



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

Evaluation Report  
July 2020



Public Safety    Sécurité publique  
Canada            Canada

Canada 

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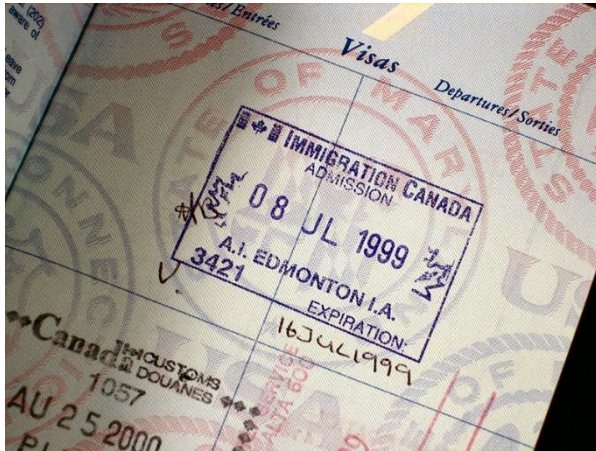
# Background

The *Immigration and Refugee Protection Act* (IRPA) is the primary federal legislation regulating immigration to Canada. IRPA sets out the core principles and concepts that govern Canada's immigration and refugee protection programs, including provisions relating to detention reviews and admissibility hearings, and the jurisdiction and powers of tribunals.

Various grounds for inadmissibility to Canada for permanent residents and foreign nationals (non-citizens) are detailed in sections 34 to 42 in Division 4 of the Act. 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).

The admissibility to Canada of non-citizens is usually determined by immigration authorities using open source information and/or information that is known to the applicant. However, when an individual is inadmissible on serious grounds, it is sometimes necessary to use classified or otherwise non-disclosable information to obtain an inadmissibility ruling and subsequent removal order. In these cases, the disclosure of such information may be damaging to national security or endanger the safety of an individual.

# Background



The Initiative is a combination of the activities (see Annex A) of nine federal partners including Public Safety Canada (PS), Immigration, Refugees and Citizenship Canada (IRCC), Justice Canada (JUS), Global Affairs Canada (GAC), Canada Border Services Agency (CBSA), Canadian Security Intelligence Service (CSIS), Royal Canadian Mounted Police (RCMP), Courts Administration Service (CAS) and the Immigration and Refugee Board of Canada (IRB).

Within IRPA, Division 9 provides statutory authority that allows for the use and protection of classified or otherwise non-disclosable information in immigration proceedings. These proceedings include security certificates before the Federal Court (section 77); admissibility proceedings before the Immigration and Refugee Board (IRB), detention reviews and appeals before the Immigration Appeals Division (section 86); and judicial review proceedings and related appeals before the Federal Courts (section 87).

The IRPA Division 9/National Security Inadmissibility Initiative includes policy development and 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;
- Classified information is used in the context of a review of reasons for detention or of release conditions;
- Non-disclosable information is used in appeals before the Immigration Appeal Division; or
- Enhanced diplomatic assurances against torture are sought and/or relied upon to facilitate the removal of an inadmissible foreign national from Canada.

# Evaluation Purpose and Methodology

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The purpose of the evaluation was to examine the governance and performance of the Immigration and Refugee Protection Act Division 9/National Security Inadmissibility Initiative from 2015-16 to 2018-19. Relevance was not examined as the continuing need for the Initiative was clearly laid out in recent initiative renewal documents. The evaluation used multiple lines of evidence, both qualitative and quantitative, to ensure triangulation of findings.

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## *Interviews*



Thirty-four interviews were conducted with program partners and subject matter experts.

## *Literature and Program Document Review*



Literature (e.g. academic research, media, reports) and corporate documents (business case, policy and program documents) were reviewed.

## *Performance and Financial Data*




Performance data from program partners was reviewed. Program financial data was analysed.

