviewed indicate that IRCC and the CBSA are implementing new measures to update the training and tools available to officers in Canada and abroad to perform their security screening duties, including those related to decisions pursuant to section 34 of the *IRPA*. For example, the CBSA has completed a review of training requirements for screening officers and is in the process of implementing a new, formal program which includes a comprehensive component addressing section 34, which will also be accessible to IRCC visa officers. Accordingly, while IRCC and the CBSA continue to strengthen collaboration on issues related to inadmissibility, the Government is also examining additional ways in which IRCC and CBSA officers could be further supported in all areas of their decision-making processes. (*Government of Canada Response to the Seventh Report of the Standing Committee on Citizenship and Immigration*: (http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6236884).

protection of information under Division 9 of the IRPA, since some files are processed using open source information, or information known to the person concerned.

This underlines the existence of interdependence and the importance of information sharing among the relevant partners.

4.2.1 Mitigation of Risks and Threats to National Security

The Initiative has contributed, to some extent, to the mitigation of risks and threats to national security through three primary means: the use and protection of classified information in inadmissibility proceedings in order to support the integrity of the security, intelligence and immigration system; the enforcement and risk management of inadmissible non-citizens; and the denial of status in Canada and facilitation of their removal from Canada.

Protecting the Integrity of the Security and Intelligence System

Division 9 of the IRPA provides for the use and protection of classified information in immigration proceedings under sections 77, 86 and 87. The government's reliance on and actions to protect classified information that would be injurious to Canada's national security or endanger the safety of a person if released publicly was described by interviewees to be appropriate and within the government's prerogative. Performance information indicates that over the past four years, 95 applications for non-disclosure were made under sections 86 and 87 of the IRPA.[34] Of these, in at least 46 cases *in camera and ex parte* hearings were held, illustrating the use and protection of classified information during proceedings at the IRB and Federal Court.[35]

In terms of challenges to using classified information, interviewees described disclosure obligations as problematic, particularly post-*Charkaoui II*.[36] They described disclosure obligations as very broad and resource intensive. Although some organizations appear to have improved their processes for meeting disclosure obligations, a number of interviewees placed considerable expectation on the provisions of the *Anti-terrorism Act, 2015* to limit the scope of disclosure obligations and make the process more manageable. The *Act* sets out the scope of the disclosure obligations and allows the Minister of Public Safety and Emergency Preparedness and the Minister of Immigration, Refugees and Citizenship Canada to appeal or have the Court review orders for public disclosure during Division 9 proceedings. These measures offer another opportunity for the Government to ask the Court to protect classified information.

Some of the interviewees described having difficulty using classified information, mainly because of disclosure obligations, as one of the most important challenges faced by case officers. In addition, some information cannot be used in proceedings as it may not meet the

[34] The total of 95 refers only to applications that were made during the evaluation period starting in 2010. In order to show use of the Division 9 provision during the evaluation period, 61 "applications" (representing figures from 2008 and 2009) have been removed.
[35] The review of Court proceedings of these cases did not always provide the exact reason(s) for an *in camera, ex parte* hearing not being held in the remaining cases. However, in some cases, the presiding Judge did not order such a hearing because in his/her opinion the decision-maker had not relied on any redacted material to make the decision and, therefore, it was not required.
[36] As indicated above, In *Charkaoui v. Canada (Minister of Citizenship and Immigration)* II, the Supreme Court ruled that the Service must disclose all information in its possession regarding the named person in a certificate. Following this ruling, the Federal Court ordered the disclosure of information to Mr. Charkaoui.

appropriate legal (reasonable grounds) threshold. This is partially attributable to differing partner authorities, mandates and purposes for information collection. For example, under section 12 of the *Canadian Security Intelligence Service Act* (CSIS Act), information that is collected focuses on "activities that may on reasonable grounds be suspected of constituting threats to the security of Canada" (emphasis added); while information gathered by the CBSA and IRCC for an admissibility decision aims to meet a reasonable grounds to believe threshold. As a result, sometimes the information gathered by CSIS may not meet the threshold required for use in inadmissibility proceedings.

External to government interviewees questioned the appropriateness of using intelligence in immigration proceedings. From their perspective, the threshold imposed in the IRPA for inadmissibility (i.e., reasonable grounds to believe) is not high enough.[37] Accordingly, in their opinion, the threshold that is used in criminal law litigation (beyond a reasonable doubt) should be used in immigration proceedings as well.

The interviews and document review indicated that ongoing efforts are being made by Initiative partners to improve their understanding of issues surrounding the collection and use of intelligence that respects their organizational information-gathering authorities and thresholds. At the same time, efforts are also being made to improve the CBSA's investigative capabilities to allow the Agency to conduct its own investigations in order to be able to obtain information sufficient to meet the reasonable grounds to believe threshold that is required by the IRPA.

Enforcement and Risk Management of Inadmissible Non-citizens

The IRPA is meant to contribute to the mitigation of risks to national security through enforcement and risk management of non-citizens who are alleged or determined to be inadmissible. The CBSA is responsible for monitoring compliance with conditions, whether they are imposed by the CBSA, the IRB or the Federal Court. Document review indicates that, prior to 2012, there was broad discretionary authority under the IRPA for the CBSA, IRB or Federal Court to impose conditions on those found inadmissible, to verify compliance with conditions, or to set consequences for breaches of conditions.[38] That is, it was at the discretion of the officer, the Immigration Division of the IRB or the Federal Court as to which conditions to impose. As of June 2015, 65 out of 139 (46%) non-citizens subject to an inadmissibility report on section 34 grounds were subject to conditions; similarly, 50 out of 95 (53%) individuals under a removal order on section 34 grounds were subject to conditions. Three named individuals under security certificates were being monitored through the imposition of stringent release conditions.

