

# AT&T +10

National Security and Human Rights a Decade Later





## **Arar +10**

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## Executive Summary

On 29 October 2014, Amnesty International, the International Civil Liberties Monitoring Group, the Human Rights Research and Education Centre, and Centre for International Policy Studies at the University of Ottawa convened a conference to review the state of national security and human rights in Canada a decade after the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar was established to investigate the rendition to and torture in Syria of Maher Arar, a Canadian citizen, in 2002.

The Conference brought together distinguished panelists to reflect from a variety of perspectives – international human rights, the individuals affected, the media, the judiciary, lawyers, and Canadian Muslims – on the appropriate balance between the need to ensure national security and the requirement to uphold human rights.

There are many troubling reminders from Canadian history of the failure to uphold fundamental human rights in the face of national security threats. Many of these reminders long predate the ten years examined by this Conference. They include Canada's internment of its Japanese population during World War II, Prime Minister Trudeau's famous response of "just watch me" when asked how far he was willing to go in suspending civil liberties to respond to the 1970 October Crisis, persistent resistance to calls from the Canadian judiciary to enhance oversight and review of Canada's security and intelligence agencies to avoid tragic events such as the Air India bombing in 1985, or the rendition and torture of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin,

The conference was held in the aftermath of two attacks which sparked considerable national debate about the need for strong and effective action to respond to terrorist threats. Two Canadian soldiers were killed in the attacks: Patrice Vincent in St-Jean-sur-Richelieu on 20 October 2014 and Nathan Cirillo at the War Memorial in Ottawa on 22 October 2014. Corporal Cirillo's attacker mounted a further attack in Parliament, where he was shot and killed.

Partially in response to these events and also amidst concern about growing numbers of Canadians reportedly travelling to Syria to join ISIS forces, the government has introduced two Bills laying out the most comprehensive overhaul of Canadian national security laws since 2001. The Bills have not been accompanied by any proposal for expanded and strengthened oversight or review of the country's agencies and departments involved in national security.

Meanwhile, Canada's judges, critically aware that the rule of law must always prevail, are continually challenged with the task of upholding, in proceedings that are largely held in secret, the due process rights of individuals accused of being national security threats. In some cases there have been admirable decisions taking a stand against blatant violations of human rights and ordering strong remedies to rectify those breaches. On other occasions, the interests of secrecy and security have prevailed, with human rights falling by the wayside.

From this Conference emerged a clear theme that national security cannot and will not be attained when a government undermines, circumvents, or directly violates international human rights norms such as the ban on torture and ill-treatment. This lesson certainly applies to Canada, where concerns often revolve around complicity in human rights violations committed by other governments, and failure to redress abuses that occur.

The Conference made clear that when it comes to upholding human rights in a national security context, Canada must learn from the mistakes of the past and account for past transgressions. The human consequences of a failure to do so are extremely grave and ultimately do no favour to either rights or security.



## Recommendations

The following emerged as common recommendations, repeated across the range of panels held during the Conference. There was an overarching call for the Canadian government to demonstrate commitment to upholding human rights in its national security laws, policies and activities, and to more particularly do so by:

1. Ensuring that Canadian law and practice in the area of national security fully meets the country's international human rights obligations;
2. Providing effective redress, including an apology and compensation, to Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin, Abousfian Abdelrazik, Benamar Benatta<sup>1</sup>, and Omar Khadr;
3. Amending the *Inquiries Act* to require an independent reviewer to follow up on and produce a report on the government's implementation of Inquiry recommendations and findings within a reasonable period. Such a review should be undertaken, for example, with respect to the two inquiries dealing with the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin;
4. Enacting legislation to increase the oversight and review of Canadian agencies and departments involved in national security activities, consistent with the recommendations made by Justice O'Connor in the Arar Inquiry. Such legislation should promote integration among review bodies and establish robust parliamentary oversight;

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<sup>1</sup> Since the Conference there has been a settlement reached in Mr. Benatta's case. See "Refugee sent to U.S. after 9/11 settles lawsuit against Ottawa" *Canadian Press* (9 March 2015) online: <<http://www.theglobeandmail.com/news/national/refugee-sent-to-us-after-911-settles-lawsuit-against-ottawa/article23379956/>>.

5. Ensuring the due process and other rights of individuals suspected of being threats to national security are protected, including by:
  - a) Refraining from extending a class privilege over CSIS human informants;
  - b) Eliminating the communication restrictions between special advocates and individuals named in security certificates after the special advocate has viewed confidential evidence;
  - c) Repealing new citizenship revocation powers under the *Citizenship Act*; and
  - d) Ensuring that individuals appearing before the Immigration Division of the Immigration and Refugee Board know and are able to meet the case against them; and
6. Addressing the root causes of exclusion, stereotyping, and scapegoating of Canadian Muslims through combined efforts of multiple stakeholders from various sectors of society, especially community leaders and organizations.

In addition, the media should recognize the human rights impact of irresponsible and inaccurate reporting on national security activities. All information leaked to media should be corroborated before being made public. Ethics counsellors should be made available to reporters who are uncomfortable or uncertain about releasing a particular story.

**"Ten years ago, the Arar Inquiry started.** The light was about to be shed on some of the darkest chapters of Canadian history. Today, what has really changed, and what remains the same? Unfortunately, Maher Arar became a symbol ... of what can go wrong when fear takes over rationality, when stereotypes about Muslims and Islam make us feel somehow comfortable in our little bubbles, and when politicians instrumentalize tragic events to justify political views and ... controversial laws. But beyond all of this, Maher Arar is today a broken man, who wakes up every day in a bigger prison, to glue together what remained from his old self. The Arar Inquiry recommendations remained our "lettre morte" ... **it fell on deaf ears.** "



**Monia Mazigh,**  
speaking at the Arar +10 Conference



## Introduction

On 29 October 2014, Amnesty International, the International Civil Liberties Monitoring Group, the Human Rights Research and Education Centre, and Centre for International Policy Studies at the University of Ottawa convened a conference to reflect on the state of national security and human rights in Canada a decade after the creation of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry) to investigate the rendition to and torture in Syria of Maher Arar, a Canadian citizen, in 2002.

In the Commission's report,<sup>2</sup> released in 2006, Commissioner Justice Dennis O'Connor found that Canadian officials had been complicit in Mr. Arar's arrest in the United States, and his rendition to and torture in Syria.<sup>3</sup> The Commission Report concluded that Mr. Arar was likely arrested in the United States on the basis of information the RCMP shared with US officials which painted him in an inaccurate and unfair way.<sup>4</sup> Upon Mr. Arar's return to Canada, security agencies and the government attempted to downplay Mr. Arar's treatment and tarnish his reputation, by, as Justice O'Connor found, omitting key facts about the case, leaking confidential and sometimes inaccurate information to the media, and preparing inaccurate reports minimizing Mr. Arar's suffering.<sup>5</sup>

In 2008 the Report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry)<sup>6</sup> was released, in which Commissioner Justice Frank Iacobucci concluded that Canadian officials had been directly and indirectly responsible for the rendition and torture of Mr. Almalki, Mr. Elmaati, and Mr. Nureddin in Syria, and in Mr. Elmaati's case, also in Egypt in the years following 9/11.

To avoid such tragic occurrences in the future, the Arar Inquiry Report made a number of recommendations, including for the establishment of a new and enhanced, single integrated review mechanism to assess the activities of all Canadian security and intelligence bodies, such as information-sharing, against concrete legal standards to ensure that they remain accountable, transparent, and act according to the rule of law.

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2 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) [Arar Inquiry Report].

3 *Ibid* at 14-15

4 *Ibid* 14.

5 *Ibid* at 16.

6 *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008).

A decade later, Justice O'Connor's important recommendation with respect to a national security review, as well as many other recommendations he made, have not been implemented by the government of Canada. In fact, rather than increasing accountability and transparency within these organizations, in the wake of the separate attacks in October 2014 against a soldier in St-Jean-sur-Richelieu and a soldier and Parliament in Ottawa, the government has introduced legislation proposing dramatically increased powers for the Canadian Security Intelligence Service (CSIS) and new criminal offences, but with no corresponding increase in oversight or review.<sup>7</sup>

The conference brought together several panels of distinguished speakers to discuss the lessons learned from the Arar and Iacobucci Inquiries, the Air India Inquiry, and other court rulings. It offered an opportunity to review the state of Canada's security establishment today when it comes to upholding and protecting human rights. The sessions offered a variety of perspectives: international human rights obligations, individual victims, the media, Canada's judges and lawyers, Canadian Muslim communities, and experts on review and oversight.

This conference report begins with a summary of the individual panels of the day, followed by a discussion of key themes and lessons that emerged.

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<sup>7</sup> Bill C-44, *Protection of Canada from Terrorists Act*, 2nd Sess, 41st Parl, 2015; Bill C-51, *Anti-Terrorism Act, 2015*, 2nd Sess, 41st Parl, 2015.



# Perspectives on National Security and Human Rights

## International Human Rights Law:

Alex Neve, Secretary General of Amnesty International Canada, opened the conference noting that responding to security threats cannot occur at the expense of human rights. Rather, human rights “are the very basis and foundation of freedom, justice, and peace, which is the very definition of security.” Mr. Neve called on the Canadian government to comply with its international human rights obligations – in particular, to impose an outright ban on deportation to torture, to provide redress for past violations, and to increase review and oversight of intelligence agencies to ensure they function in accordance with the rule of law.