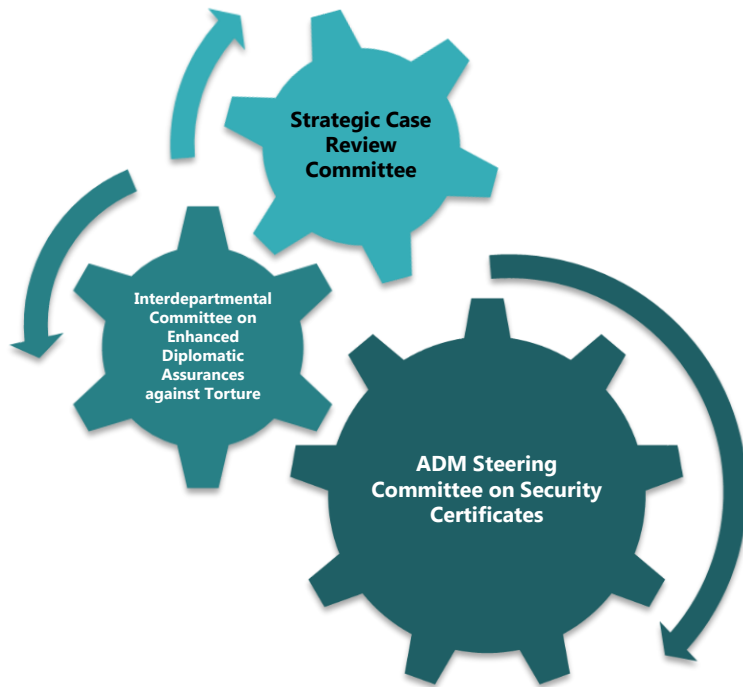
## *Limitations*

Due to the scope of the evaluation and the sensitive nature of the active security certificate cases, the evaluation team did not contact those individuals impacted by the Initiative. To mitigate the impact of this limitation, the evaluation team made use of publicly available information and conducted interviews with Initiative partners involved with security certificate cases.

As the Performance Measurement Strategy was recently developed, and there was a lack of new security certificate cases during the evaluation period, the evaluation team made use of interviews and a review of documents and literature to assess Initiative performance.

# Governance

 **Finding:** Overall, the Initiative’s horizontal governance was perceived as effective with regards to collaboration, coordination and sharing of classified information between federal partners.



Public Safety is responsible for leading and coordinating the implementation of the Initiative through a formal governance structure created in collaboration with seven funded federal partners and one participating federal organization (See Annex B). This formal governance structure includes:

- The ADM Steering Committee on Security Certificates which meets when instructions are required on major cases;
- The Strategic Case Review Committee (SCRC) which is an interdepartmental forum for discussing high-risk national security immigration cases, and that facilitates identification of potential options and approaches to cases; and
- The Interdepartmental Committee On Enhanced Diplomatic Assurances Against Torture which discusses and coordinates cases when decisions are needed on the pursuit of enhanced assurances against torture when foreign nationals or permanent residents have to be removed from Canada. Global Affairs Canada (GAC) is responsible for assessing the feasibility of, and conducting negotiations for, enhanced diplomatic assurances, when required.

# Governance

The SCRC was the most well known committee by key informants. It was perceived as an effective forum that facilitated coordination, sharing of classified information and strategic decision making on high-risk immigration cases.

Some interviewees indicated that the need for and frequency of the SCRC meetings has diminished with the limited number of new security certificate cases over the evaluation period.


It was also indicated that the ADM Steering Committee on Security Certificates and the Interdepartmental Committee on Enhanced Diplomatic Assurances Against Torture were not as active over the evaluation period for the same reason, and therefore there was limited awareness of their role.

Most of the interviewees perceived Public Safety leadership and coordination roles as effective in bringing federal partners together. In addition, interviewees highlighted good relationships among federal partners and their ability to work together without committee meetings. The recent coordination of the 2018 Treasury Board Submission was cited as an example of this cooperation.



# Performance

## Utilization of classified information

 **Finding:** The sharing and protection of classified information related to inadmissible non-citizens has been facilitated by the Division 9 Initiative. There are still challenges with using all available information in proceedings.

Cases refused by section relevant to  
Division 9 (IRCC)  
2015-16 to 2018-19



There are many cases where individuals apply for temporary or permanent residency in Canada, and they are denied. The Division 9 initiative comes into use when inadmissibility concerns for an individual are identified, and there is a need to use and protect classified or otherwise non-disclosable information to obtain an inadmissibility finding.