The *Faster Removal of Foreign Criminals Act (2013)*[39] amended the IRPA to allow for mandatory conditions to be imposed on all non-citizens alleged or determined to be inadmissible on grounds of security and created the legislative authority to prescribe those conditions in the regulations. It is important to note, however, that these provisions are not yet in force. The CBSA is leading the development of associated regulations, which are planned to

[37] Section 33 of the IRPA states that "The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur."
[38] http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-06-20a.asp
[39] From legislative summary: This enactment provides for the mandatory imposition of minimum conditions on permanent residents or foreign nationals who are the subject of a report on inadmissibility on grounds of security that is referred to the Immigration Division or a removal order for inadmissibility on grounds of security or who, on grounds of security, are named in a certificate that is referred to the Federal Court".

come into force in February 2017.[40] These regulations are intended to establish a consistent baseline for conditions of release to be imposed on all individuals alleged or determined to be inadmissible on security grounds, and as such, the monitoring and control of such individuals.

The CBSA interviewees indicated that the principal reasons that the regulations have not been implemented to date have been competing concurrent Government priorities and a temporary shortage of resources within the responsible policy area of the CBSA. These interviewees maintained that under subsection 44(3) of the IRPA, officers currently have sufficient authorities to impose conditions necessary to mitigate risks to public safety and flight risks that are identified on a case-by-case basis. Further, under the existing regime, the conditions imposed by officers in higher risk cases will, in most instances, exceed the mandatory minimum conditions that will be prescribed by regulations. As of January, 2015, dedicated policy resources were allocated to the development of the mandatory conditions regulations and, as previously noted, they are now expected to come into force in February 2017.

Nevertheless, the establishment of these mandatory conditions was meant to ensure a consistent baseline of conditions to be imposed in all in Canada section 34 inadmissibility cases and, as such, to facilitate monitoring of individuals posing national security risks; the evaluation observes that this lack of implementation represents a delay in addressing a previously identified risk.

The implementation of the mandatory conditions would present an opportunity for the Initiative to better contribute to establishing a robust and standardized enforcement regime as envisioned by the legislation.

Removal of Individuals

Denying access to Canadian territory to persons who pose a threat to Canada's national security is one of the main objectives of Division 9 of the IRPA. As such, the IRPA provides for the removal from Canada of non-citizens found inadmissible on security grounds. Accordingly, if the subjects of removal order do not voluntarily comply with their removal or if their choice of destination is not approved, their removal order shall be enforced by the Minister of Public Safety and Emergency Preparedness, and the individual shall be removed to the country from which they came to Canada; the country in which they last permanently resided before coming to Canada; a country of which they are a national or citizen; or the country of their birth. However, in some cases, those found inadmissible on security grounds may not be immediately removed from Canada due to various impediments, including a substantial risk of torture in the country to which they would be removed.

When there is a substantial risk of torture, the government may choose to seek enhanced diplomatic assurances, which include a post-return monitoring mechanism to verify that the country is complying with the assurances given. The principles and processes for seeking diplomatic assurances against torture in immigration cases provide that assurances would only be considered in cases where, among other things, the initial assessment of the danger posed by the non-citizen, or the nature and severity of acts they committed favours removal.

[40] As indicated in the Management Response and Action Plan that were developed in response to the recommendations made by this evaluation, the Regulatory Impact Analysis Statement and the final Regulations are targeting publication in the *Canada Gazette* in the 2016-2017 fiscal year.

Performance information indicates that between 2009 and 2014 a total of 31 individuals who were found inadmissible on section 34 grounds were removed from Canada. During this time, the pursuit of enhanced diplomatic assurances was required in only one instance.[41]

Although the challenge and complexity of negotiating diplomatic assurances are widely acknowledged, they were identified by interviewees as issues that have not affected the Initiative's overall contribution to the achievement of its objective, i.e., the mitigation of risks to national security.

4.2.2 Fair Representation of Subjects

The current regime was found to strike an appropriate balance between mitigating threats to national security and ensuring procedural fairness for individuals. Evidence gathered through interviews and document reviews indicates that procedural fairness has improved in recent years, particularly as a result of legislative changes introduced since 2008. Specific provisions that have been implemented and that are perceived to have promoted fair representation of individuals include:

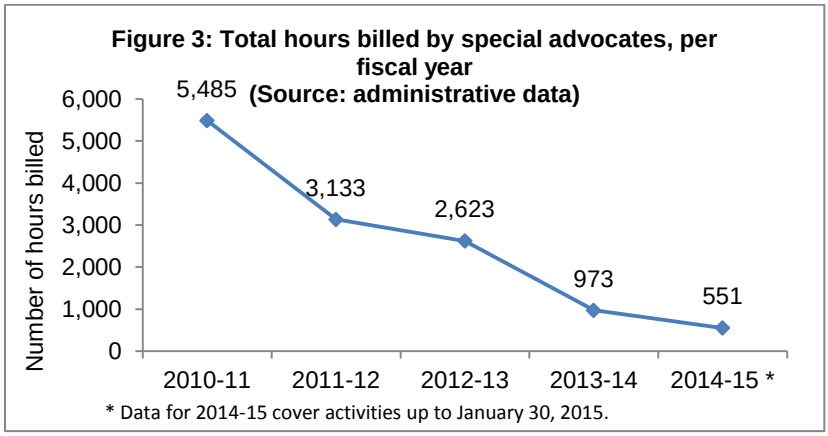
- Special Advocates Program;
- Use of Legal Aid;
- Enhanced Diplomatic Assurances against Torture.

