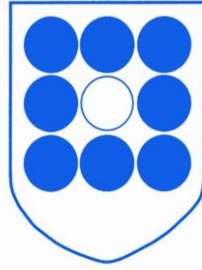


# CANADIAN CIVIL LIBERTIES ASSOCIATION

360 Bloor Street West, Suite 506  
Toronto, ON M5S 1X1  
Telephone (416) 363-0321  
Fax (416) 861-1291  
E-mail: mail@ccla.org



# ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES

360 rue Bloor ouest, Bureau 506  
Toronto, ON M5S 1X1  
Téléphone (416) 363-0321  
Télécopieur (416) 861-1291  
Courriel: mail@ccla.org

**Via mail and email**

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July 28, 2011

The Honourable Jason Kenney, P.C., M.P.  
Minister of Citizenship, Immigration and Multiculturalism  
Citizenship and Immigration Canada  
Ottawa, Ontario  
K1A 1L1

Dear Minister Kenney:

The Canadian Civil Liberties Association (CCLA) wishes to express its concerns with respect to the constitutionality of the provisions of Bill C-4<sup>1</sup>. The Canadian Civil Liberties Association asks you to:

- 1) Withdraw the Bill;
- 2) Amend it to remove all the unconstitutional provisions and the provisions that violate the international Conventions;
- 3) At a minimum, refer the question of the constitutionality and legality of the bill to the Supreme Court of Canada.

Canada's history with respect to immigration and refugees is not perfect. The "Chinese Head Tax", and the internment of Japanese Canadians during the second World War are both relics of old discredited philosophies and, sadly, of our past. Another event from our undistinguished past was the Canadian government's refusal to admit a boatload of Jewish people fleeing Hitler's Germany – a refusal that forced the MS St. Louis back to Europe where many of its passengers perished in the Holocaust.

The individuals on that boat were not Canadian citizens or even permanent residents. Yet many Canadians feel – *and you yourself have expressed* – a sense of responsibility for the passengers on the St. Louis, and a fundamental ethical obligation to help people in desperate situations fleeing for their lives. In your speech, at the unveiling of the monument to commemorate the MS St. Louis just this year, you describe the monument as a "concrete perpetual expression of regret." You

<sup>1</sup> *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 1st Sess., 41<sup>st</sup> Parl., 2011.

go on to remind us that we must learn the lessons of history in order to apply them to the future, and assert that:

“Canada will never close its doors to legitimate refugees who need our protection and who are fleeing persecution.”

The CCLA is concerned that if passed into law, Bill C-4 will lead Canada into another dark chapter. History will continue to judge Canada on the way in which it treats victims of international crisis. In this letter, we highlight the concerns that we have with respect to the constitutionality of the provisions of the Bill as well as its violations of several international law conventions.

### Second-class Refugees

At the heart of Bill C-4 is the creation of a two-tier system for refugees. The Bill grants the Minister discretion to designate a group of people arriving in Canada into this second class, in circumstances defined broadly<sup>2</sup>. Once so designated, people in this group are subject to numerous deprivations of liberty and restrictions not ordinarily imposed on refugees and refugee claimants in Canada.

In our view, the criteria for the exercise of the discretion are too vague to be pass constitutional muster in light of the mandatory incarceration. In addition, it is our respectful submission that politicizing the detention and eventual release of asylum seekers is ill-advised. Canada should protect itself against future governments who may act for politically expedient reasons or anti-immigrant feelings to act precipitously and incarcerate groups of people fleeing persecution. The legacy of the MS St Louis should be to recognize the temptation to deny humanity to people fleeing horrors of wars and persecution and the popularity of defining the “other” or the “stranger” as dangerous and unwelcome. There is a responsibility on the government to prevent such temptations.

### Automatic Mandatory Group Detention

According to the proposed Bill, any group of people ‘designated’ *must* all be placed in detention and must remain in incarceration until their refugee claim is settled. Outside of the costs of such mandatory and extended incarceration, this automatic detention violates several international treaties and the Canadian Charter of Rights and Freedom:

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<sup>2</sup> The Bill authorizes the Minister to designate any group (of undefined number) of people arriving in Canada (excluding citizens or permanent residents) into the “designated” class, in circumstances including the following: if the Minister believes that these people cannot be examined and dealt with “in a timely manner,” or that their arrival into Canada was facilitated in violation of the immigration laws by someone who earned a profit.