In the four-year period from 2015-16 to 2018-19, the total number of cases refused annually by IRCC for inadmissibility under sections 34, 35 and 37, in Canada and overseas, ranged from 286 to 519. The majority of these cases were related to section 34.

Another measure of inadmissibility cases is the number of Section 44 reports prepared. These reports are those prepared by a CBSA officer who is of the opinion that a non-citizen in Canada is inadmissible. These reports are then referred to the Immigration and Refugee Board for decisions. In the four years under review, 448 cases with section 44 reports were referred to the IRB and in over 80% of these cases deportation orders were issued.

# Performance

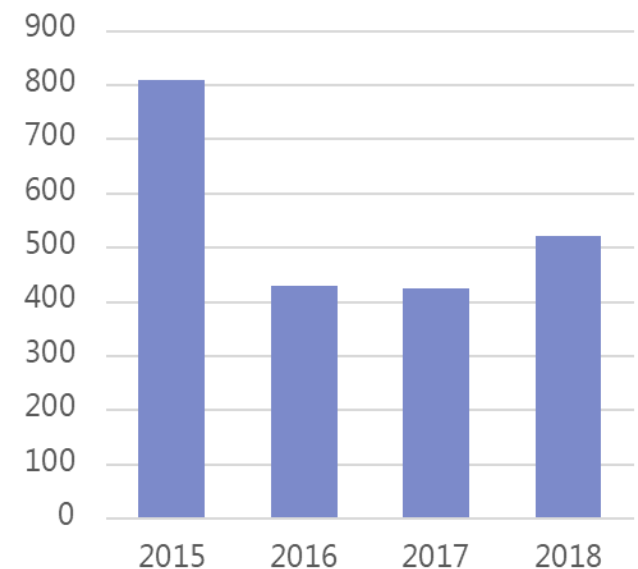
## Utilization of classified information

Individuals deemed inadmissible under sections 34, 35 or 37 may, through various facilitative regimes, have their inadmissibility waived on either a temporary or permanent basis. Temporary remedies such as Public Policy Temporary Resident Permits, Temporary Resident Permits or National Interest Temporary Resident Visas, can be issued by IRCC. Additionally, the Minister of Public Safety may grant “Ministerial relief” which results in a permanent waiver of inadmissibility. The rationale for these decisions could include the review of classified or otherwise non-disclosable information.

Between 2015 and 2018, IRCC made over 2000 favourable decisions to waive inadmissibility on a temporary basis. Of these, 1574 were related directly to section 34, 596 to section 35, and 8 to section 37. However, visas may not have been issued for all cases. Over the same time period, 14 decisions were made to grant Ministerial relief to individuals inadmissible under sections 34, 35 or 37.

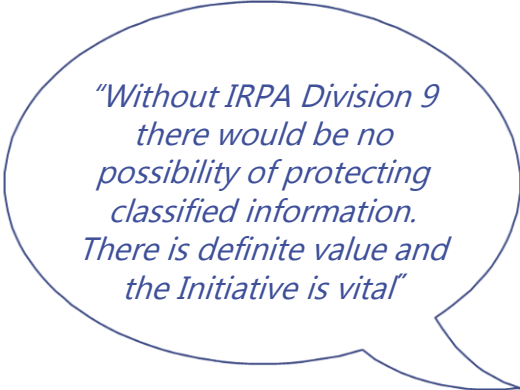
Applications for the non-disclosure of information can be made by the Minister of Public Safety for judicial review proceedings and related appeals before the Federal Courts (s. 87). Between 2015-16 and 2018-19, 100 such applications were made. This demonstrates the reach and usefulness of Division 9, beyond the high profile security certificate cases.

**Favourable Decisions made by IRCC (2015 to 2018)**



# Performance

## Utilization of classified information



*“Without IRPA Division 9 there would be no possibility of protecting classified information. There is definite value and the Initiative is vital”*

The Initiative has facilitated the sharing and protection of classified information. It was seen by federal partners to have emboldened the use of sensitive information to support cases of inadmissibility. This was seen as particularly useful in overseas visa applications. It was also suggested by partners that it is more cost-effective to deal with these cases when an individual is overseas.