Special Advocates Program

Introduced in 2008, the SAP is viewed as a major change to the Initiative that has both facilitated the use of classified information in Division 9 proceedings, and contributed to the protection of the interests of the individuals, which has resulted in creating a fairer process overall. The JUS evaluation of the SAP indicates that, "special advocates have, in fact, been in a position to challenge the Minister's claims related to the protection of certain information, as well as to challenge the relevance, reliability, or sufficiency of the protected information." Special advocates have played a significant role in six cases billing close to 13,000 hours from 2010-2015.[42]

There were five initial certificates in 2008. One of these was quashed and one was found unreasonable, both prior to the evaluation period. In the matter of *Canada (Citizenship and Immigration) v. Mahjoub (Mahjoub* (Re), 2013 FC 1097*),* the Federal Court found that the certificate was reasonable but an appeal is pending. In the matter of *Canada (Citizenship and Immigrations) v. Harkat* the certificate was found reasonable, and he is subject to removal proceedings. In the case of *Canada (Citizenship and Immigration) v. Jaballah,* a decision on reasonableness is pending.[43] In addition, the IRB appointed special advocates on three occasions: once, during a detention review for a migrant who arrived in Canada aboard the MV *Sun Sea;*[44] and twice during inadmissibility proceedings before the IRB. Both of the inadmissibility proceedings were active during the period of the evaluation. Figure 3 clearly illustrates a decline in the use of special advocates in more recent years. This is likely due to the fact that no new security certificates have been issued since 2008.

[41] In this case, the individual was inadmissible under section 36 of the IRPA.
[42] Department of Justice Canada. *Evaluation of the Special Advocates Program – February 24, 2015*: page 10.
[43] Post script: On May 26, 2016, the Federal Court found the security certificate imposed on Mr. Jaballah unreasonable and quashed it.
[44] MV *Sun Sea* was a cargo ship that brought 492 Sri Lankan Tamils into Canada (British Columbia) in August 2010.



Some interviewees expressed the view that some of the limitations that are imposed on special advocates, especially those concerning communications between special advocates and public counsels, could undermine the fairness of the process.[45] However, as will be described below, the Supreme Court of Canada in the *Harkat* 2014 ruling upheld the constitutionality of Division 9.

Use of Legal Aid

Under the Initiative, JUS administers agreements with provincial legal aid plans for the provision of legal aid to assist named persons in paying for public counsel; this support is separate and apart from that provided by the SAP.

Legal Aid was described by some interviewees as playing a unique role in the Initiative, as it is primarily concerned with the fairness of the process by ensuring that named individuals are adequately represented. During the period 2010-2011 to 2014-2015, three Division 9 cases received legal aid funding from JUS. The total cost was $6.743M of which $2.608M was provided through Division 9 of IRPA funding. Interviewees indicated that the provision of legal aid has indeed contributed to creating a fairer system.

Enhanced Diplomatic Assurances against Torture

As described above, save in exceptional circumstances, removing an individual to a country where they would face a substantial risk of torture is prohibited. However, foreign nationals who cannot be removed because they would face a substantial risk of torture in the receiving country can pose a threat to national security or to public safety if they remain in Canada. Thus, enhanced diplomatic assurances may be sought in the immigration context in serious inadmissibility cases, including on security grounds (s. 34). The purpose of these enhanced diplomatic assurances is to ensure that the named individuals will not be subject to torture upon their deportation.[46] The enhanced diplomatic assurances also include a post-return monitoring

[45] Section 85.4(2) of the IRPA states that: "After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate."

[46] Note that enhanced diplomatic assurances obtained may be subject to judicial review by the Federal Court. The Court does not assess whether the assurances are sufficient. However, the decision assessing risk upon removal or the decision to remove may be judicially reviewed.

mechanism, which is meant to ensure that the receiving country respects the terms of assurances provided.

Seeking enhanced assurances is subject to prior authorization by Cabinet. Over the past three years, the Government of Canada negotiated enhanced diplomatic assurances which included a post-return monitoring mechanism. These negotiations were described as sensitive, complex and lengthy, generally involving multiple meetings with the receiving state in Canada and abroad. Within the context of the Initiative, and in accordance with the requirements of IRPA, the enhanced diplomatic assurances were sought and successfully obtained in one case. GAC, which has the mandate to conduct foreign relations, plays a lead role for the Government of Canada on its approach to implementing international legal obligations, including those related to the IRPA in the context of the Initiative. The evaluation notes GAC's regular engagement with like-minded international parties and ongoing review of international law and practices related to enhanced diplomatic assurances. It was noted that sharing experiences and best practices with other jurisdictions contributes to mitigating risks. Obtaining enhanced diplomatic assurances has resulted in the removal of one individual who was deemed to be inadmissible under section 36 of the IRPA.

Supreme Court of Canada's 2014 *Harkat* Ruling

The fairness of Division 9 processes of the IRPA was confirmed by the Supreme Court of Canada's 2014 ruling on the *Harkat* case. Mr. Harkat appealed the Federal Court's decision that had found him inadmissible on security grounds. Mr. Harkat argued before the Supreme Court of Canada, among other matters, that the Division 9 mechanism was unconstitutional because it does not enable the non-citizen subject of the proceedings to know and respond to the Government's case and places restrictions on the communications of special advocates with the non-citizen.

The Supreme Court made a number of findings, including that the provisions of the Division 9 scheme under challenge were constitutional, and that they did not violate the rights of the non-citizen named in the certificate to know and meet the case against him, or the right to have a decision made on the facts and the law.

In particular, the Court found that the *IRPA* scheme provides sufficient disclosure to the named person to be constitutionally compliant, since the designated judge has a statutory duty to ensure that the named person is reasonably informed of the case against him or her throughout the proceedings. A named person is "reasonably informed" if he or she has personally received sufficient disclosure to be able to give meaningful instructions to his or her public counsel and meaningful guidance and information to his or her special advocates which will allow them to challenge the information and evidence presented in the closed hearings.

The Court also ruled that the communications restrictions imposed on special advocates do not render the scheme unconstitutional, as they are not absolute and can be lifted with judicial authorization, subject to conditions deemed appropriate by the designated judge. The judicial authorization process gives the designated judge a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties.[47]

[47] Canada (*Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13643/index.do).