- Non reviewable detentions for 12 months contravene section 10 of the Charter<sup>3</sup> (right to habeas corpus); this is a particularly harsh departure from the current standard, that requires independent review within *48 hours* of the detention
- Detention irrespective of the level of threat presented by an individual, that is, group detention, violate section 9 of the Charter (protection against arbitrary detention); These fundamental rights are also guaranteed in the *International Covenant on Civil and Political Rights*.
- Punishment of asylum seekers for their illegal entry into Canada is prohibited by section 31 of the Convention on the Status of Refugees (the Refugee Convention);
- To the extent that children are incarcerated, this may violate the *International Convention on the Rights of the Child*; to the extent, that they would be released and separated from their families, this may also constitute a violation of the said Convention.

One must remember that our current statute has ample provisions to detain individuals for any number of reasons, including public safety and flight risk. The increased powers of detention found in Bill C-4 are neither necessary nor justifiable.

#### Restrictions post finding of refugee status

Even when a person in the designated class *is recognized as a refugee*, Bill C-4 prevents the refugees from applying for temporary or permanent resident status for five years and prevents them from obtaining refugee travel documents for five years. The arbitrary denial of travel documents to refugees is also a violation of the Refugee Convention<sup>4</sup>. The combined effect of these restrictions is that individuals who are fleeing persecution will be prevented from seeing their family who may have escaped to another country for years. This seems unnecessarily harsh when it comes after a finding that people are genuine refugees.

There is no doubt that the delays in obtaining permanent residency, which delay the process of citizenship, prevent appropriate integration in Canadian life and access to full participation. This is has human and prosperity costs for Canada.

#### Second-class Canadians

Finally, for individuals in a “designated group,” the restrictions do not end with detention nor with the restrictions above-mentioned. Even after refugee status is recognized, the “designated” individuals may be required to report to an officer to answer all questions, and provide any information or documents the officer requests.

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<sup>3</sup> *Charkaoui v. Canada* (2007) SCC 9 where the Supreme Court invalidated detention without reviews for 120 days.

<sup>4</sup> Article 29 provides that “The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require.”

This is a stark departure from Canadian law that does not oblige people to report to the authorities, outside of a criminal process. This new statutory duty to co-operate and report is unique to the designated group of refugees. This provision has the potential to coerce refugees into spying and informing on friends, neighbors, employers – even if the individual refugee is himself or herself not suspected of any wrongdoing. It is certainly incompatible with the right against self-incrimination or the absence of a legal duty to co-operate with the police in Canadian law.

#### Detention of Permanent Residents

Bill C-4 expands the reasons for which people, including permanent residents, upon entry into Canada can be detained. These new grounds for detention include: reasonable grounds to *suspect* that the permanent resident or the foreign national is inadmissible on grounds of serious criminality, criminality or organized criminality. In other words, under this Bill, permanent residents of Canada could be incarcerated on a reasonable suspicion of criminality, even if they have never been charged, tried or convicted. Besides the costs of such wide ambit of the detention powers, this could have a significant impact on the ability of permanent residents to work and travel.

#### Justification under Section 1 of the Charter

The objective of Bill C-4 is to prevent human smuggling, a goal that CCLA does support. However, the Canadian government cannot do so in a manner that undermines constitutional protection or commitment to international conventions. International cooperation and law enforcement efforts are needed to control human smuggling. Such goals are undermined by failures to adhere to international treaties and the rule of law. In our view, these provisions of the Bill cannot be saved under section 1 because they are too vague and do not minimally impair the rights. We urge you to reconsider Bill C4.

#### Conclusion

There are serious potential rights violations in Bill C-4. We ask that you withdraw it, amend it to correct the above-noted unconstitutional provisions or, at a minimum, refer it to the Supreme Court of Canada to assess its constitutionality. The Canadian government should not enact statutes where such constitutional uncertainty exists as to their validity.

We would welcome a meeting to discuss our concerns with you.

Sincerely,



Nathalie Des Rosiers  
General Counsel  
Canadian Civil Liberties Association



Noa Mendelsohn Aviv  
Director, Equality Program  
Canadian Civil Liberties Association