While the Initiative has made it possible to use classified or otherwise non-disclosable information, partners would prefer to use unclassified information particularly for in-Canada cases due to the added complexity of disclosure and fairness obligations during litigation.

It was also cautioned that intelligence information may need to be further developed, so that it can be used as evidence in court proceedings. Partner organizations use various means such as interviews and open source data to develop the evidence for inadmissibility.

An additional administrative challenge highlighted was the lack of access to a single electronic means for sharing information. A common secure platform amongst partners would streamline the sharing and protection of classified information.

# Performance

## Enforcement and risk management

 **Finding:** Division 9 has contributed to mitigating threats to national security. The Initiative supports enforcement measures and risk management of existing security certificate cases.

Section 77 of IRPA concerns security certificates that state a permanent resident or foreign national is inadmissible to Canada on grounds of security, human or international rights violations, serious criminality or organized criminality. While not large in number, these cases frequently draw the most attention from the public and media.

While there were no new security certificates during the evaluation period, in the first two years there were three active security certificate (s.77) cases; one of which was deemed unreasonable by a Federal Court in 2016. For the duration of the evaluation period, there were two cases remaining.

The section 77 cases were mentioned by interviewees when discussing any negative unintended consequences of the Initiative. Several of those affected by the security certificate regime have brought civil action against the Government of Canada. This result was largely unanticipated.



At the end of 2018-19, there were three active civil cases brought against the Government of Canada by individuals formerly under security certificates. These cases have been filed for millions of dollars, ranging between \$16 million and \$37.4 million.

Interviewees also spoke of the intense resource requirements for Division 9 cases. It was not anticipated that the security certificate cases would take the amount of time, energy and resources that they do.

# Performance

## Enforcement and risk management

When individuals are already in the country and found to be inadmissible, their removal is not always immediate. For those persons under security certificates still remaining in Canada, Division 9 allows for detention or release under court-ordered conditions to manage the risk these individuals pose. There are currently two individuals released under court-ordered conditions. Division 9 funding provides the resources to enable CBSA to monitor these individuals.



The terms and conditions of release imposed on individuals typically restrict travel, phone and internet use among other things.


CBSA tracks non-compliance which they define as “a potential breach of an individuals’ terms and conditions of release”.

One individual can have several instances of non-compliance within a fiscal year. During the evaluation period, there were 17 instances of concern with respect to compliance that were investigated. Nine were confirmed breaches brought to the attention of opposing counsel or the Federal Court.

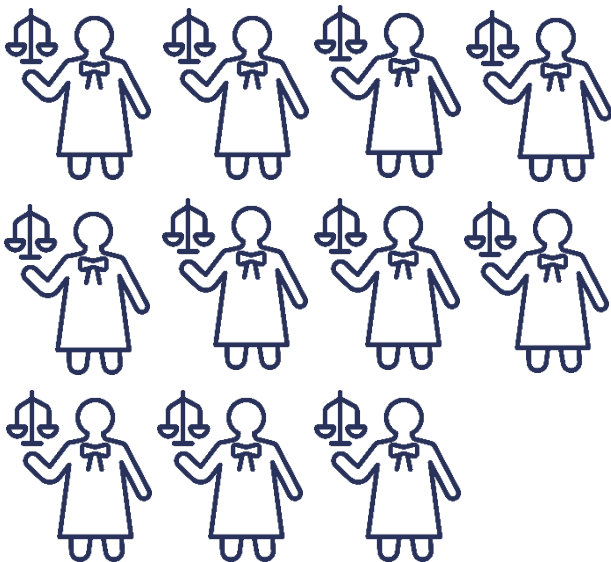
*“The detention conditions... greatly diminished the potential threat posed by the individuals. The regular surveillance, and their difficulty in communicating, would make it hard for the individuals to be involved in any form of violent activity or otherwise support a violent organization.”*

# Performance

## Fair representation and Charter compliance

 **Finding:** There continues to be fair representation of subjects through a Charter-compliant process. The Division 9 Initiative has enabled Canada to respect international human rights and Charter obligations in inadmissibility cases.