4.2.3 Horizontal Activities

Provision of Litigation Services and Legal Advice

Performance information notes an annual average of 17,670 hours of litigation services and 2,887 hours of legal advisory services from 2009-2010 to 2013-2014. Interviewees found litigation services and advice provided by JUS to be timely, useful, and of high quality. The majority of the service user interviewees responded that they agreed with the statement that legal advice was presented, and legal services were carried out "in a manner that meets my needs." Interviewees noted that although historically there may have been some challenges with consistency of the advice received, JUS now deals with identified leads from the appropriate departments/portfolios and they put forward "one voice." This improvement in consistency in recent years was noticed by several users. It was further noted that JUS lawyers are thoroughly specialized in the areas that meet their clients' needs.

JUS has commented that an important factor that could affect its delivery capacity is that the department is often called upon to respond to motions made by special advocates or rulings by the courts, which are resource intensive. Another challenge to timeliness is dealing with multi-agency files involving classified information which must be channeled to legal advisors with appropriate security clearances.

JUS was of the opinion that future security certificate cases initiated under current legislation would likely proceed more smoothly than in the past, as the law and procedures are clearer now and JUS has gained valuable lessons learned from past security certificate cases.

JUS appears to be fully aware of, apprised, and responsive to the expectations of their Initiative partners regarding both their advice and litigation services, and keenly involved in pro-actively finding solutions to problems as they emerge. This approach and the effort expended to provide high quality specialized service in a timely manner has not been lost on service recipients.

Governance and Coordination

PS has the overall coordination and leadership responsibility for the Initiative and has been active in leading and coordinating policy and funding renewal activities four times since the Initiative's inception in February 2008. PS fulfills its responsibility for leading and coordinating the relationship among Initiative partners through a formal governance structure that includes the ADM Steering Committee on Security Certificates[48] and three working groups that report to this committee: the Policy Working Group; the Interdepartmental Case Coordination Committee; and the Interdepartmental Committee on Enhanced Diplomatic Assurances Against Torture.

The ADM Steering Committee met a limited number of times during the period under evaluation; instead communications at the ADM level were secretarially coordinated. The majority of Interviewees described PS's overall coordination and leadership role as positive. The number of successful networks created was given as evidence. Interviewees also stated that PS officials demonstrated a good level of collaboration and were willing to engage to resolve partner issues, maintaining close consultation with the Privy Council Office (PCO). Remaining gaps include the

[48] IRB, as an independent Tribunal, and CAS provide input on post-policy funding issues but do not sit on committees reporting to the ADM Steering Committee on Security Certificates.

need for more communication at the DG/Director level, as well as holding quarterly meetings among IRCC, CBSA, and CSIS to discuss regional issues.

At the working level, the Policy Working Group met multiple times in preparation of the policy and funding renewal documents. The formal implementation of the new Interdepartmental Case Coordination Committee has been a success. Case coordination meetings were described as positive, allowing members to act in accordance with their own mandates; hear and discuss options for proceeding; and bring due diligence to cases. The establishment of these meetings was seen as an improvement over the previous approach where discussions were more informal. The Interdepartmental Committee on Enhanced Diplomatic Assurances against Torture met infrequently, as expected, since no case has been put forward since 2011.

The evaluation notes that horizontal performance information is not used for ongoing performance monitoring and decision-making and, for some partners, was not readily available for the evaluation. Those partners indicated that the lack of performance information was due to the requirement to gather information manually from regional offices or due to competing priorities in central units that handle data requests. This presents an opportunity for improvement since, according to the Horizontal Performance Measurement Strategy, each partner was responsible for monitoring performance against identified indicators and for gathering data to be provided in support of the horizontal evaluation.

4.3 Performance – Efficiency and Economy

The evaluation assessed resource utilization, in relation to the production of outputs and progress toward expected outcomes. To do so, the evaluation first examined how financial resources have been used by partners by examining the differences between allocations and expenditures. The assessment also included an examination of alternatives and lessons learned that could be applied in the Canadian context to improve the Initiative.

It was envisioned at the outset of the evaluation that cost per type of case (sections 77, 86, and 87) might be calculated. However, the evaluation team was presented with several limitations to conducting this exercise; these limitations are discussed below.

4.3.1 Efficient Use of Resources

Document review indicates that, from the horizontal perspective, partners have made appropriate and efficient use of financial resources. Financial information shows that current expenditure levels are similar to those in 2008-2009, as reported in the previous evaluation. In 2008-2009, partner expenditures were $20.8 million.[49] Information from 2012-2013 and 2013-2014 shows expenditures of $20.01 million and $19.5 million respectively.[50] This demonstrates cost containment, which was partially realized as a result of certain efficiency measures that were taken by partner organizations, including organizational and accommodation reorganization, increased coordination of lower complexity tasks to less specialized employees, reduced travel costs through videoconferencing and implementation of IT solutions, including software. It is also noted that partners have absorbed some costs and have been required to manage a 10% allocation reduction during the time period under evaluation.

[49] CSIS expenditures are not included in this amount for comparison purposes.
[50] As an unfunded partner in the Initiative, the RCMP absorbs the cost of resources devoted to it internally.

Table 4 illustrates that, during the past two years, partners underspent against their allocations by a combined amount of 9% or about $2.1 million in 2012-2013; and 12% or $2.6 million in 2013-2014.

Table 4: Allocations vs. Expenditures 2012-2013 and 2013-2014 ($ in millions, figures are rounded)

Partner**	2012-2013			2013-2014		
	Allocated	Spent	% of Allocation Unspent	Allocated	Spent	% of Allocation Unspent
PS	0.477	0.477	-	0.477	0.477	-
IRCC	3.053	2.784	9%	3.053	2.814	8%
JUS*	7.959	7.167	10%	7.959	6.073	24%
GAC	0.350	0.220	37%	0.350	0.331	5%
CBSA	4.516	4.048	10%	4.516	4.394	3%
CAS	3.884	3.884	-	3.884	3.884	-
IRB	1.844	1.430	22%	1.844	1.502	19%
Total	**$22.083**	**$20.010**	**9%**	**$22.083**	**$19.475**	**12%**

* Note: The majority of JUS unspent allocation was vote 5 related (the SAP). In 2012-2013, the SAP lapse was $379,587; in 2013-2014, the lapse was $868,940. These figures represent about half of the total JUS lapse for these two years.