## The Human Impact of National Security Measures:

Abdullah Almalki told the story of his detention and torture in Syria because the Royal Canadian Mounted Police (RCMP) had incorrectly informed American authorities that he was an important member of Al Qaeda. The RCMP had no basis for that information, and in fact acknowledged in an internal document that the agency was “finding it difficult to establish anything on him other than the fact that he [was] an Arab running around.” Despite Iacobucci Inquiry findings, Mr. Almalki and the two other subjects of the Inquiry, Mr. Elmaati and Mr. Nurreidin, have received no apology or compensation from the government. Instead, the government has forced them into protracted civil litigation in their efforts to obtain redress.

Sophie Harkat reflected on her family’s struggle to fight for the due process rights of her husband, Mohamed Harkat, who was deemed a threat to national security and arrested in 2002 under Canada’s security certificate regime. Ms. Harkat recalled the physical and mental toll her husband endured for three and a half years in jail, one of those years in solitary confinement, and then another seven and a half years on strict house arrest. She expressed the injustice felt by Mr. Harkat and his entire family at not being informed of or being able to meet the case against him, his fate determined in secret proceedings from which he was excluded.

Dennis Edney reflected on his experience representing Omar Khadr, who from the age of 15 spent a decade in Guantanamo Bay and eventually entered into a US military commission plea deal sentencing him to eight years of prison in October 2010. Mr. Khadr was returned to Canada to complete his sentence in September 2012, where he was classified as a maximum security risk and physically assaulted on numerous occasions. Mr. Edney stated: “The story of Omar Khadr touches upon the legal to the illegal. From the human to the inhuman. I could simply sum it up by saying that I’ve never met anyone such as Omar Khadr who has been so badly treated, and so abandoned by so many who should know better.” Omar Khadr’s story will be heard by the Supreme Court of Canada for the third time on 14 May 2015.<sup>8</sup>

8 Kelly Hartle, *Warden of the Edmonton Institution, et al v Omar Ahmed Khadr*, SCC Court File No. 36081.

Paul Champ, an Ottawa-based lawyer, told the story of his client Aousfian Abdelrazik, a Canadian citizen who had been detained on the request of CSIS, then tortured over three years by the Sudanese national security intelligence agency when he travelled to Sudan to visit his family. When he was released from detention, the Canadian government barred him from returning to Canada by refusing to issue him a passport. Eventually, a team of lawyers, which included Mr. Champ, obtained a scathing Federal Court judgment<sup>9</sup> ordering the government to issue Mr. Abdelrazik an emergency passport and return him to Canada within 30 days of the decision. Like Mr. Almalki, Mr. Nurreidin, and Mr. Elmaati, the government of Canada has not provided Mr. Abdelrazik with any redress and has instead forced him into long and arduous civil litigation in his efforts to obtain redress.



Mr. Champ also recalled the case of Benamar Benatta, an Algerian national who came to the US for Algerian military training and then fled to Canada to make a refugee claim.

Mr. Benatta had the misfortune of seeking asylum in Canada on 5 September 2001 and was detained in order to confirm his identity when the 9/11 attacks occurred. When he was questioned by Canadian officials on 12 September 2001, they discovered that Mr. Benatta was a Lieutenant in the Algerian Air Force. The fact “he was an Arab who knew something about planes” was sufficient for Canadian officials to surreptitiously turn Mr. Benatta over to American authorities. Mr. Benatta remained detained in the US for nearly five years and was subjected to abuse during that time. In 2004, the UN Working Group on Arbitrary Detention stated that the detention regime Mr. Benatta had been subjected to could be described as torture.<sup>10</sup> Mr. Benatta settled his lawsuit against the Canadian government in March 2015.



Abdullah Almalki

## The Media

Moderated by Kerry Pither, author of *Dark Days: The Story of Four Canadians Tortured in the Name of Fighting Terror*,<sup>11</sup> this panel brought together three journalists: Jeff Sallot, Jacques Bourbeau, and Brigitte Bureau. Together they reflected on the ethical and practical dilemmas they faced while reporting on Maher Arar’s story a decade ago and the lessons learned that still apply to reporting, especially on terrorism and allegations of terrorism today.

Jeff Sallot was reporting as a senior political correspondent for the *Globe and Mail* when Mr. Arar was finally released and allowed to return home to Canada. At the time, the Canadian media and the public were anxiously waiting for Mr. Arar to speak for the first time about his experience. He took almost a month to recover and be with his family before speaking out for

9 *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267 [Abdelrazik].

10 United Nations Commission on Human Rights, *Opinions Adopted by the Working Group on Arbitrary Detention*, 61st Sess, UN Doc E/CN.4/2005/6/Add.1 (19 November 2004).

11 (Toronto: Penguin Group, 2008).

the first time, and during that time anonymous officials were busy using the media to cast doubt on his innocence and the possibility he had been tortured. Speaking with Mr. Sallot on the eve of Mr. Arar's first press conference, a Canadian official told him that Mr. Arar had received "some rough treatment" but that he had not been tortured while in Syria. Mr. Sallot quoted the official in a story. He then heard Mr. Arar speak for himself about his experience and say that he had indeed been tortured, and realized that his decision to publish the anonymous quote had terrible consequences. He later apologized to Mr. Arar and said again at this conference that he regretted that decision.

Mr. Sallot told another story demonstrating the need to question allegations made without evidence that has been rigorously tested. The first of the four men imprisoned and tortured overseas was Ahmad Elmaati. Mr. Elmaati was working as a long-haul truck driver when he was stopped on the Canada-US border, questioned, and searched. US customs officials found a map of facilities in Ottawa close to government buildings which could be considered targets for terrorist attacks. On the map were cryptic alpha-numeric notations. The US authorities passed on this information to Canadian officials. The map was later referred to as part of an alleged terrorist plot by Syrian and Egyptian interrogators when Mr. Elmaati was being tortured. It was then cited by anonymous officials to the media as evidence of Mr. Elmaati's alleged terrorist links. After Mr. Elmaati had been released and returned home, Mr. Sallot obtained a copy of the map and followed it, only to learn that it was actually a standard-issue government map of which there were hundreds of copies for delivery drivers, and that the alpha-numeric markings matched location numbers for various parking lots and government buildings. When asked, the RCMP refused to say whether they had ever investigated the origins of the map or knew of its origins.

Ms. Bureau was covering Mr. Arar's story for Radio Canada. She talked about an RCMP officer who repeatedly tried to persuade her to report allegations including that the RCMP had photographs of Mr. Arar at an Al Qaeda training camp in Afghanistan. He would then call her after hearing her stories to ask why she had not used the information. Ms. Bureau explained that unless he was willing to go on the record with his name or show her the photos, she would not report the allegations. Ms. Bureau said she found the RCMP officer's calls and his persistence intimidating. Many years later, the Arar Inquiry confirmed that Canadian agencies never had evidence to back up the allegations made against Mr. Arar. The officer told Ms. Bureau that he had been disgusted to learn that he had been lied to by his superiors and forced to unknowingly spread untruthful information about Mr. Arar. He resigned from the RCMP shortly after.

Ms. Bureau said that this experience reinforced for her the importance of always confirming information by a second source independent from the first. She still believes in the importance of confidential sources. She said that protecting the identity of sources is key to ensuring that whistleblowers acting in the public interest, for instance, do not fear coming forward to reporters with information.

In her view, whether the source is in a position of authority or not, due diligence is always necessary.



Mr. Bourbeau was one of the first television reporters to cover the story. He reminded everyone that every piece of information received by a reporter has an agenda attached to it, and the real task is to understand that agenda and to frame the story with that in mind. He used Mr. Sallot's story as an example, demonstrating that the government's assertion that Mr. Arar had only received "rough treatment" would have had an entirely different impact had it been reported *after* Mr. Arar had spoken publicly about the torture he had endured. The story would then have become about the government attempting to downplay what occurred to Mr. Arar and why.

Reflecting on what lessons today's journalists can apply when covering stories related to national security, Ms. Pither lamented the fact that so many policy makers, journalists, and members of the public do not know about what happened in these cases, and strongly recommended that those working in the field or covering the issue for the media take the time to read the Arar and Iacobucci Inquiry Reports to understand the findings and recommendations made, and her book to understand more fully the human impact of national security activities gone wrong. Mr. Bourbeau reminded everyone to frame stories in ways that do not advance any particular person's, organization's, or government's agenda. Ms. Bureau stressed again the need to double-source all information before making it public. Mr. Sallot, recognizing the pressures young journalists face from editors to get stories out quickly, recommended that news organizations employ an ethics counsellor to which any person can turn when they are uncomfortable about releasing a particular story.

## Reflections from the Bench

The keynote panel of the day, moderated by Nathalie Des Rosiers, Dean of the Faculty of Law at the University of Ottawa and former General Counsel to the Canadian Civil Liberties Association, brought together three distinguished judges to discuss their experiences with public inquiries in the area of national security: Justice Dennis O'Connor, who served as the Commissioner for the Arar Inquiry, former Supreme Court Justice and Commissioner for the Air India Inquiry John Major, and former Supreme Court Justice Frank Iacobucci, who was Commissioner for the inquiry into the treatment of Mr. Almalki, Mr. Elmaati, and Mr. Nurreddin.

Justice O'Connor noted that one of the benefits of the Arar Inquiry was that he was given a mandate to conduct an integrated investigation and review of all of Canada's security and law enforcement bodies – the RCMP, CSIS, foreign affairs, the Canadian Border Services Agency (CBSA), and more. This allowed Justice O'Connor to obtain a comprehensive picture of the information that was available regarding Mr. Arar prior to and during his ordeal. Justice O'Connor also commented on the difficulties of conducting a fact-finding inquiry that deals with often sensitive, confidential information, parsing out which information can be made public and what evidence can only be heard *in camera*. He stated: "I can tell you as a judge sitting *in camera*, it's most uncomfortable, because the accountability of our judiciary, one of the main planks of our accountability, comes from the public nature of our judicial process."



