
Faculty of Human and Social Development

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Panel presentation sponsored by the Canadian International Council (CIC),
University of Victoria, 31 March 2015

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Citation for this paper:

Morris, C. (2015). *Canada's International Human Rights Obligations and Bill C-51: Panel presentation sponsored by the Canadian International Council (CIC), University of Victoria, 31 March 2015*. Retrieved from www.peacemakers.ca/publications/MorrisBillC-51UVic31March2015.pdf

Canada's International Human Rights Obligations and Bill C-51

Catherine Morris¹

Faculty of Law, University of Victoria, Victoria, BC, 31 March 2015

Speaking notes

As someone working in the field of international human rights, I am more accustomed to addressing situations in Southeast Asia where human rights defenders are at risk because of their advocacy on corporate land grabbing, environmental issues or labour rights violations, often abetted by officials with conflicts of interest, and aided by courts that lack independence and integrity. Southeast Asian human rights defenders, including indigenous community activists, often face arbitrary arrests and detentions or criminalization of their peaceful activism, sometimes in the name of national security. Judicial and administrative harassment is often aided through abuse of badly drafted laws rushed through legislatures without proper debate or public consultation. I used to imagine that Canada was not like those places.

Bill C-51 raises major alarm in Canada, because it demonstrates a deliberate intention to violate Canada's international human rights obligations and puts human rights defenders and the integrity and independents of Canadian courts at risk.

In 1976, Canada became a party to a number of international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR).² In 1982, Canada partially implemented this Covenant into the *Charter of Rights and Freedoms* (*Charter*). For several decades, Canada has enjoyed a reputation for respecting international human rights, but here at home, indigenous leaders and human rights advocates have long told us of corporate and official complicity in historic violations of aboriginal land rights. Violations of internationally protected rights against race and sex discrimination are implicated in the persistent impunity for hundreds if not thousands of murders and disappearances of indigenous girls and women. And there is persistent economic and social inequality. Human rights bodies in the United Nations (UN) and the Inter-American human rights system have been fruitlessly urging Canada to do something about it,³ yet, for some years we have heard unsettling stories of official

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² Article 9, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 16 March 2015]

³ Inter-American Commission on Human Rights. *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14, 21 December 2014 available at: www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf; United Nations Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee of the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/CAN/1, 6 March 2015, available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf#sthash.KA4gnLgi.dpuf

surveillance and intrusions on the privacy of highly respected, peaceful indigenous human rights defenders like Cindy Blackstock and Prof. Pam Palmater and other activists with concerns that Bill C-51 adds further risks to their internationally protected rights to privacy and freedoms of expression and assembly.⁴

The name of Maher Arar reminds us of Canadian officials' shameful involvement in arbitrary detention and torture of a number of Canadians in foreign countries. This is despite the fact that Canada has been a State Party to the *Convention Against Torture (CAT)*⁵ since 1987. Even though the international prohibition of torture and ill-treatment is absolute, with no exceptions whatsoever,⁶ the Supreme Court of Canada has been equivocal, saying in the 2002 *Suresh* case that "in exceptional circumstances, deportation to face torture [called *refoulement*] might be justified" on national security grounds. So far, Canada has not heeded urgings of two UN human rights bodies to incorporate into Canadian law the absolute ban on *refoulement* to torture.⁷

Canada has had years to implement the 2006, 2008 and 2010 recommendations of the Arar, Iaccabucci and Air India Commissions of Inquiry⁸ but so far has not done so.⁹ For years there have been calls for thorough review of Canada's security legislation.¹⁰

⁴ Lawyers' Rights Watch Canada, *The Shrinking Space for Dissent in Canada*, Report to the 26th Session of the United Nations Human Rights Council, May 2014, available at http://www.lrwc.org/ws/wp-content/uploads/2014/05/Online-Copy-Canada.Shrinking-Space-for-Dissent.LRWC_.25.May_.2014.pdf

⁵ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 19 March 2015]

⁶ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1: "in exceptional circumstances, deportation to face torture might be justified" and that "the ambit of an exceptional discretion to deport to torture, if any, must await future cases." In [2005 \(pdf\)](#) (among other things) the CAT expressed concern about:

- "The failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever;"
- "The alleged roles of the State party's authorities in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to the Syrian Arab Republic where torture was reported to be practised."
- continued allegations of inappropriate use of chemical, irritant, incapacitating and mechanical weapons by law enforcement authorities in the context of crowd control."

⁷ UN Committee against Torture, *Concluding Observations of the Committee against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6 (25 June 2012) at para 12; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (20 April 2006) at para 15.

⁸ John C. Major, *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, 2010, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm.