In 2014, the Supreme Court of Canada rejected a constitutional challenge of the security certificate regime and ruled that the process is consistent with the Charter of Rights and Freedoms.



One hundred percent of Special Advocates are trained

Special Advocates are provided to protect the interests of those involved in certain proceedings under IRPA (s. 85.1) “when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.”

- Special Advocates (SAs) were recruited through a competitive process run by Justice Canada in 2007.
- Special Advocates were appointed in all proceedings relating to security certificate cases; in 2015-16 there were 2 proceedings and in each of the other years there was 1 proceeding.
- There have been fewer cases requiring Special Advocates and the number of Special Advocates has diminished from 28 in 2015-16 to 11 in 2018-19.

# Performance

## Fair representation and Charter compliance

The Department of Justice administers agreements with provincial legal aid plans for the provision of legal aid to assist named persons in paying for legal counsel.



During the time covered by the evaluation, all those who required legal aid had access to it. In 2015-16 and 2016-17, 2 people were funded by legal aid and in 2017-18 and 2018-19, 1 person was funded.



In addition to providing Special Advocates and access to Legal Aid, the Division 9 Initiative includes efforts to obtain enhanced diplomatic assurances against torture to facilitate the removal of an inadmissible foreign national. Canada is a signatory of 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 subject to torture.

During the evaluation period, there were no cases requiring enhanced diplomatic assurances against torture or mistreatment.

# Performance

## Fair representation and Charter compliance

Interviews conducted revealed that a large portion of interviewees feel an appropriate balance has been established between risks to Canada and fairness to individuals.

The majority of interviewees who felt an appropriate balance has been established pointed to the 2014 ruling of the Supreme Court that found the Initiative to be Charter-compliant and the use of Special Advocates in proceedings.

In its decision in the Harkat case, the Supreme Court concluded that the provisions of IRPA covering the role of special advocates meet the requirements of a fair process.

Interviewees discussed that changes within IRPA introduced features (i.e. the special advocate system) into Canadian law that have now been tested in courts and it is possible that these

features may be used in other areas where information needs to be protected, such as no-fly lists and passport cancellation.

There is additional support for including special advocates in other areas. In their 2016 paper, *Righting Security*, Craig Forcese and Kent Roach state “the government


should... recognize a formal role for special advocates...where secret evidence is used – including on appeals or judicial reviews of no-fly listing and passport revocations.”





# Performance

## Recommendations from 2014-15 Evaluation of IRPA/Division 9

 **Finding:** The current performance measurement strategy was developed as part of the Initiative funding renewal, and while not fully implemented during the evaluation period, concerns regarding the validity of the indicators were raised.




A new Horizontal Performance Measurement Strategy was developed as part of the Initiative's funding renewal in 2018. Partner departments and agencies committed to collecting data on a wide range of indicators. No mechanism was put in place for ongoing monitoring or reporting of these indicators.

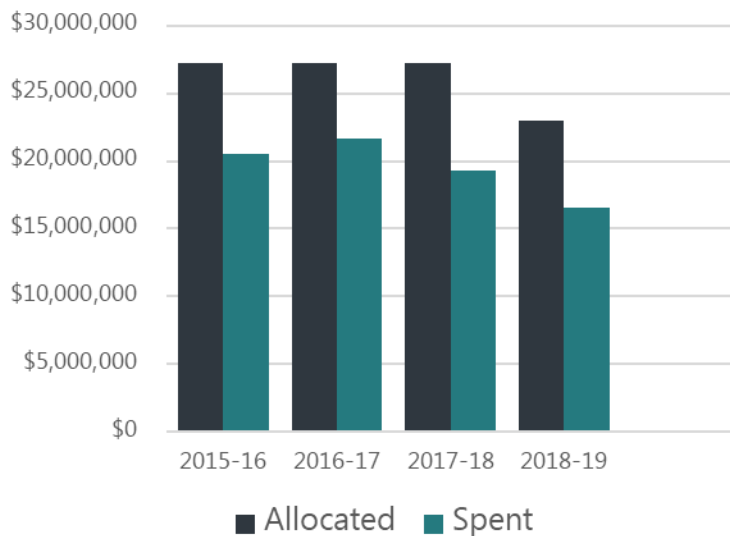
Some interviewees noted that the indicators may not fully reflect the scope of the work undertaken as part of the Initiative, particularly with regards to the enforcement of ongoing cases. Other interviewees noted that the indicators did not reflect the data that is collected by the partner departments, and that the usefulness to their work was uncertain. A further challenge with the performance measurement strategy was the focus on security certificate cases. As there have been no new security certificate cases, these indicators have limited value at this time.