Justice Major

Nathalie Des Rosiers

Justice O'Connor

Justice Iacobucci

Justice O'Connor did not comment on the lack of implementation of his recommendations:

*Quite simply, my view of it is that when judges or retired judges are asked to do public inquiries, they do them, they issue the reports, they say everything they have to say in their report, they make recommendations. It's then up to the government and the political process and other people to make of that what they will but the Commissioner after having delivered the report should not partake in the debate as to whether or not the recommendation should be implemented or not, or comment on it.*

While unlike Justice O'Connor, Justice Iacobucci did not have a mandate to make recommendations in his report, he was clear that he expected the government to respond to the inquiries' findings and to remedy the 'deficiencies' they revealed. He called on the government to amend the federal *Inquiries Act* to require an independent reviewer to conduct a follow-up on the government's response to public inquiries.

Justice Iacobucci drew a parallel between Canada's past wide-spread internment of Japanese Canadians and others during World War II, his own personal experiences growing up as the son of Italian Canadians who were considered enemy aliens during the war, and today's increasing use of security measures to curtail the fundamental rights and freedoms of Canadian Muslims. He stressed that we need to be more proactive rather than rush to enact and enforce new laws to combat increasing radicalization and insecurity.

Justice Major discussed how the RCMP has been under scrutiny for their behavior as early as the 1970s, when, after failing to secure a warrant to install wiretaps at a barn where they suspected a meeting between Quebec separatists and members of the Black Panthers would take place, the RCMP allegedly burned the barn down. As a result of that action, Prime Minister Trudeau called the Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission), which concluded that it was

not appropriate for the RCMP to be undertaking intelligence activities, and resulted in the creation of a new agency, CSIS. The newly established CSIS, however, recruited individuals from the RCMP. The RCMP considered those individuals traitors, creating a lack of trust and cooperation between the two agencies from the very beginning.

Justice Major went on to recall the events of 23 June 1985, when Air India Flight 182 was blown up over the Atlantic Ocean, killing 329 people, 182 of whom were Canadian. An unknown person had purchased a one-way ticket from Vancouver to Toronto, but insisted that his baggage be checked all the way through to New Delhi in India. His request was tragically granted. Justice Major linked the bombing directly to the lack of communication and cooperation between Canada's security intelligence bodies: "I believe its common knowledge that if each had known what the other knew, they could have foiled the attack." There had been plenty of warning signs. There was a general warning in June of that year that Sikhs should not fly on Air India; Air India put out a more urgent message warning of an imminent attack (Canadian authorities interpreted that warning as Air India trying to cut back on costs and transferring the burden of maintaining security to the RCMP); and there was evidence from Ontario Lieutenant Governor James Bartleman, who was in charge of the intelligence analysis and security branch of the Department of External Affairs at the time, that he had seen a communication indicating there would likely be a bombing on 23 June. When he approached the RCMP with this information, the RCMP brushed him off. During the Air India Inquiry, the government took great efforts to conceal the existence of this communication.

Justice Major regretted taking seriously the government's request for real recommendations. In retrospect, he thought he should have limited the number of recommendations he made. His most important recommendation was that given the intense friction between the RCMP and CSIS, an individual national security advisor should be appointed to referee disputes between the two agencies and promote communication. Justice Major expressed frustration that the government dismissed his recommendation by saying it could not create a whole new department to advise on national security. Justice Major concluded that either Minister Vic Toews never read the report, or that he was unable to understand the report.

### **Lawyering for Human Rights in national security cases**

The next panel, moderated by Alex Neve, brought together four lawyers who litigate in various areas of the law where human rights intersect with national security occurs: Paul Cavalluzzo, Marlys Edwardh, Barbara Jackman, and Phil Tunley.

Special advocates were created as a response to the Supreme Court of Canada's decision in 2007 in *Charkaoui v. Canada*,<sup>12</sup> in order to increase the fair trial rights of individuals named in security certificates. A special advocate is an experienced security-cleared lawyer who is appointed by a designated federal court judge to represent the interests of the named individual in secret proceedings in two ways – by challenging assertions of national security confidentiality made by the government; and by challenging the relevance, reliability, and sufficiency of evidence brought forth by the government in secret hearings.

12 2007 SCC 9, [2007] 1 SCR 350.



The special advocate and the named person do not have a solicitor-client relationship, but communications between them carry that privilege. However, special advocates are not permitted to communicate with a named person without judicial authorization once they have viewed the secret evidence.

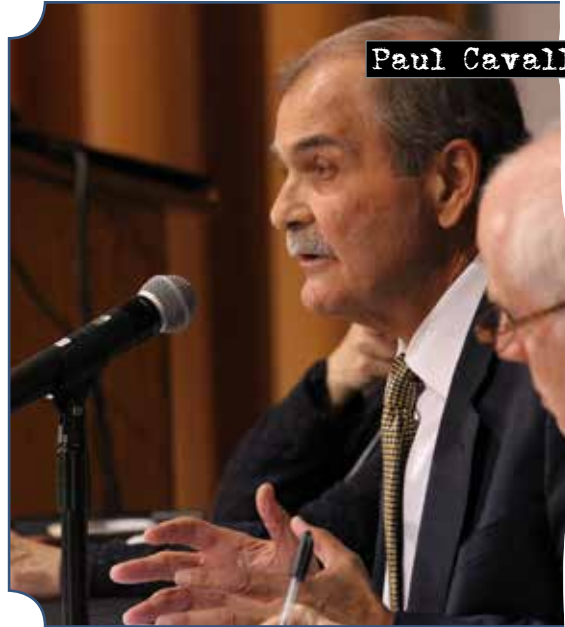
The constitutionality of the special advocate system was recently upheld by the Supreme Court of *Canada in Canada v. Harkat*<sup>13</sup> (Harkat). Mr. Cavalluzzo, who served as lead Commission counsel to the Arar Inquiry and is also a special advocate, disagreed with the Court. Although he stated that the Court made a number of important clarifications and admonitions, he believes the system remains unconstitutional for a number of interrelated reasons.

First, Mr. Cavalluzzo commented that (i) secret hearings violate the open court principle that fosters transparency and accountability; (ii) the exclusion of the named person significantly limits the judge's fact-finding ability; (iii) judges are over-reliant on government officials to persuade them that evidence should be heard in secret and that it is presented fairly; and (iv) the dynamic of secret or closed proceedings may condition judges to unduly favour the interests of secrecy and security.

Second, Mr. Cavalluzzo suggested that the restriction on communication between the named person and special advocate once the special advocate has reviewed the secret evidence should be eliminated. There were no such restrictions during the Arar Inquiry, nor in the previous Security Intelligence Review Committee (SIRC) reviews of CSIS activities. Mr. Cavalluzzo pointed out:

*The special advocates are experienced and competent counsel. You can trust them that they will not inadvertently disclose national security evidence when they are talking to people. What used to drive me mad was that the special advocates in Harkat, Paul Copeland and I, had 85 years of legal experience with these restrictions imposed on us by the law while the CSIS counsel across the court, with a few years of experience, did not have the same restrictions, presumably because Copeland and Cavalluzzo may inadvertently disclose secret information!*

Third, Mr. Cavalluzzo pointed out that the government is known to over-claim national security confidentiality. The Supreme Court of Canada in *Harkat* specifically drew attention to this issue, and reminded judges to remain vigilant against and skeptical of such assertions. Given this consistent pattern of over-claiming, Mr. Cavalluzzo argued there should be an effective penalty on the government when such assertions are made unreasonably.



Paul Cavalluzzo

13 2014 SCC 37, [2014] 2 SCR 33 [*Harkat*].

The Supreme Court of Canada also found there should be no class privilege to protect the identities of CSIS human sources. Mr. Cavalluzzo stated that withholding the identity of CSIS human sources contributes to an unfair process because most of the information heard during secret proceedings comes from such individuals, and is completely unourced. Therefore, without at least being able to cross-examine informants, there is no way any lawyer can effectively challenge that evidence. Unfortunately, the government has recently introduced a Bill<sup>14</sup> which will extend a class privilege over CSIS human sources.

Marlys Edwardh was Commission counsel to a number of inquiries, counsel to Maher Arar at the Arar Inquiry, and also acts as counsel in security certificate cases. Ms. Edwardh noted that in the areas of oversight in national security, nothing has changed. She urged everyone to remain profoundly suspicious of government claims that the powers of national security agencies must be increased. She stated:

*From the perspective of being a lawyer, sitting here today, this is what I've heard panelists say. I've heard the service lies. I've heard the RCMP lies. I have heard that they have every interest in misleading the community to deflect any attention from their own wrongdoings. I have heard that both agencies are involved in and connected with significant human rights abuses that have taken place in foreign states. Well, if I were looking at these issues objectively ... what is utterly and absolutely foundational is that we need to come out of this discussion today recognizing that there must be a mechanism to review the conduct of intelligence and policing agencies. Despite recommendations to create oversight, we need to know why we haven't gone anywhere. Some oversight is necessary even if it means going to members of Parliament. Given the tenure of our discussion, it probably means kicking up a fuss with the next groups who are running for public office.*

On the special advocate system, Ms. Edwardh stated that “to participate in this process is to feel that you have a blindfold on at all times.”