⁹ Canadian Bar Association, "Bill C-51 - Anti-terrorism Act 2015: Submission to House of Commons Committee on Public Safety and National Security," available at <http://www.cba.org/cba/submissions/pdf/15-15-eng.pdf>

¹⁰ Dennis R. O'Connor, *Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, 2006, available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf; Frank Iacobucci, Q.C., *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf; John C. Major, *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, 2010, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm; Canadian Bar Association,

And now we see Bill C-51¹¹ being rushed through Parliament with limited debate, using the urgent language of “security threat.” Professors Forcese and Roach (to whom we owe a tremendous debt for their tireless analysis of Bill C-51) say the bill demonstrates “Arar amnesia.”¹²

Our government tells Canadians “trust us,” and conversely not to trust those with concerns about Bill C-51, including anti-terrorism experts, academics, judges, lawyers’ organizations, privacy experts, indigenous leaders and human rights organizations. Charity law experts join the chorus with concerns that Bill C-51 emphasise the chill on charities already created by existing anti-terrorism laws and the “broad audit and sanction capabilities of Canada Revenue Agency.”¹³

At first, Conservative parliamentarians dismissed concerns about Bill C-51 as “conspiracy theory.”¹⁴ In House of Commons committee hearings in March, several Conservative MPs hurled personal insults at witnesses who criticized the Bill. Those singled out for disparagement included expert human rights defenders from Amnesty International and the BC Civil Liberties Association.¹⁵

In response to public pressure, the government offered a few minor amendments, which are welcome, but woefully inadequate. Some of the most important concerns have been completely ignored, including the need for proper safeguards and oversight of the proposed information-sharing regime and the expanded mandate of CSIS to go beyond surveillance towards terrorism “disruption” measures.¹⁶

“Bill C-51 - *Anti-terrorism Act 2015*: Submission to House of Commons Committee on Public Safety and National Security,” available at <http://www.cba.org/cba/submissions/pdf/15-15-eng.pdf>;

Professors Forcese and Roach say Bill C-51 demonstrates “Arar amnesia.” Roach, Kent, and Craig Forcese, “Bill C-51 Backgrounder # 3: Sharing Information and Lost Lessons from the Maher Arar Experience,” February 16, 2015, at 5, available at <http://ssrn.com/abstract=2565886>.

¹¹ *Anti-terrorism Act, 2015, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts* [Bill C-51], available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6932136&File=4>

¹² Roach, Kent, and Craig Forcese, “Bill C-51 Backgrounder # 3: Sharing Information and Lost Lessons from the Maher Arar Experience,” February 16, 2015, at 5, available at <http://ssrn.com/abstract=2565886>.

¹³ Carter, Terrance S. Nancy E. Claridge, and Sean S. Carter, “The Impact of Bill C-51 on Charities and Not for Profits,” *Anti-Terrorism and Charity Law Bulletin* No. 39, February 18, 2015, available at <http://www.carters.ca/pub/bulletin/charity/2015/atcylb39.pdf>. Also see Dean Beeby, “Canadian charities feel ‘chill’ as tax audits widen into political activities,” *Toronto Star*, 10 July 2014, available at http://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html; Lawyers’ Rights Watch Canada, “The Shrinking Space for Dissent in Canada,” Written Statement by Lawyers Rights Watch Canada to the 26th Session of the United Nations Human Rights Council, 2014, available at <http://www.lrwc.org/canada-the-shrinking-space-for-dissent-in-canada-report/>

¹⁴ “Stephen Harper dismisses Bill C-51 criticism as “conspiracy theory,”” excerpt from Question Period, House of Commons, Canada, 17 February 2015, available YouTube/Macleans, <https://www.youtube.com/watch?v=Yp0udcyROKA>

¹⁵ Pugliese, David, “Tories go after Greenpeace, BC Civil Liberties Assoc. and Muslim group for raising concerns about new security bill,” *Ottawa Citizen*, 16 March 2015, <http://ottawacitizen.com/news/national/defence-watch/tories-go-after-greenpeace-bc-civil-liberties-assoc-and-muslim-group-for-raising-concerns-about-new-security-bill>. After BCCLA Senior Counsel, Carmen Cheung, presented a careful ten-minute analysis of the Bill, Conservative MP Rick Norlock had only one rhetorical question: “Are you fundamentally opposed to taking terrorists off the streets?”

¹⁶ Bill C51, Part 4, section 42 (amending S. 12 of the CSIS Act)

1. The State duty to protect the right to life

The international human rights concerns with this bill are so numerous that it's difficult to know where to start. Let me start with the internationally protected right to life. Canada has a State duty to protect its citizens' right to life and security. This includes the duty to take effective measures to prevent and prosecute crimes and violence of all kinds, including crimes such as the appalling attacks against Parliament and the murders of Canadian soldiers in October 2014.

2. International human rights are indivisible: Bill C-51 demonstrates intention to violate international human rights law binding on Canada.

Bill C-51 fails to be clear about how it will effectively improve the rights to life and security on the ground. But the Bill is very clear in its intention to violate internationally protected rights to liberty, fair hearings, access to justice and privacy.