# Performance

## Efficiency and Economy

 **Finding:** The Division 9 initiative is delivered in an efficient manner, given the complexity and number of current cases.

**IRPA Division 9 Funding**



Permanent funding for the Initiative was established in 2018-19. Overall funding levels were established at \$23M. This funding is provided to departments and agencies as part of a special allotment, and unspent funding is returned to the Treasury Board.

It is anticipated that if there is an increase in the number of complex cases, such as additional security certificates or s.87 cases, additional funding may be required. One interviewee, noted that the resource requirements for Division 9 cases were unanticipated when the Initiative was created, and that the efforts for cases is unique in each instance.

As well as being cost-intensive, Division 9 cases can be time intensive. Some security certificate cases have been ongoing for over 10 years. Cases are very complex and there is a need to have solid evidence to present to the Courts. Due to the complexity of cases, it is important to maintain the expertise of officers and all individuals involved. The permanent funding was seen as beneficial to the ongoing efficiency of the Initiative.

# Gender Based Analysis Plus (GBA+)

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**Finding:** GBA+ has been taken into account during the design and implementation of the Initiative.

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Under IRPA, foreign nationals and permanent residents are inadmissible to Canada on grounds of security, violating human or international rights, or organized criminality.

The admissibility screening of foreign nationals and permanent residents, whether or not classified information is used, applies to all individuals who may come into contact with Canada's immigration program. This screening occurs irrespective of ethnicity, geographical origin, religious background or any other intersectionality. Historically, Initiative partners have noted that men more so than other genders tend to be subject to Division 9 proceedings.

Division 9 partners are committed to integrating GBA+ into all of their work:

- IRCC is required to include a GBA+ assessment of the impact of the Act in its Annual Report.
- CBSA has established a GBA+ Responsibility Centre which is responsible for supporting implementation of the Agency's GBA+ policy.
- The IRB Chairpersons Guidelines addresses vulnerabilities and GBA+ considerations for individuals involved in proceedings (these guidelines are currently under review).
- As the lead department responsible for horizontal policy development on national security immigration cases, PS continues to engage with stakeholders through the Cross Cultural Roundtable on Security (CCRS) on national security issues.

# Conclusions



Within IRPA, Division 9 provides the statutory authority that allows for the use and protection of classified or otherwise non-disclosable information in immigration proceedings, when the disclosure of such information may be injurious to national security or endanger the safety of an individual. The Initiative also provides the framework for enforcement and risk management of security certificate cases.

Appropriate governance structures are in place for managing the activities under the Initiative. There are three relevant committees that meet as needed. Public Safety has worked well in bringing partners together on common issues, such as the renewal of funding in 2018-19.

While Division 9 enables the sharing and protection of classified or otherwise non-disclosable information, using the information for in-Canada cases in court proceedings remains a complex matter. Additionally, there is no common secure electronic platform amongst partner department and agencies to share classified information. Ongoing expertise is required to ensure that the integrity of Canada's immigration system is maintained and that national security remains safeguarded.

The existing Performance Measurement Strategy may not accurately reflect the work being done as part of the Initiative or the level of effort undertaken for specific activities.