Barbara Jackman discussed how the current national security climate affects her practice as a leading refugee and national security lawyer in Canada. Ms. Jackman stated that the government has not learned from the false targeting of Mr. Arar, Mr. Almalki, Mr. Elmaati, and Mr. Nurreidin, and has instead significantly broadened its interpretation of the definition of “terrorist.” Ms. Jackman noted that further targeting is also occurring with the introduction of amendments to Canada’s *Citizenship Act* which will permit the government to strip Canadians of their citizenship if they have committed certain serious crimes – and the list of “serious crimes” is also broad. Ms. Jackman stated: “When you think of it, citizenship is meaningless if they can just redefine it by statute. What does section 2 or section 6 of the *Charter* mean? It means nothing if they can just redefine it. And you can be sure once they start one class of criminality, they will expand it so that any criminal can no longer be a citizen of Canada.”



14 *Protection of Canada from Terrorists Act, supra note 7.*



Alex Neve

Phil Tunley

Marlys Edwardh

Ms. Jackman discussed the deficiencies of the immigration and refugee determination process in cases involving security allegations. During that process, individuals do not have access to a special advocate to represent them; the government presents highly redacted evidence and news articles which advance its arguments. Ms. Jackman expressed frustration that tribunals have allowed the

admission of newspaper articles as evidence in such proceedings. Ms. Jackman described the whole process as a rubber stamp to approve the inadmissibility of those the government finds undesirable.

Phil Tunley is a civil lawyer representing Mr. Almalki, Mr. Elmaati, and Mr. Nurreddin in their claims for compensation against the government. Mr. Tunley pointed out the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)* provides that States parties have an obligation to impartially investigate torture without delay and to provide redress and compensation to victims of torture. Despite the fact that in 2009, in response to the Iacobucci Inquiry report, the Standing Committee on Public Safety and National Security and a majority of House of Commons vote recommended that the government provide Mr. Almalki, Mr. Nurreddin, and Mr. Elmaati with compensation and an apology,<sup>15</sup> the government has refused to do so. This refusal has been criticized by the United Nations Committee against Torture.<sup>16</sup>

Mr. Nurreddin's action started in 2004 within months of his release from custody in Syria, and Mr. Almalki and Mr. Nurreddin's actions were under underway by 2006. Since then, the government has forced these three men into protracted litigation over the disclosure of some 12,000 documents which is not complete to this day. Finally, however, Mr. Tunley has managed to secure an order from the Superior Court demanding that the government disclose documents more quickly, making a cost award of over \$125,000 against the government, and setting a trial date for September 2016. The trial will be public, meaning anything the government refuses to produce to the claimants will not be relied upon in the proceedings.

15 Standing Committee on Public Safety and National Security, *Report 3 - Review of the Findings and Recommendations of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry) and the report from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (O'Connor Inquiry)*, 40th Parl, 2nd Sess (16 June 2009) online: <http://www.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=SECU&Language=E&Mode=1&Parl=40&Ses=2>.

16 United Nations 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 16.

## A view from the Community Level

Moderated by Dominique Peschard, this panel generated a discussion on the impact of Canada's security establishment on the wider Muslim community. Ihsaan Gardee is the Executive Director of the National Council of Canadian Muslims (NCCM) (formerly CAIR.CAN), an organization that advocates for the human rights and civil liberties of Canadian Muslims. Dr. Sheema Khan is the founder of CAIR.CAN, has served on the Board of the CCLA, and testified as an expert witness in the Arar Inquiry. She is also a monthly columnist for the Globe and Mail, writing on issues such as civil liberties, security, islamophobia, radicalization, and feminism. Khalid Elgazzar is an Ottawa-based lawyer practicing in the areas of civil and commercial litigation, human rights law, and national security law. He was part of the litigation team that secured the Federal Court order to bring Mr. Abdelrazik home to Canada.

Mr. Gardee and Dr. Khan reflected on the troubling and polarizing relationship that has existed between the Canadian Muslim communities and security agencies since 9/11. Mr. Gardee and Dr. Khan both noted how the government's misrepresentations during the Arar Inquiry shook the trust and confidence of Canadian Muslims in Canada's security agencies. Mr. Gardee stated, "this had the effect of damaging trust and creating an us versus you dichotomy or narrative where it seems like security agencies would go to any lengths to justify their actions even if they were clearly unjustifiable or simply an error."

Mr. Gardee emphasised that efforts to combat phenomena like radicalisation towards criminal violence must go beyond merely enacting new security laws, even if they are accompanied with robust review and oversight mechanisms. Rather, the root causes

including alienation, exclusion, stereotyping, and scapegoating as well as facilitating factors such as the role of the internet and social media must be addressed, which necessarily requires a comprehensive short, medium, and long-term strategy. This strategy must include the combined efforts of multiple stakeholders from various sectors of society, including social services, mental health services, drug abuse advisors, educational and research institutions, technology firms to better understand and counter online propaganda, and most importantly, community leaders and organizations. In the same vein, Dr. Khan emphasized that Canadian Muslims are "part and parcel of this society and we want to stop anyone from within our community who would want to do harm to our Canadian society. We want to be part of

the solution. And we would hope the security agencies would understand that, but approach us with respect, and not paternalism."



Khalid Elgazzar

Dominique Peschard

Mr. Elgazzar elaborated upon one area in which counter-terrorism measures directly impact the fundamental freedom of movement of Canadian Muslims: no-fly lists. He noted that before 9/11, there were only 16 names on the watch list used by the US government to screen airline passengers. Today, the reported figure is approximately 45,000 names on the US no fly list. Some reports state that when you combine all of the security watch lists that are used by the US government, the number stands closer to 1.1 million.

Mr. Elgazzar described the typical process an individual experiences when placed on a no fly list. An individual receives no notice, no details of the allegations against them, and no meaningful process to challenge the listing. Further, amendments to Canada's *Aeronautics Act* now permit Canadian airlines to share passenger information with the US government, resulting in significant concerns regarding privacy and the potential misuse of the personal information of Canadian travellers. Mr. Elgazzar also highlighted the fact that the US no-fly list is now also routinely applied in relation to domestic Canadian flights. Mr. Elgazzar has brought a challenge to this policy before the Canadian Human Rights Tribunal, arguing that it is discriminatory for Canadian airlines to rely on the US no-fly list, which itself was ruled to be unconstitutional by a US court in 2014.<sup>17</sup>



**Insaan Gardee**

Dr. Khan, Mr. Gardee, and Mr. Elgazzar all appealed to our political leadership to stop using Canadian Muslims for political ends. Mr. Gardee stressed that doing so “will continue to negatively impact not just on social cohesion, but on our shared security.” Mr. Elgazzar added: “the Muslim community has an important role to play in the security of Canada. However, in order for it to have a meaningful role ... there has to be a certain level of trust with government institutions and security institutions as well. Curtailing civil liberties and violating human rights does the exact opposite.”

## Review and Oversight

The final panel of the day consisted of Craig Forcese, an associate professor of public international law, national security law, administrative law, and public law at the University of Ottawa faculty of law, Gar Parady, who served with the Foreign Service of Canada for 40 years, and was moderated by Warren Allmand, Former Solicitor General of Canada. Both Professor Forcese and Mr. Parady spoke about the lack of capacity of bodies like SIRC to fulfill their review and oversight mandates because they are under-staffed and under-resourced.

Professor Forcese commented that the powers of other review and oversight bodies such as the RCMP Civilian Complaints Commission fall far short of Justice O'Connor's recommendations. Meanwhile, some agencies like the CBSA lack any oversight or review whatsoever, which is alarming given the CBSA's new role in citizenship revocation

<sup>17</sup> *Latif et al v Holder et al*, 3:10-CV-00750-BR (D Or, 2014).

procedures made possible through amendments to the *Citizenship Act* and its general role in intelligence and law enforcement. The review and oversight bodies are further limited by constraints on their ability to share information with one another. Professor Forcese stressed that such communication is vital in order to fully and adequately fulfill their review mandates. Professor Forcese concluded by expressing alarm at the lack of political will to legislate enhanced review and oversight of Canada's security agencies.

Mr. Pardy was also critical of government lawyers in their failure to adhere to the rule of law in national security proceedings, noting that "it is not a stretch to suggest that the distinction between prosecution and persecution is thinner than it used to be." He recalled two alarming precedents for such conduct: the memos written by Jay S. Bybee and John Yoo in the United States, providing legal authorization for the use of torture; and the Nuremburg prosecutions of several judges and legal officials for having permitted the crimes of the Nazi regime to persist. He suggested that provincial law societies take up this issue and hold government lawyers up to the standards of the rule of law.

Mr. Pardy's outlook on what the future holds was grim:

*There is little expectation that [the mandates of review bodies] will be improved, their resources will be increased, and the appointment process improved to even make the existing system meet the needs of Canadians caught in the national security webs. And it's more likely that the existing system will become worse. Even more pessimistic is that it is hard to envisage a successor government in Ottawa to the present one willing to act decisively in this sensitive area of governance.*



Gar Pardy

Warren Allmand

Craig Forcese

## Key themes/lessons

### We cannot forget the human impact of national security measures

Throughout the conference, there was a resounding reminder that amid all of the talk about law and policy, there is a real human cost to the actions of national security agencies. Security measures that facilitate torture or cause human rights violations and irresponsible media reporting have had a real physical and psychological impact on individuals who have been subjected to them. Families suffer. The wider community suffers, and Canadian society is rendered less secure.