** Note: CSIS information has been excluded from the table for national security reasons given the non-classified nature of this report. The RCMP did not receive funding under the Initiative given its limited role.

As shown in Table 4, a number of partners have wide variances in allocations vs. expenditures; however, since the Initiative is funded under a special purpose allotment, unspent funds are returned to the fiscal framework. It is noted that some partners have very limited funding and this may overstate the magnitude of this result. Interviewees indicated that, despite underspending, they continue to feel funding pressure if they wish to remain in a state of readiness to respond to the unpredictable demand for their highly specialized services and expertise and to have infrastructure permanently ready for service delivery.

Table 5 shows that the Initiative is characterized by an unpredictable and fluctuating workload.

Table 5: Key Output Production

Partner	Output	2010-11	2011-12	2012-13	2013-14	2014-15
CSIS	# of security advice briefs sent to CBSA	898	1186	1113	838	238
IRCC	# of inadmissibility cases processed by Inland regions (sections 34-38 of the IRPA)[51]	320	246	197	324	n/a
CBSA	# of 44 Reports prepared on s.34 (security) grounds	88	67	33	49	n/a
CBSA	# of Immigration Division admissibility hearings involving s.34 (security) grounds	9	17	7	11	n/a
JUS	Litigation services (hours)	19,030	12,400	19,718	10,839	6,545
JUS	Advisory services (hours)	2,304	2,206	3,770	2,353	798
JUS	Hours billed by special advocates	5,485	3,133	2,623	973	551
IRB[52] & CAS	Applications for non-disclosure	19	22	25	10	19

[51] It is not known whether classified information was used to process these cases. IRCC began recording these statistics on April 1, 2014.

Partners whose main role is related to the development of policy and legislation or who are involved primarily in committee work (GAC, RCMP and PS) are less subject to caseload-driven fluctuations. However, it must be noted that the level of effort for this role has not diminished. For example, PS, as the horizontal lead, has produced four rounds of renewal documents in the five-year period. All partners were involved in these efforts.

Production of the outputs listed in Table 5 fluctuates for several reasons. As previously noted, there is a "funnel" effect to the processing of cases wherein at the front end of the process, there are a large number of potential cases that may not use the mechanism under Division 9 of the IRPA. Whether or not the Division 9 mechanism is used in these cases, these cases still consume partner time and resources at the front-end of the process.

When a case ultimately proceeds under Division 9, the amount, variety and cost of legal services required depends on a number of factors such as: case complexity, novelty, amount of classified information potentially subject to disclosure, pace of litigation, and the number of *Charter* and other challenges incidental to the proceedings. In addition, a delay in proceedings can result in a decrease in or postponement of proceedings-related costs, but also give rise to the need for continuing case maintenance. Varying case complexity means that there is no "one to one" ratio for cost per case. For example, a security certificate case could be many times more complex than a section 86 or section 87 case.

These factors make it difficult to calculate an average or standardized cost per case. In addition, partners do not use a common, individualized case identifier across organizations, so calculating the horizontal cost of an individual case is not possible. Furthermore, only some partners indicated that they have been tracking costs at the activity/output level.

Document review and interviews emphasize the possibility of unpredictable future demand, which reveals that the economy of IRPA processes may be positively affected by a number of developments in recent years. Some of the interviewees suggested that some costs may decrease as experience is gained following the Courts' clarification of rules and expectations concerning disclosure obligations. In addition, legislative changes introduced through the *Anti-terrorism Act*, 2015 will enhance the ability of federal agencies and departments to gather and share information pertaining to national security, some of which may ultimately be used as classified information in proceedings under the IRPA. Finally, it was suggested that the increased use of case coordination meetings among partners can result in improved administrative and coordination efficiencies.

Efficiency of the Information Sharing Processes

In line with senior management expectations, the evaluation team focused on the efficiency of information sharing among IRCC, CSIS and the CBSA, who are involved at the onset of initiating inadmissibility cases which may eventually proceed as Division 9 cases. Interviewees indicated that both the processes and practices for sharing information have improved in recent years. The quality of information and the efficiency of its exchange were reported to be good. Roles and responsibilities are clear, and cooperative relationships among partners appear to be the norm. Information exchange was described as timely, smooth and useful for decision-making. Interviewees noted an increased level of review and discussion of cases and exchange of best approaches or mitigation strategies on a case-by-case basis in order to avoid reliance on

[52] The IRB had two section 86 cases which have been added into the data for 2011.

Division 9. Some attributed this to the initiation of case coordination meetings, which are considered to be a good forum for information sharing.

A number of remaining information-sharing challenges affect the efficiency of information exchange. These include: technical challenges such as inconsistent secure electronic access across departments/agencies and corresponding security-cleared personnel who are able to access the system as required; hesitation in sharing source documentation and information due to the risk of its subsequent disclosure and potential associated risk impact on operational activities.[53]

In addition, some interviewees in the regions expressed the need for training and support on how to process cases. Documents, including the CBSA 2014-15 Report on Plans and Priorities, indicate that the CBSA is planning to establish specialized processes to manage tips and referrals, as well as analyze trends, and provide information, guidance and training to CBSA staff and partners regarding roles, responsibilities and procedures.

4.3.2 Lessons Learned and Alternatives

Document review indicates that partners have performed due diligence in terms of environmental scanning to develop policy options and alternative approaches. These options included a consideration of approaches taken by other countries.