# Recommendations

Led by the Senior Assistant Deputy Minister of the National and Cyber Security Branch, Public Safety Canada, in collaboration with all partners should:



1. Explore options for a common secure platform to allow for classified information sharing.



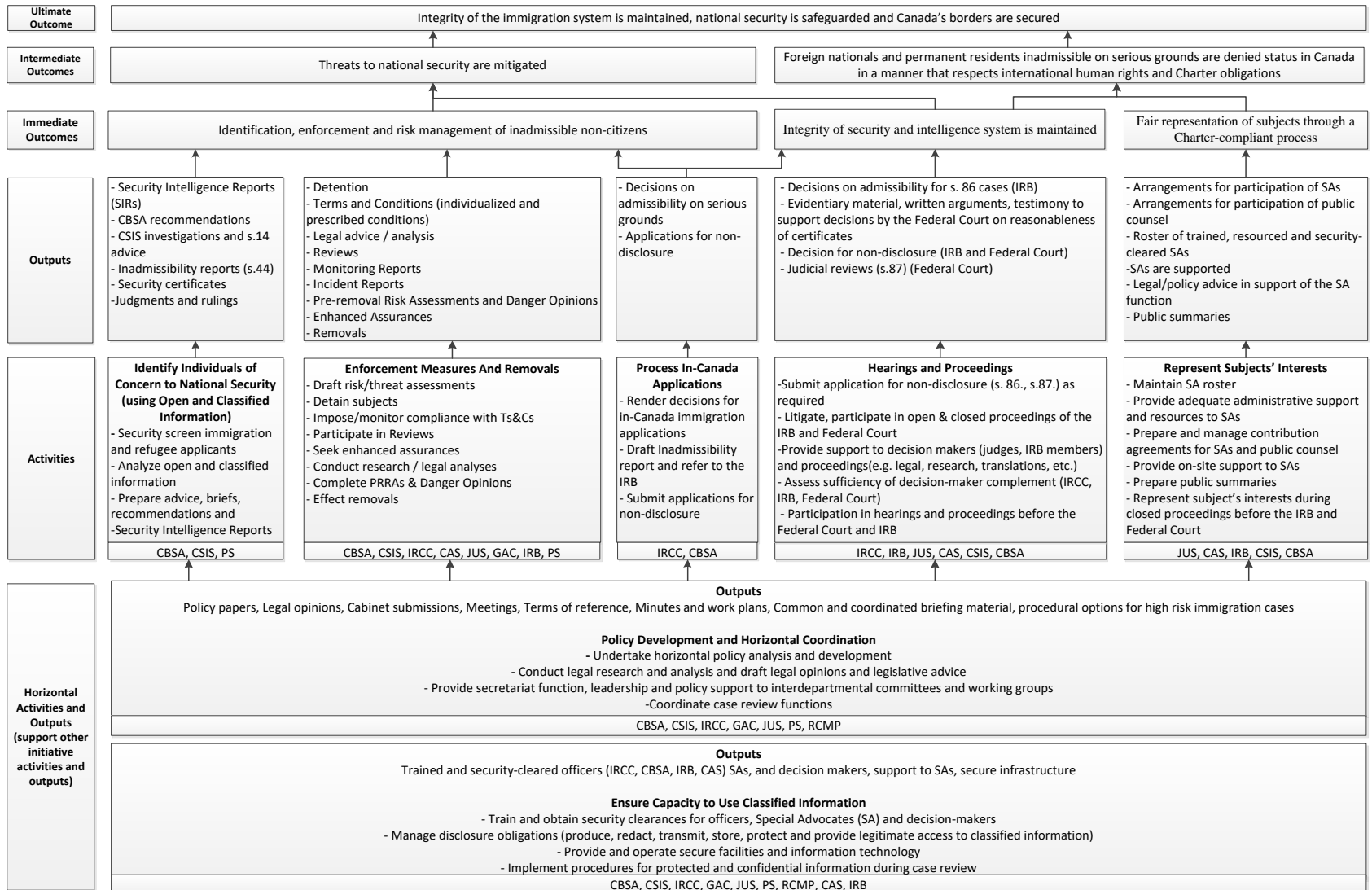
2. Review the indicators included in the Performance Measurement Strategy and consider developing mechanisms to regularly collect and report on performance data.