#### PHYSICAL AND MENTAL TORTURE

Mr. Almalki spoke in detail about the torture he had been subjected to in Syria – being forced to lay on the floor with his arms tied behind his back and legs in the air, the soles of his feet (and the rest of his body) hammered with electric cable; being repeatedly kicked and whipped; being squeezed, folded over, into the centre of a car tire, causing permanent damage to his body; being hung from the ceiling by his wrist and beaten. And when he was not being beaten, he was kept in a tiny underground cell which he described as a “grave,” in conditions of extreme heat and extreme cold. Mr. Almalki also described the psychological toll of being constantly afraid that at any moment he would be pulled out of his cell and tortured again. Mr. Almalki concluded:

*Torture is one of the most despicable dangers, damaging, destructive, a crime with dreadful human consequence. If it produces anything, it produces pain, agony, frustration, fear, suffering, anger, international insecurity, and possibly results in laws and policies that curtail basic fundamental human rights.*

Mr. Harkat was held in solitary confinement for one year when he was detained under a security certificate. He had no outdoor visits for the first six months, nothing to read or to do when confined in his cell, and when he was finally permitted to see his family, it was for two visits of 20 minutes per week. Ms. Harkat stated at the conference that her husband was treated like an animal, without any knowledge of why he was imprisoned, and with no charges laid against him.

Omar Khadr spent a decade being tortured and ill-treated and enduring unfair proceedings in Guantanamo Bay, sent there when he was still a juvenile. Upon his repatriation to Canada in 2012, he was placed in solitary confinement for seven and a half months. Upon release into the general prison population at the maximum security Milhaven Penitentiary, an inmate tried to stab him, and a contract was put on his life. Mr. Khadr’s lawyer managed to get him transferred to a maximum security prison in Alberta, where, upon arrival, he was placed in a white supremacist unit and beaten up within minutes. Today, Mr. Khadr suffers from major health problems and is going blind.

Mr. Abdelrazik was tortured in the Sudan following his arrest on the request of Canadian authorities. When he was released from detention, he spent a year living in the reception

area of Canada's embassy in Khartoum under very difficult circumstances because Canada refused to issue him a passport. His physical and mental health deteriorated quickly. His lawyer commented how, incredibly, Sudanese authorities sent Canada communications pressuring Canadian authorities to bring Mr. Abdelrazik back as continuing to hold him in the Sudan was a violation of his human rights. The Sudanese were worried that unless Canada acted, the Sudanese security intelligence agency would find a "final solution" for him.

When Mr. Benatta was sent back to and detained in the United States, he was held in solitary confinement with 24-hour lighting, subjected to sleep deprivation, and was physically abused. He was thrown against walls and door jams, forced to wear shackles so tight that he still bears the scars they inflicted today, and has a chipped tooth and cognitive impairment as a result of his treatment.

Ms. Jackman pointed out that in Canada, we sanitize the mistreatment of people, stating: we think we're a nice country so if we keep someone in solitary for five years, that's not cruel. It is in Syria, but it's not in Canada, because it's us doing it ... it's the banality of evil." She noted that people have come out of the security certificate process with Posttraumatic Stress Disorder caused by the process itself.

## IMPACT ON FAMILIES

Security measures cause significant damage to individuals' family lives and ability to live productively in Canada. Mr. Abdelrazik was forced to leave his children alone in Montreal during the time he was in the Sudan, as his wife had died of cancer a year before he left Canada. Mr. Almalki was away from his children for two years. When he returned to Canada, he had lost his business and his career. Ms. Harkat described the heavy conditions that were placed on her husband when he was finally released from detention and placed on house arrest. Mr. Harkat could never be left alone, even inside the house or when going to the washroom; he had to wear a GPS device that had to be charged for two hours every day by plugging it into a wall; there were surveillance cameras in their home, and all of their mail and phone calls were intercepted; all visitors had to be pre-approved, even their new-born nephew and Ms. Harkat's 80-year old grandmother; and any outing, even for errands, had to be approved 48-96 hours in advance, and was accompanied by 2-6 CBSA officers in bullet proof vests and carrying weapons. Ms. Harkat stated:

*For 12 years, we have been dehumanized, humiliated, put into question, even under oath. You testify, you're a liar. You don't testify, you're hiding something. Every word, every movement, every breath, put into question. Not only Mohamed, but myself and our family and friends. Every aspect of our private lives exposed and scrutinized by the court and the press ... Ours was called a marriage of convenience by the court. There is nothing convenient about our struggle.*

## KEPT IN THE DARK

The fact that individuals subjected to security measures are not told why and provided with no meaningful way to respond to the allegations made against them also causes significant psychological damage. Mr. Almalki found himself on the RCMP radar and was sent to Syria



merely for being an “Arab running around.” Ms. Harkat described the years of legal battles her husband endured to gain access to the allegations made against him under a security certificate and to be able to answer those allegations. This struggle ultimately culminated in the Supreme Court of Canada’s recent decision<sup>18</sup> upholding the constitutionality of secret hearings and the special advocate system, including its restrictions on Mr. Harkat being able to communicate with his special advocate, and restrictions on the special advocate from being able to adequately challenge the relevance and reliability of secret evidence.

Ms. Jackman, in reflecting on acting for Mr. Elmaati during the Arar Inquiry, stated that secrecy “re-victimizes the people by putting them through a process where they have no idea what’s going on, [forcing them] to completely trust strangers to do the right thing ... It’s really not fair to people to do that.” Aside from the security certificate cases, Ms. Jackman pointed out that individuals appearing before the Immigration Division never get full disclosure of the information the government is using to seek to have them excluded from Canada, nor do they benefit from special advocates to represent their interests if that information carries national security confidentiality. This process, Ms. Jackman stated, is no more than a rubber stamp for the government.

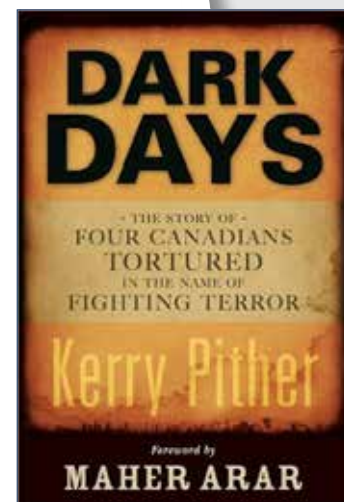
## LASTING STIGMA

The emotional impacts persist when the government and security agencies attempt to use the media to downplay the experience of individuals subjected to security measures, or to tarnish their reputations. Mr. Champ commented:

*People who are wrongfully accused in these national security investigations are so outside the law, they are so denied rights, so denied the opportunity to show ... that they did not do anything wrong. Yet they are forced to live with not only the horrible experience that they’ve had to suffer but the stigma. Every time someone “googles” your name, that’s what you’ll find.*

In his forward to Ms. Pither’s book, Maher Arar wrote that some journalists

*unfortunately, knowingly or unknowingly became instruments in the hands of anonymous Canadian and American officials whose agenda was to prejudice public opinion. These officials leaked a damaging mixture of selective, inaccurate, and false information to journalists, most of which was either extracted under torture or was a pure fabrication by the Syrian Military Intelligence. These journalists must know that the damage they have done to people’s lives is beyond repair, and the stigma created by those leaks will follow the victims for the rest of their lives. These journalists must ask themselves how they would feel if they were publicly slandered in the eyes of all society by a trusted authority. I am sure that an honest answer to that question is that as sacred as it is, the principle of freedom of expression in the media is not absolute.<sup>19</sup>*



18 Harkat, supra note 13.

19 Pither, supra note 8 at xv.

## IMPACT ON VULNERABLE COMMUNITIES

Ms. Jackman commented on how the government's overly-broad interpretation of "terrorism" in immigration and refugee law has resulted in the targeting of certain individuals coming to Canada to seek asylum. She provided the example of Sugunanayake Joseph, a woman who is now in her late 70s, whose husband was a Member of Parliament in Sri Lanka. Her husband's party tried to speak for and present the perspective of the Tamil National Alliance in efforts to end the civil war, and was assassinated. When Ms. Joseph came to Canada to rejoin her daughters, she was branded a terrorist because of her husband's alleged associations with the Liberation Tigers of Tamil Eelam. Ms. Jackman stated, "she knew what he believed in. She understood it, therefore she's a terrorist." Now, Canadian citizens are at risk of having their citizenship revoked through a further broadening of what it means to have committed terrorism or a serious crime. Ms. Jackman pointed out that Omar Khadr would likely be caught under these provisions because of the sentence he was handed by the American military commission.

Security measures have had a profound impact on Canadian Muslim communities more generally. Mr. Gardee described a survey that NCCM (then CAIR.CAN) undertook after 9/11 to examine some of the tactics of Canadian security agencies against Canadian Muslims, and produced a report entitled, *Presumption of Guilt: A National Survey on Security Visitations of Canadian Muslims*.<sup>20</sup> The Report highlighted questionable tactics employed by Canadian security agencies, including aggressive interviewing techniques, racial profiling (e.g. by using an individual's immigration or refugee status to threaten or intimidate), or by taking advantage of stigma by visiting individuals at their places of work in order to coerce cooperation.



Khalid Elgazzar

Mr. Elgazzar spoke in detail about the experience of being placed on no fly lists. Nobody knows they are listed until *after* they have purchased their ticket and attempt to obtain a boarding pass at the check-in counter at the airport. An individual will be told that they cannot board the plane, but not why. It is up to the individuals to discover on their own that *maybe* they have been placed on a US no-fly list, and that they can apply to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP), give them a significant amount of personal information, and insist that they've been erroneously placed on the no fly list. In response, individuals will receive a note stating something akin to "if there was something that needed to be done, we've

done it. Thank you." And the only way individuals can find out whether they have been removed from the list is to purchase a new ticket and appear before the check-in counter at the airport once more.

<sup>20</sup> Online: < [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=pjcaad/asio\\_ques\\_detention/subs/sub107a.pdf](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcaad/asio_ques_detention/subs/sub107a.pdf)>.