More recent documents articulate that the most cost-effective way to deal with inadmissible individuals is to prevent their access to Canada in the first instance. Lessons learned may be gleaned from JUS' *Summative Evaluation of the Crimes against Humanity and War Crimes Program* (October 2008). This evaluation examined several remedial processes and concluded that "Essentially, if an allegation can be dealt with before a person suspected of involvement in crimes against humanity and war crimes becomes a permanent resident or citizen or is granted refugee protection, the available remedies can be very cost effective."

In addition, there are other federal programs, mentioned previously in this report, that attempt to "push the border out" so that foreign nationals who may pose a risk to Canada's security are identified ideally before they depart their country of origin. It is noted that these alternatives cannot address all cases of inadmissible non-citizens as, notwithstanding all best efforts, there will be cases where inadmissibility is discovered after the non-citizen accesses Canadian territory. Or, as discussed earlier in the report under section 4.1.1 (Future Requirements for Initiative Activities), security cases that are refused by the visa offices abroad have the potential of becoming section 87 cases. Thus, the Initiative represents a needed approach to managing individuals who do manage to obtain entry to Canada.

In terms of broader options in the legal landscape, external interviewees identified the criminal justice system (subjecting any violation of national security to criminal law) as the only viable alternative to the current regime worthy of consideration. The key point, in their view, is sensitivity to procedural fairness vis-à-vis the justice system. They argued that if Division 9 of the IRPA were not in place, all offences committed by non-citizens would be approached in the same manner as citizens, which would be by using the criminal justice system. This, in their view, would be a fairer and more efficient way of dealing with individual cases concerning national security. However, document review and the majority of the interviewees indicated that

[53] Some of these are systemic problems that go beyond the Division 9 Initiative; and as such, fall outside of the scope of the evaluation.

this option will not improve the efficiency or effectiveness, including cost-effectiveness of the process. Furthermore, internal interviewees expressed that Division 9 cases of the IRPA represent immigration issues for which immigration tools are needed. They stated that criminal justice is not appropriate because the objectives are different. Immigration processes seek to deny status to non-citizens and remove them from Canada when they are inadmissible; while criminal processes seek to assign culpability and impose a sentence for a *Criminal Code* violation. These two processes are not interchangeable.

5. CONCLUSIONS

Relevance

The original impetus for the Initiative when it was established in 2008 was to provide for the appointment of a special advocate to represent the interest of a person named in a security certificate[54] and to preserve the Government's ability to use and protect classified information in immigration proceedings through a *Charter*-compliant process. In 2015, these needs remain. Over the past five years, the Initiative has evolved to meet the changing immigration and threat environment. Terrorism and national security remain prevalent issues in Canada and abroad, and there is a continued need to use and protect certain types of information during immigration proceedings in order to preserve information sources and intelligence or law enforcement agencies' tradecraft. Several policy renewals have added new components and demonstrated the Initiative's ability to evolve with changing jurisprudence. The Supreme Court of Canada's 2014 ruling in *Canada (Citizenship and Immigration) v. Harkat (*2014 SCC 37, [2014] 2 S.C.R. 33),[55] in which the constitutionality of Division 9 of the IRPA was upheld and IRPA's statutory framework was determined to be consistent with the *Canadian Charter of Rights and Freedoms* (the *Charter*), affirmed the continuing relevance of the Initiative.

In terms of future requirements for Initiative activities, it is anticipated that the Initiative's fluctuating levels of effort will continue into the foreseeable future. This observation is based on past trends and factors that could either increase or decrease the need for Initiative activities. International political upheaval and migration flows, as well as known and emerging national security issues and recent legislation such as the *Anti-terrorism Act, 2015,* could increase the need for Initiative activities and increase the number of Division 9 cases. On the other hand, the success of other programs such as: the Interactive Advance Passenger Information Initiative; the Beyond the Border Action Plan; and the presence of CBSA Liaison Officers oversees, which aim to prevent the entry of inadmissible foreign nationals to Canada, could decrease demand. These other security-related federal programs are complementary to the Initiative and, notwithstanding their impact, there will be a continuing need for the Initiative to process future cases.

Budget announcements and recent legislation demonstrate that the Initiative is well aligned with the Government of Canada's public safety priorities. National security and counter-terrorism efforts are among the government's top priorities. In order to deliver on these priorities through Initiative activities, the appropriate federal partners are actively engaged. The role of partners including the protection of public safety; determination of admissibility and conferring temporary or permanent immigration status; IRB and Federal Court proceedings and international activities are federal responsibilities that cannot be undertaken by the provinces or the private sector.

[54] The term "security certificate" is used in this document to refer to a "certificate" as referenced in s. 77 of the IRPA.
[55] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13643/index.do

Performance

The Initiative has contributed to the achievement of its stated immediate and intermediate outcomes. In particular, the Initiative helped maintain the integrity of the security and intelligence system and mitigated risks to national security. Together, partners have demonstrated the ability to use and protect classified information in immigration proceedings. Risk has been mitigated by keeping non-citizens from accessing Canada, from gaining immigration status and by revoking status. Risk has also been mitigated through the imposition and monitoring of conditions of release on some individuals, and a number of individuals have been removed from Canada.

As attested by the Supreme Court of Canada's 2014 *Harkat* ruling, the Initiative has provided fair representation to individuals named under security certificates. In this case, the presence of a special advocate was found to provide a substantial substitute for the disclosure of information to the individual and to protect his interest in proceedings that were held in the absence of the public and the individual and his counsel. The post-*Charkaoui I* (*Charkaoui v Minister of Citizenship and Immigration)* legislative changes, which included the introduction of measures such as the Special Advocates Program have improved the procedural fairness of the regime and its compliance with the *Charter*.

With respect to horizontal governance and coordination, partners view PS's overall coordination and leadership role as positive. PS has been effective in bringing the partners together, and the implementation of the Interdepartmental Case Coordination Committee highlights this success. Horizontal information exchange among the partners, particularly the CBSA, IRCC, RCMP, and CSIS was found to be timely and useful for decision-making purposes. The efficiency of information sharing processes has improved in recent years. Other horizontal activities such as litigation services and advice provided by JUS were described as timely, useful, and of high quality. The consistency of the advice provided across government has improved in recent years.