# Management Action Plan

Recommendation	Action Planned	Planned Completion Date
Explore options for a common secure platform for classified information sharing.	Determine whether a new or existing platform can be used to more easily access classified information among partners.	March 31, 2021
	Consult with the partners on options for a common secure platform and assess feasibility of options.	June 30, 2021
Review the indicators in the Performance Measurement Strategy and consider developing mechanisms to regularly collect and report on performance data.	Consult with partners, through an interdepartmental working group, to determine whether the performance indicators continue to capture the most useful and relevant information about the Initiative.	March 31, 2021
	Revise existing mechanisms to enhance data collection and reporting on performance data.	June 30, 2021

# Annex A

## Logic Model



# Annex B

## Principal Roles of Federal Partners involved in the Initiative

Partner	High-level Description of Activities
Public Safety Canada (PS)	<ul style="list-style-type: none"> <li>Leads and coordinates policy development and case management functions.</li> <li>Provides advice on issues related to national security, immigration and the use of classified information in proceedings.</li> <li>Co-leads with the Global Affairs Canada (GAC) policy functions related to enhanced diplomatic assurances against torture.</li> <li>Leads horizontal evaluations as per the Policy on Results.</li> </ul>
Justice Canada (JUS)	<ul style="list-style-type: none"> <li>Provides legislative, litigation and legal advisory services.</li> <li>Represents Government in detention or conditions in security certificate cases and legal challenges before the Federal courts arising in the context of Division 9 litigation.</li> <li>Continues the administration of the Special Advocates Program.</li> <li>Continues the administration of the State Funded Counsel Program through the legal aid plans.</li> </ul>
Canada Border Services Agency (CBSA)	<ul style="list-style-type: none"> <li>Conducts activities pursuant to Division 9 of the IRPA related to representing Ministers in hearing before the Immigration and Refugee Board and provides instructions on litigation relating to these cases.</li> <li>Detains or monitors release conditions of individuals subject to security certificates.</li> <li>Provides assessments to support decisions on temporary and permanent resident applications under Division 9.</li> <li>Participates in case coordination activities.</li> <li>Provides instructions on litigation of certificates and cases involving sections 34,35 and 37 of IRPA, with the exception of visa cases.</li> </ul>
Canadian Security Intelligence Service (CSIS)	<ul style="list-style-type: none"> <li>Prepares briefs, security Intelligence Reports and unclassified summaries.</li> <li>Redacts information for court proceedings, in accordance with existing privileges, to protect sensitive information from disclosure.</li> <li>Testifies at reasonableness hearings, detention reviews, judicial reviews and other court proceedings.</li> <li>Participates in case coordination activities.</li> </ul>
Immigration, Refugees and Citizenship Canada (IRCC)	<ul style="list-style-type: none"> <li>Processes immigration files that may include the use of classified information for decision-making.</li> <li>Conducts Pre-Removal Risk Assessment (PRRA) and Danger Opinion process.</li> <li>Provides litigation instructions, support and advice in Division 9 proceedings.</li> </ul>
Global Affairs Canada (GAC)	<ul style="list-style-type: none"> <li>Assesses the feasibility of negotiating Enhanced Diplomatic Assurances against tortures with relevant foreign states in identified individual cases.</li> <li>Leads the negotiations of Enhanced Diplomatic Assurances against torture or mistreatment in identified individual cases.</li> <li>Provides appropriate follow up and/or monitoring in the foreign state, where an individual has been removed pursuant to Enhanced Diplomatic Assurances.</li> <li>Reviews international practices and sustains international engagement on this issue.</li> </ul>



# Annex B

## Principal Roles of Federal Partners involved in the Initiative

Partner	High-level Description of Activities
Royal Canadian Mounted Police (RCMP)*	<ul style="list-style-type: none"> <li>Participates in case coordination activities.</li> <li>Conducts searches of police database holdings on an exceptional basis, in support of RCMP member attending case coordination meeting.</li> </ul>
Courts Administration Service (CAS)**	<ul style="list-style-type: none"> <li>Supports the hearings and proceedings of the Federal Court and Federal Court of Appeal.</li> <li>Provides facilities for protection and review of secure material, and onsite support to special advocates.</li> </ul>
Immigration and Refugee Board of Canada (IRB)**	<ul style="list-style-type: none"> <li>Conducts immigration proceedings, including admissibility hearings and detention reviews, as well as imposing conditions of release.</li> <li>Provides facilities for protection and review of secure material, and onsite support to special advocates.</li> </ul>

\*RCMP is a non-funded partner involved in case coordination activities.

\*\*CAS and IRB are at arm's length from the federal government.