Bill C-51 creates potential for violations of the rights to freedoms of (legitimate) expression, association and peaceful assembly, should such acts be deemed threats to the security of Canada under Bill C-51's information sharing regime (SCISA).¹⁷ Given Canada's equivocation about implementing the absolute ban on *refoulement* to torture, there may even be potential for violations of the *Convention Against Torture* (CAT)¹⁸ should the increased mandate of CSIS end up legitimizing Canadian official complicity in unlawful detention, which is known to increase the risk of torture and ill-treatment.

3. Integrity of courts: Amendments to *Canadian Security Intelligence Service Act* (CSIS Act)

In the limited time available I will focus on Bill C51's proposed amendments to the CSIS Act. My work in Southeast Asia has sensitized me to the crucial importance of protecting the independence and integrity of courts.

Bill C-51 would allow CSIS to engage in "reasonable and proportionate" measures to disrupt terrorism - anywhere in the world. CSIS won't be allowed to take measures that will break laws or the *Charter of Rights and Freedoms*, unless they are authorized to do so by a court warrant. The only measures completely excluded are causing death, bodily harm, violation of sexual integrity, and obstructing justice¹⁹ (and the government is amending the Bill to preclude CSIS from having powers of arrest²⁰).

¹⁷ ICCPR Article 5.1 states "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." Also see United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at <http://www1.umn.edu/humanrts/instreet/siracusaprinciples.html>.

¹⁸ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 19 March 2015]

¹⁹ Bill C-51, Part 4, S.42 (12/2(1), (2)). Bill C-51 qualifies this by saying that "'bodily harm' has the same meaning as in section 2 of the Criminal Code." While the case of *R. v. McCraw* (1991), 66 C.C.C.(3d) 517 (SCC) extends the definition to include psychological harm, Bill C-51 should spell this out.

²⁰ Roach, Kent, and Craig Forcese, "The government has not made its case for C-51," *Globe and Mail*, 29 March 2015, available at <http://www.theglobeandmail.com/globe-debate/the-government-has-not-made-its-case-for-c-51/article23678195/>; Tonda MacCharles, "Government plans four amendments to soften anti-terror Bill C-51, Toronto Star," 30 March 2015, available at <http://www.thestar.com/news/canada/2015/03/30/government-plans-four-amendments-to-soften-anti-terror-bill-c-51.html>.

The plain language of this Bill shows that our elected officials contemplate that Canadian judges will be asked to issue warrants that permit violations of the *Charter* and other laws. This is both unprecedented and shocking. We may never know if judges actually agree to such applications, because these warrants will be obtained in secret hearings, where only the government position is heard by way of *ex parte* affidavit, with no appeal. While the government claims that this provides “checks and balances,” the Canadian Bar Association describes it as a way to “conscript judges to authorize *Charter* violations and unlawful acts, under the guise of providing judicial oversight...”²¹

How could any Member of Parliament, no matter what their political loyalties or ideological persuasion, support a law that would authorize violations of Canada’s Constitution, laws and internationally protected rights? How can any MP in good conscience support the subversion of Canada’s independent judiciary and prosecutors and pervert fundamental principles of the rule of law?²²

Since I need to wrap up, I will leave you to examine other materials in a bibliography I have compiled.²³ I challenge everyone in the legal profession as practitioners, academics or students to stand up with human rights defenders to protect their rights to conduct peaceful advocacy and education without fear of administrative harassment. The legal profession must also now stand up for the integrity of Canada’s courts and insist that no Canadian bill be allowed to provide for violations of Canada’s Constitution, laws or international human rights obligations.

²¹ Canadian Bar Association, “Bill C-51 - *Anti-terrorism Act 2015*: Submission to House of Commons Committee on Public Safety and National Security,” available at <http://www.cba.org/cba/submissions/pdf/15-15-eng.pdf>

²² I note that some former members of the Conservative are concerned. Former Conservative Senator Hugh Segal in his submission to the House of Commons Committee on Public Safety and National Security said: “a provision that would allow a judge...with respect to “lawful” disruption, to set aside the *Charter of Rights and Freedoms*. That is a principle which I think is overdone, it’s excessive, it’s unconstructive, and it violates a core Canadian value. And were there an amendment on that it would be constructive; if there were not an amendment on that, I think the courts would strike it down very soon under any circumstance. But the notion that we would give a judge the ability to, in a less than public context, set aside the *Charter of Rights and Freedoms* to facilitate a security agency being involved in lawful disruption strikes me as a core contradiction and deeply problematic,” available at <http://www.cpac.ca/en/digital-archives/?program=180> at 99:00.

²³ Catherine Morris, ed, Canada: Bill C-51, *Anti-terrorism Act, 2015: Selected Commentaries and Analyses* | Bibliography, 30 March 2015, available at <http://www.lrwc.org/bill-c-51-selected-commentaries-and-analyses-bibliography/>