Mr. Gardee noted that the wider political as well as societal conflation of Islam with terrorism has resulted in a visible chilling effect among Canadian Muslims to openly practice their faith. He commented:

*The stereotype of Muslims and Islam remain, whether Muslims are viewed or perceived or portrayed as inherently violent, as a fifth column, as being required to be subjected to a stiffer test of their loyalty to Canada, and that remains and unfortunately has been amplified by the growth of certain right-wing media.*

Dr. Khan added: “As a Canadian Muslim, first you see your government complicit, your security agencies complicit, and then the media somehow ... and you ask yourself about your place in a country where your most cherished institutions seem to be against you.”

### **The Importance of International Human Rights**

A number of panelists called on Canada to improve on respecting its international human rights obligations. Mr. Edney pointed out that Omar Khadr’s treatment has violated the *Geneva Conventions*, the *Convention against Torture*, the *Convention on the Rights of the Child*, the *Universal Declaration of Human Rights*, the *Charter of the United Nations*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Social Economic and Cultural Rights*, among others. Mr. Edney stressed that as a State Party to all of these treaties, “Canada has an obligation to protest when they have not been applied to one of its citizens. And yet, it has refused to uphold these human rights obligations when it comes to Omar Khadr.”

Mr. Tunley also noted that under the *Convention against Torture*, individuals have a right to redress for torture and ill-treatment, and a right to a prompt and impartial investigation. Article 14(1) of the *Convention against Torture* states: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.” Article 13 states: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and have his case promptly and impartially examined by its competent authorities.” Mr. Tunley stressed that in doing everything to delay the civil proceedings in the disclosure process, the Canadian government was violating those obligations.

Mr. Neve opened the conference with remarks challenging the common assertion by governments that the difficulty of responding to security threats justifies and excuses human rights violations. Mr. Neve discussed a number of ways in which Canada has been violating its international human rights obligations in the name of security, from permitting deportation to face a risk of torture, being complicit in the rendition and torture of its own citizens, significantly limiting the due process rights of individuals suspected of being a danger to national security through, for example, the security certificate regime, failing to intervene in the unlawful arrests of Canadian citizens abroad, and human rights violations by Canadian soldiers in transferring Afghan detainees in the battlefield to a risk of torture.

Mr. Neve pointed out that “if anything, the intensity of the government crackdown, be it barely disguised persecution or the over-the-top response to an actual security threat, serves only to create more victims, foment violence, deepen divisions and – ultimately – foster greater insecurity.” For this reason, the international community carefully drafted its human rights instruments to recognize that under certain, very exceptional circumstances, the security needs of a nation might require the limitation of some rights, but acknowledged that some rights can *never* be violated, no matter the threat, challenge, or emergency, including the right to life, the protection against torture, freedom from discrimination, and freedom of thought, conscience, and religion. Mr. Neve stressed that “[h]uman rights do not stand in the way. They are the very basis and foundation of freedom, justice and peace; which is the very definition of security.”

### **We must learn from and account for the mistakes of our past**

A resounding message throughout the day was that we must remember and learn from the mistakes of our past in dealing with matters of security and human rights. For example, Ms. Bureau noted with some dismay that in discussions with senior ministerial advisors, many do not remember the Arar Inquiry or its associated recommendations.

#### **WARNING SIGNALS FROM THE PAST**

Many panelists looked far beyond the Arar Inquiry. Mr. Edney, for instance, described today’s legal proceedings in the area of national security as a modern Star Chamber: “We appear to have forgotten the lessons of the Star Chamber, where the accused was submitted to torture, to accusations based on secret evidence, heard by a secret court, while being shackled in the extremes of isolation.”

Justice Iacobucci expressed concern that the security measures of the last decade and the consistent curtailment of fundamental freedoms have targeted and tainted Muslim communities, drawing parallels to Canada’s past wide-spread internment of Japanese Canadians and others during World War II, and his own personal experiences growing up as the son of Italian Canadians, enemy aliens that had to report to the RCMP monthly. Justice Iacobucci commented: “we need to be very very concerned about the over-reach of what we’re doing in the struggle against terrorism and marginalizing groups in our society.”

Justice Major also recalled Canada’s internment of the Japanese, stating that “the first step should be for the government to rationally consider what powers they already have enacted rather than have a knee-jerk reaction to present existing circumstance.”

Justice Major discussed how the RCMP has been under scrutiny for their behavior as early as the 1970s, with the McDonald Commission concluding that it was inappropriate for the police to be undertaking intelligence activities, resulting in the creation of a new agency, CSIS.

He commented about the lack of trust and cooperation that existed between the RCMP and CSIS from the very beginning. Justice Major went on to recall the Air India bombing, linking the cause of the bombing directly to the lack of communication and cooperation between the Canada’s security intelligence bodies.

Across the board, panelists lamented that Justice O'Connor's recommendations have failed to be implemented, and that the Arar and Iacobucci Inquiry Reports have been shelved and gather dust. Justice Iacobucci expressed his disappointment with the lack of action: "if you're asked to make findings, and you find findings of some deficiency or some failing or some contribution, there is an implicit recommendation to *fix* it." Mr. Champ stated: "why did Canadians spend over 20 million dollars on the Iacobucci Inquiry? For nothing, it was pointless because the findings have been completely and utterly ignored."

## PERSISTENT RESISTANCE TO ACCOUNTABILITY

Part of accounting for the past includes acknowledging mistakes and making efforts to rectify them. Throughout the day, panelists spoke about the government's resolve to shirk responsibility for their actions that led to the rendition and torture of Canadian citizens.

## THE MINIMIZATION OF SUFFERING

In the Report of the Arar Inquiry, Justice O'Connor found that

*following Mr. Arar's return, reports were prepared within government that had the effect of downplaying the mistreatment or torture to which Mr. Arar had been subjected. Both before and after Mr. Arar's return to Canada, Canadian officials leaked confidential and sometimes inaccurate information about the case to the media for the purpose of damaging Mr. Arar's reputation or protecting their self-interests or government interests.<sup>21</sup>*



When Mr. Arar was finally returned to Canada, Mr. Sallot regretfully recalled publishing a piece, based on the statements of an anonymous government official, reporting that Mr. Arar had received "some rough treatment" but that he had not been tortured while in Syria. According to Mr. Sallot:

*I had no idea at that time how damaging this could be to a torture survivor, to have your suffering trivialized, denied, and it was indeed a terrible blow to Maher. And, as it turned out, when he did have a chance to speak for himself, it wasn't true. What did I learn from this? ... I should have waited. I should have put my editors off, and I should have said no, you will wait until the man speaks for himself.*

Ms. Bureau told the story of an RCMP officer who would persistently try to leak false information to her, claiming that the RCMP had photographs of Mr. Arar in Afghanistan, but refusing to produce them or to waive his anonymity and provide a public interview about them. Not being able to corroborate the existence of these photographs, Ms. Bureau never reported them.

<sup>21</sup> Arar Inquiry Report, *supra* note 1 at 16.

Ms. Bureau's most shocking revelation in this experience, however, was discovering the depth of institutional lying that occurs in organizations like the RCMP:

*[L]ater on, I found out that the RCMP officer who kept calling me, who was quite firm and insistent in his dealing with me, he really believed Maher Arar was a bad guy, because he was told by his bosses that Maher Arar was a bad guy. He was told by his bosses that there were photos of Maher Arar in Afghanistan, and his bosses were telling him to call me, and probably other journalists, with this information."*

It was only after the Arar Inquiry that Ms. Bureau's RCMP contact realized he had been lied to and that as a result he had found himself lying to others, including Ms. Bureau. Sickened, he resigned from the RCMP.

### **LACK OF REDRESS**

Mr. Almalki, Mr. Nurredin, and Mr. Abdelrazik are being forced into long and arduous litigation in their efforts to obtain justice. As stated by Mr. Champ, "what we've seen ... is this culture of impunity, this resistance of accountability."

Failure to provide acknowledgment and redress for wrongs by Canadian national security officials has a significant human cost. Ms. Jackman stated: "Part of reparation has got to be transparency and if we learned one thing from the Iacobucci Commission it's that transparency is very important for people who are victims." According to Mr. Almalki, his experience has been "13 years of cascaded oppression." Mr. Champ concluded: "I'd just caution us all to look back and see that we've not even owned up or understood the mistakes, the excesses, the misguided actions, and the rationalizations that the government tries to tell itself. If we can't own up to the mistakes of the last 10 years, how can we move forward?"

### **GROWTH OF SECURITY INTELLIGENCE POWERS AND SHRINKING OF HUMAN RIGHTS**

Rather than learning from the findings of the reports leading to recommendations for integrated review and oversight of Canada's security intelligence bodies, the government is now introducing new legislation that will expand those powers, without *any* increase in oversight or review. Justice Iacobucci commented:

*I worry about whenever an incident comes up, even the ones of recent weeks, we immediately resort to what changes in the law should we make. And I wonder whether that exercise is as important as some people think it is ... Again I come back to proactive thinking as well as reactive thinking responses and I believe that we should be very careful about rushing to change laws immediately because of the dangers that that can pose.*



**Paul Champ**

While national security is without a doubt a laudable goal, Justice Iacobucci cautioned that we need to be careful when choosing the means to combat that goal:

*I believe that when we are choosing the means, we really have to remember what we pride ourselves in ... and that is a democracy that has to be respectful of fundamental principles that define a democracy. And that is the rule of law and other freedoms that we enjoy daily. If we rush to the legislative resort, we have to be careful of what we're doing in terms of over-reacting.*

## The need for review and oversight

Despite several inquiries pronouncing that national security agencies should be held accountable for their actions and be meaningfully reviewed to ensure they are acting in accordance with the rule of law, the trend has been to expand the powers of these agencies without any corresponding growth in capacity to oversee their activities. In the Air India Inquiry, Justice Major's most important recommendation was that an individual be appointed to act as a national security advisor to help resolve friction between the RCMP and CSIS and to make sure information is shared in a way that is responsible and consistent with human rights standards. In the Arar Inquiry Report, Justice O'Connor made a number of recommendations for a new and enhanced, single integrated review mechanism to assess the activities of all Canadian security and intelligence bodies against concrete legal standards to ensure that they remain accountable, transparent, and act according to the rule of law. These recommendations have not been implemented, and instead the government has introduced new legislation which will further expand CSIS powers without any according expansion of oversight.