In terms of efficient use of resources, partners have demonstrated overall cost containment, with funding levels reduced over the past five years. For some partners, allocations versus expenditures show a wide variance (under-spending). Performance information and interviewees indicate this is due, in part, to the fluctuating nature of the workload or case delay. Interviewees indicated that, despite underspending, they continue to feel funding pressure if they wish to remain in a state of readiness to respond to the unpredictable demand for their highly specialized services and expertise and to have infrastructure permanently ready for service delivery. Since the Initiative is funded under a special purpose allotment, unspent funds must be returned to the fiscal framework. These factors point to a need to track spending at an acceptable level of granularity to facilitate future resource allocations.

In examining alternatives to the Initiative, partners have exhibited due diligence in exploring and advancing policy and legislative options to reform certain aspects of the Division 9 mechanisms. These options included a consideration of approaches taken by other countries. The evaluation also found that the most cost-effective way to deal with inadmissible individuals is to prevent their access to Canada. However, it is noted that alternatives that prevent entry cannot address all cases of inadmissibility as, notwithstanding all best efforts, there will be cases where the reason for inadmissibility will not, or in certain cases, cannot be discovered until after the foreign national is already in Canada. Furthermore, alternative measures cannot address all cases because sometimes inadmissibility results from actions discovered while the non-citizen is in Canada or results from activity in Canada. In addition, permanent residents are allowed to enter.

Canada even though alleged to be inadmissible. Thus, there is an ongoing need for the Initiative.

Outstanding Issues

Notwithstanding the above-noted conclusions, the evaluation has identified opportunities for improvement. For example, the *Faster Removal of Foreign Criminals Act,* which received Royal Assent in 2013, included provisions to support the imposition of mandatory minimum conditions on all non-citizens alleged or determined to be inadmissible on grounds of security. The regulations that would prescribe the specific conditions to be imposed are under development, and have not yet been introduced. Given that the objective of these legislative provisions is to ensure a consistent baseline for the control and monitoring of such individuals by the CBSA as long as they remain in Canada, the evaluation has identified this delay as an unmet commitment to address a previously identified risk.

For some partners, performance information was not readily available. Partners indicated that this was due to lack of resources/competing priorities at respective headquarters and challenges associated with outdated case management software. This was particularly true for country-wide information on the management and removal of inadmissible individuals, whose terms and conditions, where applicable, are imposed and monitored via CBSA regional offices.

Although efforts are being made to improve the efficiency of information sharing among partners, there remain information-sharing challenges. These include inconsistent access to secure electronic networks across departments/agencies and corresponding security-cleared personnel who are able to access the system as required.

Finally, there is a need to better understand Initiative costs in relation to activities/outputs.Tracking these costs would benefit partners by facilitating resource planning, both from a central agency and departmental perspective. Cost tracking may also increase partners' capacity to respond to fluctuating demand.

6. RECOMMENDATIONS

The evaluation recommends that:

1. Canada Border Services Agency implement regulations associated with the *Faster Removal of Foreign Criminals Act*. Current plans indicate that final Regulations will be published in the Canada Gazette in the 2016-2017 fiscal year; all efforts should be made to expedite this deadline.

2. Public Safety Canada lead a collaborative exercise with partners to update indicators and implement the horizontal performance measurement strategy. The strategy should:
   - identify the frequency of data collection;
   - clearly identify reporting responsibilities for each department/agency; and
   - incorporate performance indicators to track partners' spending by funded activity.