Professor Forcese commented that the accountability system for intelligence agencies in Canada "groans in efforts to keep pace with the increasingly large-scale and integrated security operations." Both Professor Forcese and Mr. Pardy pointed out that SIRC remains severely understaffed and under-resourced at three part-time members, and that two SIRC chairs had recently resigned in quick succession in controversy.<sup>22</sup> In SIRC's latest annual report, *Lifting the Shroud of Secrecy*,<sup>23</sup> the Committee complained that CSIS had not met its duty of candour and disclosure in its reporting to its review body.

The RCMP Civilian Complaints Commission created through the enactment in 2013 of the *Enhancing Royal Canadian Mounted Police Accountability Act* falls far short of Justice O'Connor's recommendations and faces many significant constraints in accessing the information it needs in order to adequately review RCMP activities.<sup>24</sup> Meanwhile, some agencies like the CBSA do not have any review at all, let alone in the area of national security, which is alarming given its regular law enforcement and intelligence functions and the new role it will have in the citizenship revocation procedures made possible through amendments to the *Citizenship Act*.

22 Chuck Strahl and Arthur Porter: See Max Paris, "Chuck Strahl steps down as spy watchdog amid lobbying questions" CBC News (24 January 2014) online: < <http://www.cbc.ca/news/politics/chuck-strahl-steps-down-as-spy-watchdog-amid-lobbying-questions-1.2510321>>; Wesley Wark, "The rise and fall of Arthur Porter" *National Post* (29 September 2014) online: < <http://news.nationalpost.com/full-comment/wesley-wark-the-rise-and-fall-of-arthur-porter>>.

23 (2014) online: < [http://www.sirc-csars.gc.ca/pdfs/ar\\_2013-2014-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2013-2014-eng.pdf)> [SIRC Report].

24 For more details, see Craig Forcese "New 'RCMP Accountability, But ... Act' Coming into Force" (1 December 2014) online: < <http://craigforcese.squarespace.com/national-security-law-blog/2014/12/1/new-rcmp-accountability-but-act-coming-into-force.html>>.

Whenever review bodies like SIRC and the Community Security Establishment Commissioner attempt to coordinate their reviewing operations, they are reportedly criticized by the intelligence agencies. There are no coordination efforts being made at all on the international level between review bodies of different states. Professor Forcese stressed that in order to adequately fulfill their review mandates, all these agencies should be permitted to collaborate and share information. Instead, “review remains



Craig Forcese

dangerously stove-piped, even as security intelligence efforts are directed at becoming more seamless.”

In terms of legislative responses, Professor Forcese stated: “Parliamentarians for their part are blind and frankly often oblivious, and no legislated committee of parliamentarians has attracted government support despite private members’ bills calling for such measures.” Professor Forcese mentioned two private members’ bills tabled at the House of Commons and the Senate: Bill S-220, *An Act to Establish the Intelligence and Security Committee of Parliament*, sponsored by Senator Hugh Segal, and Bill C-551, *National Security Committee of Parliamentarians Act*, sponsored by Wayne Easter. (A third, Bill C-622, *CSEC Accountability and Transparency Act*, sponsored by

Joyce Murray, was defeated at its second reading 11 November 2014.)

Mr. Pardy pointed out that in 1968, the MacKenzie Commission made recommendations to separate the RCMP’s intelligence function from its policing powers (these recommendations were re-affirmed in 1976 through the McDonald Commission, which resulted in the establishment of CSIS). In 1970, when asked by a reporter how far Prime Minister Pierre Trudeau was willing to go in suspending civil liberties in the name of security during the October Crisis, Prime Minister Trudeau famously responded, “just watch me,” setting a standard for politicians ever since.

And today, the government plans to expand the powers of these agencies even further. Mr. Pardy noted how quickly Prime Minister Harper jumped at the opportunity to call the Ottawa shootings an act of terrorism, a statement later supported by allegations by the commissioner of the RCMP that the shooter had referred to Allah during the attack. According to Mr. Pardy,

*The Prime Minister has made clear that he is not interested in causes when there is an opportunity to apply his well-exercised political stratagem of providing answers to non-existing problems ... If referring to the God of Islam which most scholars would agree is not much different than the God of Christianity, and having a distorted view of Canadian foreign policy are sufficient grounds to declare an act of terrorism then the concept itself is of less value than I’ve even conceived.*

Mr. Pardy found that in his experience, the Ministers of Public Safety have done a poor job in fulfilling their role: “In the past ten years, there have been five different ministers in this key portfolio. It is an understatement to suggest that they do not know what they were doing ...



substantial ministerial responsibility has disappeared from our system.” This was affirmed in the most recent SIRC report, which states: “SIRC believes that many of the issues raised in this review go to the heart of Ministerial accountability over CSIS.”<sup>25</sup>

Justice Iacobucci felt that the time has come for the government to amend the *Inquiries Act* to require a follow-up on government’s response to the Inquiries, conducted by an independent reviewer:

*[T]here ought to be a way of having more transparency and accountability. If it’s important enough to have someone spend a lot of time on it, and a lot of money involved, and a lot of people also involved, why isn’t it also important to get a fuller understanding of what came out of that report, and why its recommendations were not adopted or recommended, or if they were, in what form and why?*

## Rays of hope?

Amid the alarming picture that emerged from the various panels as to the progressive curtailment of human rights for the sake of national security, two sources of comfort emerged: the strength of our judiciary and lawyers and the goodness of the Canadian people.

### JUDGES AND LAWYERS: SAFEGUARDS FOR HUMAN RIGHTS

As Mr. Pardy stated, “Justice O’Connor demonstrated today ... the reasons why we as Canadians can put our trust and confidence in the bedrocks of our political system, the rule of law, and the independence of our judiciary.” Both Justices Iacobucci and O’Connor expressed comfort in the fact that today there is far more judicial writing in the area of national security than there existed at the time of their inquiries.

Decision-makers today can rely on these rulings and inquiries when identifying and applying legal standards that find an appropriate balance between safeguarding national security and human rights. Moreover, government action is reviewable under the *Charter*.

The fact that judges take their duty to uphold human rights very seriously was evidenced by the work of Justices O’Connor, Iacobucci and Major in their respective inquiries and thorough recommendations that followed. At the conference, Justice Iacobucci stressed the need for judges to resist blurring the line between the executive and judiciary. He stated:



<sup>25</sup> SIRC Report, *supra* note 15.

*[D]emocracy in fighting terrorism has to fight with one hand behind its back, so to speak. But the terrorist doesn't have that constraint, the one hand being respect for the rule of law and human rights and so on. The terrorist has no such constraint. But ... ultimately, democracy will have the upper hand, if it responds in a way that respects the balance that has to be observed in choosing the means to achieve the goal of struggling with terrorism.*

Such strong statements do not only come from Supreme Court Justices. Rather, courts at all levels have stood up for human rights in proceedings involving national security. One notable example, of course, is the FC's judgment in *Abdelrazik*<sup>26</sup> which finally forced the Canadian government to bring Mr. Abdelrazik home from the Sudan. Mr. Neve quoted Mr. Justice Speyer of the Ontario Superior Court in *The United States of America v Abdullah Khadr*,<sup>27</sup> an extradition case: "there will always be a tension, especially in troubled times, in the balancing of intelligence and security issues with cherished democratic values, such as the rule of law and protection from human rights violations. In civilized democracies, the rule of law must prevail over intelligence objectives."

The dangers of international intelligence sharing have also not gone unnoticed by the courts. Professor Forcese quoted a decision of Justice Mosley of the Federal Court of Canada which "underscores the importance of robust coordination between review bodies so that they understand what each of them knows to better do their function. Otherwise, we're left with haphazard and approximate review and accidental accountability is not sustainable." In *X(Re)*,<sup>28</sup> Justice Mosley held that the ability of CSIS and CSEC to monitor Canadians abroad did not authorize those agencies to use the intercept facilities of other foreign agencies. Justice Mosley stated:

*the Court considers it necessary that the use of 'the assets of the Five Eyes community' is not authorized under any warrant issued to CSIS pursuant to the CSIS Act. The question of whether CSIS may, with the assistance of CSEC, engage the surveillance capabilities of foreign agencies was not raised in the application that resulted in the issuance of the first such warrant or in any subsequent warrants of this type.*

And of course, we can draw hope from the tireless work of lawyers like Mr. Champ, Mr. Edney, Mr. Cavalluzzo, Ms. Edwardh, Ms. Jackman, Mr. Tunley, and Mr. Elgazzar, who persist in advocating for the human rights of those who find themselves affected by security intelligence activity. In areas where the judiciary has favoured national security and secrecy at the expense of human rights, these lawyers continue to urge judges to establish a better balance between these two mutually enforcing goals.

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26 *Supra*, note 9.

27 2010 ONSC 4338, 322 DLR (4th) 483.