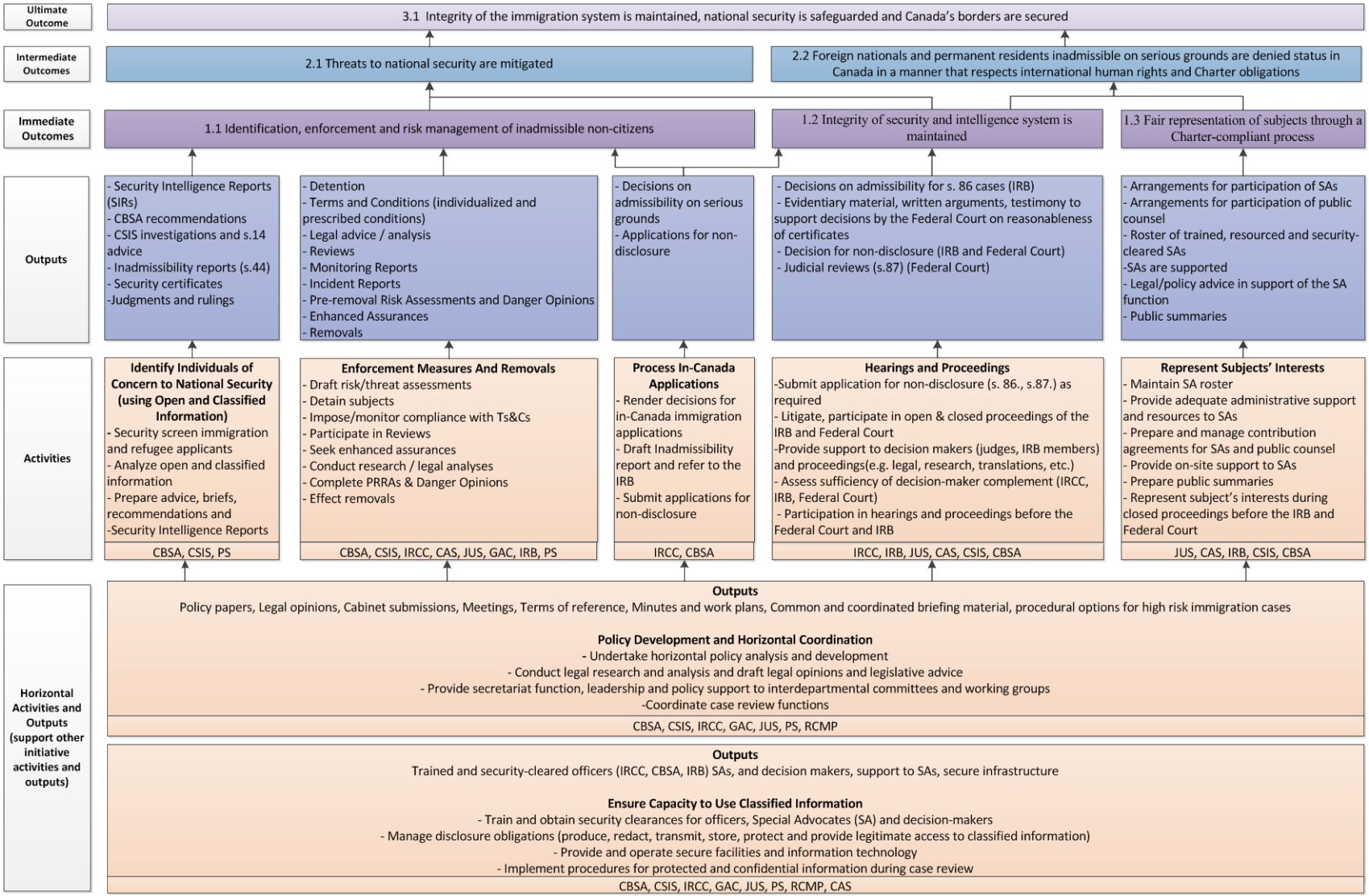
7. MANAGEMENT RESPONSE AND ACTION PLAN

All partners accept and support the evaluation and its recommendations.

Recommendation	Action Planned	Planned Completion Date
Canada Border Services Agency implement regulations associated with the *Faster Removal of Foreign Criminals Act*. Current plans indicate that final Regulations will be published in the Canada Gazette in the 2016-2017 fiscal year; all efforts should be made to expedite this deadline.	Canada Border Services Agency (CBSA) accepts responsibility for the implementation of Recommendation 1. The CBSA supports this recommendation.	Pre-publication of the regulations is planned for October 2016. Final publication of the regulations is planned for February 2017.
Public Safety Canada lead a collaborative exercise with partners to update indicators and implement the horizontal performance measurement strategy. The strategy shall: • include an indication of the frequency of data collection • clearly identify reporting responsibilities for each department/agency • develop and incorporate performance indicators to track partners' spending, by each funded activity.[56]	Public Safety Canada (PS) accepts responsibility to lead the implementation of recommendation 2. PS agrees that there is a need to understand Initiative costs in relation to its activities/outputs. PS agrees that tracking these costs would benefit partners by facilitating resource planning, both from a central agency and departmental perspective. However, it is understood that owing to overlapping activities conducted by the same FTEs in some institutions and the limitations of government financial tracking tools and systems, it may be impossible to track spending in a detailed manner for each activity. PS will lead, with the collaboration of all its Initiative partners, as well at their evaluation divisions and their planning divisions, the development of revised horizontal indicators. The indicators that will be developed will need to: provide information on the various components of the Initiative; be meaningful for partners, and subsequent evaluations; and provide a means to be collected that does not unduly tax initiative resources in a manner that shifts primary program resources from key initiative activities to performance measurement tasks. PS will also support the implementation of the renewed Horizontal Performance Measurement Strategy.	Indicators will have been approved by November 2016. Horizontal Performance Measurement Strategy is implemented by March 2017.

[56] Any horizontal performance measurement strategy implemented would recognize and respect the need to protect classified information in public reporting.

ANNEX A: LOGIC MODEL



ANNEX B: RESULTS OF CALIBRATION EXERCISE

Table 1: Evaluation Scope Calibration				
Evaluation Issue Area/ Questions	**Calibration Considerations**	**Level of Effort**		
		L	**M**	**H**
RELEVANCE				
1. To what extent has the specific need persisted, and has the Initiative evolved to meet changing needs?	• Capitalize on policy work already done • Continuing need to handle national security cases – caseload • Division 9 or the IRPA continues to evolve.		X	
2. Is the initiative consistent with current federal government priorities?	• In the government's safety/security agenda	X		
3. Are the appropriate federal partners involved in the horizontal initiative and are their roles and accountabilities clearly defined?	• Previous evaluation laid out federal roles • Partners and roles have not changed – Immigration and Refugee Board and Royal Canadian Mounted Police added	X		
PERFORMANCE				
4. To what extent has there been: a) identification of individuals on grounds of security inadmissibility b) mitigation of risks and threats to national security, including enforcement of conditions on individuals?	• Interest of senior management • Mandatory conditions for individuals that pose a risk to national security • Recommendation in previous evaluation			X
5. To what extent has the Initiative made it possible to use intelligence in security inadmissibility cases and to protect that intelligence in court?	• Disclosure obligations • Current policy environment • Interest of senior management – challenges in bringing cases forward			X
6. To what extent has the initiative supported fair representation of subjects? 7. Are foreign nationals and permanent residents inadmissible on security grounds denied status in Canada in a manner that respects international human rights and *Charter* obligations?	• Covered by previous evaluation • Supreme Court of Canada decision (May 2014) • Justice Canada - component evaluation of the SAP • Only one case of enhanced diplomatic assurances in the past four years	X		
8. Is there effective horizontal governance and coordination?	• Recommendation in previous evaluation • Will assess PS leadership		X	
9. Is the initiative being delivered in an efficient manner? 10. What is the full cost of each partner's initiative activities and how have these costs differed from the amounts that were allocated?	• Interest of senior management – PS, CSIS, JUS (service quality) • New policy provisions – past three years (case coordination)			X
11. Are there lessons learned from other like-minded countries that could be applied in the Canadian context?	• Capitalize on policy work already done (evaluation will only supplement information)	X		