28 In the process of being appealed to the Supreme Court of Canada, Court File No. 36107.

## THE POWER OF COMMUNITY ACTION

Another source of optimism comes from the Canadian people themselves. Monia Mazigh in her concluding remarks thanked Canadians who stood with her in her struggle to bring her husband, Mr. Arar, home:

*Let me express my gratitude to ... all Canadians who believed in human rights, in justice, in dignity for all. It is those Canadians ... that helped me when I was alone, trying to bring my husband home. It is those Canadians who didn't know at that time who Maher Arar was, who stood up for justice. They didn't know if he was a terrorist or not. They didn't know if he was innocent or guilty. They didn't know how religious he was, and whether he prayed regularly five times a day, or how radical his views are. They didn't know anything about him. Nevertheless, those Canadians knew one thing. Everyone has to be treated with justice. And obviously, they saw in Maher Arar's case only one thing: the utmost injustice.*

Dr. Khan echoed these sentiments:

*if there's one element of this story that inspires me today and I always tell my kids, it's the Canadian people, because as the Canadian people came to find out what had transpired, they spoke quietly, consistently, in the calm, measured, outrage that Canadians can show. Slowly, there was a growing demand for justice. Our civil liberties organizations, our human rights organizations, and our judicial institutions were at the forefront with the inquiry. If anything, my hope and faith in these institutions of our country were reinforced.*

With regards to the recent shootings in Ottawa, Dr Khan continued:

*If anything, last week, I saw a response that reflected what I believe is our ethos. We saw a calm, resolute, principled reaction. Whether it was the civilians who tried to help Corporal Nathan Cirillo in his last moments. The security officials at Parliament Hill, who saved many lives by their quick action. By the media coverage, which was measured, balanced, restrained, and that Wednesday evening, when we heard statements from the three leaders of the various parties. We were heartened to hear Mr. Mulcair remind us to stand on guard against hate. We were reassured by Mr. Trudeau, who reached out to the Muslim community and made it clear that we were part and parcel of this community. We've also seen incredible responses in Cold Lake, where a mosque was recently vandalized. People were told to go home and how the residents of Cold Lake came out and helped clean up this mosque and showed a message of love and compassion.*



Mr. Elgazzar pointed out that much of the work done to bring Mr. Abdelrazik home was undertaken by ordinary Canadians, who at risk of criminal prosecution, donated funds to purchase Mr. Abdelrazik's ticket home because he was subject to an asset freeze. Foreign Minister Cannon's response of using his exceptional discretionary powers to deny Mr. Abdelrazik a passport, was chastised by the Federal Court. Thus, the community action to purchase Mr. Abdelrazik's ticket contributed a great deal towards securing the judgment that resulted in Mr. Abdelrazik being able to finally come home.

Such reflections resulted in a strong appeal to all Canadians to remember our values as a society that cherishes fundamental rights and freedoms, and to stand up for those values when they are being threatened. Mr. Pardy stated:

*Maher and Monia symbolize more than the conflict between the unchecked ends of our national security behemoth and the ability of Canadians to get on with their daily lives. They symbolize the need for a national collective will to restore some measure of balance between the needs of national security and the protection of our rights as Canadians.*

Dr. Khan concluded:

*let's remember who our common enemies are: fear, over-reaction, and yes extremism of all stripes. Our common values are respect for dignity, irrespective of race, religion, ethnicity, sexual orientation. We are a very inclusive society, and this is something we should do our best to maintain. We all value the protection of life and the well-being of every single individual. And we have a strong resilience and a strong commitment to democratic values.*



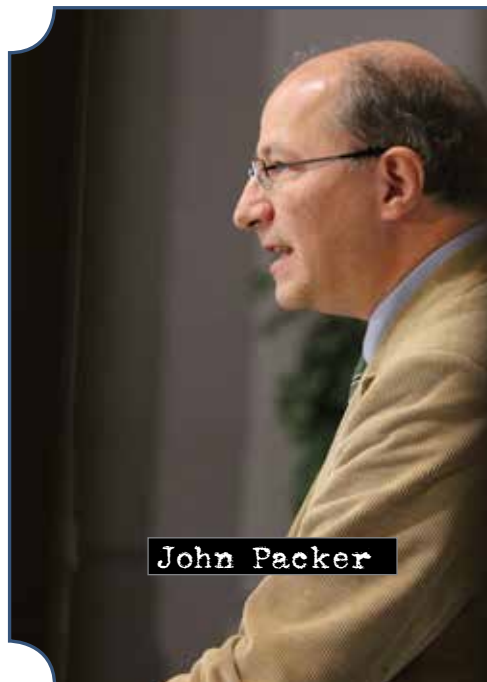
**Monia Mazigh**

PHOTOGRAPHER: Sebastian Packer (all photos)

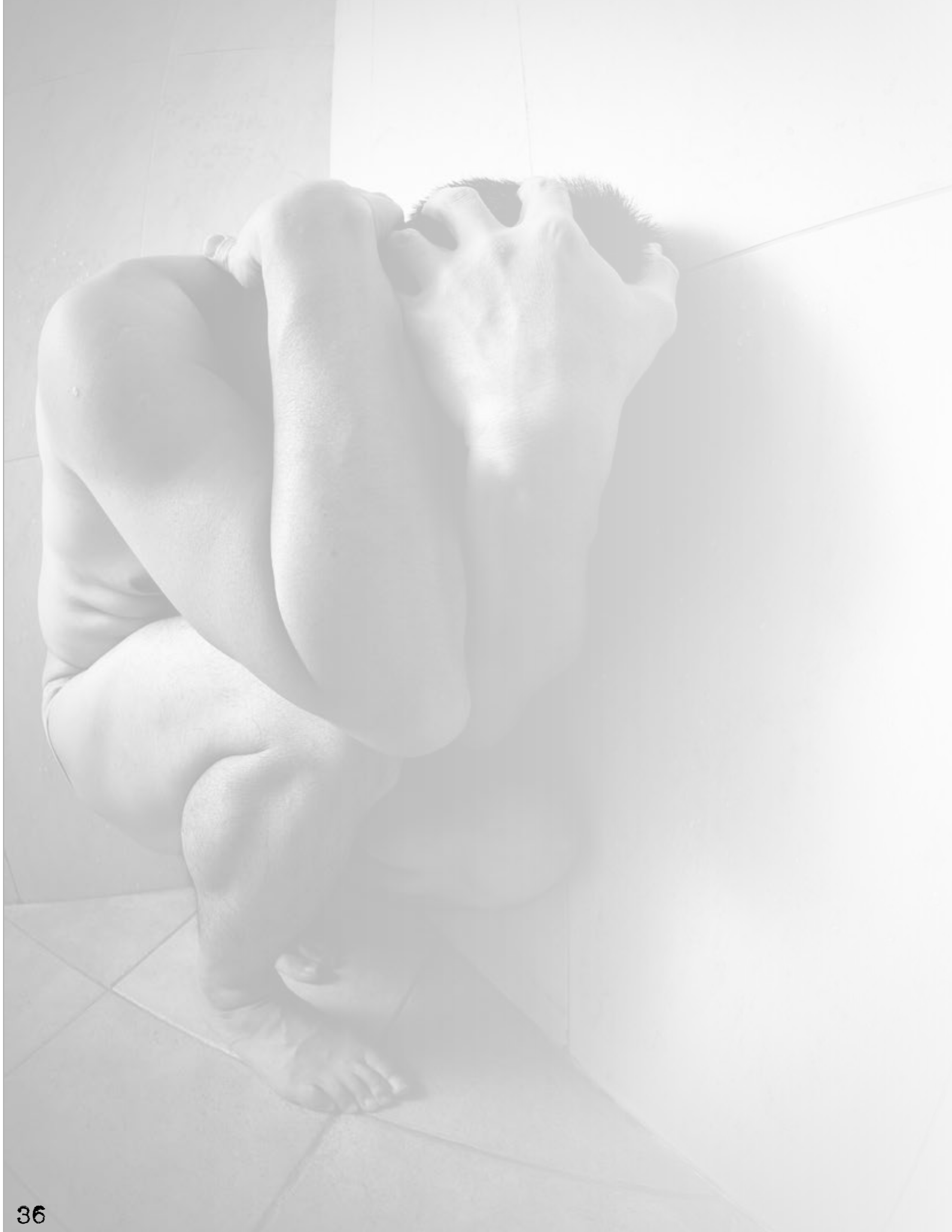
## Conclusion

Professor John Packer closed the conference. Reflecting upon the day, he stated:

*Our values are being challenged and our freedoms are under threat. Indeed, in a number of cases, some still ongoing, we have committed violations. It is clear to me that the challenges we face are universal – and so we are not unique. Perhaps the greatest threat is our complacency. Obviously, we must secure our country, but we must do so in such a way that also secures every human being and that preserves Canada as an open society in which we can live with confidence, invest in our futures, and enjoy our rights and freedoms. In this, what distinguishes us, what defines our civilization, is exactly the rule of law protecting human rights for everyone – that we assert these, uphold them both in law and in fact, and promote them energetically. To hesitate, to prevaricate, or to surrender is a betrayal ... In the words of Churchill, “the price of freedom is eternal vigilance.”*



The most secure society will be attained when we all work towards respecting, protecting, and fulfilling the fundamental human rights of all in our community. By allowing our government continued impunity for its complicity in torture and ill-treatment, and enabling further law reforms that will further increase the capabilities of security agencies and curtail human rights, we are compromising our Canadian values and contributing to a less secure community. Canada must learn from the mistakes of its past, and account for its past transgressions. The human consequences of a failure to do so have proven to be extremely grave. Yet, we have seen that judges, lawyers, and ordinary Canadian citizens alike are capable and willing to stand up against injustice, and achieve positive change. As stated by Mr. Edney, these stories are not just about individuals who have had their rights trampled, but they are “about how we as individuals define ourselves as a society and what each one of us is prepared to stand up for.”



# APPENDIX 10

National Security and Human Rights a Decade Later

