



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

Submission on Bill C-51

Submission to the Standing Committee on Public Safety and National
Security

March 23, 2015

B.C. Freedom of Information and Privacy Association
103-1093 West Broadway
Vancouver, British Columbia, V5N 1E2
Phone: 604-739-9788 | Fax: 604-739-9148
fipa@fipa.bc.ca

FIPA would like to acknowledge the Law Foundation of British Columbia. Their ongoing support of our work in the areas of law reform, research, and education makes submissions like this possible.



INTRODUCTION

FIPA is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform.

While our work focuses primarily on access and information rights in British Columbia, we have also played an active role in federal sphere, including in relation to the *Personal Information Protection and Protection of Electronic Documents Act (PIPEDA)* last month, and also on the issues related to lawful access going back to 2002.

We will keep our points brief, as many of the serious concerns about this bill have already been eloquently expressed by a number of individuals and organizations.

We hope you will look carefully at all the submissions, and hopefully recommend that this unjustified and unjustifiable piece of legislation be withdrawn.

What others have said about Bill C-51

For unknown reasons, this Committee has declined to call any of the Privacy Commissioners as witnesses, including the Privacy Commissioner of Canada. Fortunately, every Commissioner in the country has taken the initiative to sign a public statement on the many shortcomings of C-51, including a joint letter to this Committee.¹

Perhaps the most chilling paragraph in their letter to you is the following:

Bill C-51 challenges fundamental rights and freedoms on several fronts, but the focus of our concern is on its mandate for overbroad, unregulated and intrusive sharing of the personal information of ordinary Canadians. If enacted, the portion of Bill C-51 comprising the Security of Canada Information Sharing Act (SCISA) would significantly expand the power of the state to surveil and profile ordinary, law-abiding Canadians.

Pointing out that Bill C-51 would allow virtually unlimited surveillance of law-abiding Canadians, the Commissioners point out that this massive state surveillance "...would be inconsistent with the rule of law in our democratic state and contrary to the expectations of Canadians."²

¹ <https://www.oipc.bc.ca/public-comments/1764>

² *ibid*

Some of their key points relate to the excessive breadth of concept of what “undermines the security of Canada.” They also criticize the overbreadth of the scope for information sharing under the bill, and recommend that the proposed *Security of Canada Information Sharing Act* be withdrawn.

You have already heard from Professors Forcese and Roach about the shortcomings of C-51, and we will not repeat their remarks, but refer you to their excellent online blog for the catalog of shortcomings and overreach.³

Professor Michael Geist has put together a trenchant criticism of the privacy shortcomings of this bill, and you can find it set out on his blog.⁴

He refers to the proposed *Security of Canada Information Sharing Act* as a piece of legislation which would “eviscerate” the protections provided to personal information by the *Privacy Act*. We agree with his analysis and his conclusion.

Comparison between Bill C-51 and the successor to the *War Measures Act*

As the government has not seen fit to provide actual justification for the introduction of this bill beyond vague assertions of threats and platitudes about how security does not necessarily infringe on civil liberties, we thought it would be instructive to compare this Bill to current Canadian laws which provide extraordinary power to the government in emergency situations. Presumably the current situation is not an emergency, or else the government would have actually used its extraordinary powers under the *Emergencies Act*.⁵

1. Preamble

The preamble is an important tool in statutory interpretation, and a guide to the intention of Parliament in enacting the law.

The preamble of the *Emergencies Act* is set out below.

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

³ www.antiterrorlaw.ca

⁴ <http://www.michaelgeist.ca/2015/03/why-the-anti-terrorism-bill-is-really-an-anti-privacy-bill-bill-c-51s-evisceration-of-government-privacy/>

⁵ *Emergencies Act* R.S.C., 1985, c. 22 (4th Supp.)

AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and must have regard to the International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency.

This preamble sets out the need in times of emergency to take “temporary measures” to ensure safety and security AND “protection of the values of the body politic,” which may not be appropriate in normal times. The contrast with what is contained in C-51 is startling.

The preamble to the proposed *SCISA* (s.2 of C-51) reads as follows:

Whereas the people of Canada are entitled to live free from threats to their lives and their security;

Whereas activities that undermine the security of Canada are often carried out in a clandestine, deceptive or hostile manner, are increasingly global, complex and sophisticated, and often emerge and evolve rapidly;

Whereas there is no more fundamental role for a government than protecting its country and its people;

Whereas Canada is not to be used as a conduit for the carrying out of activities that threaten the security of another state;

Whereas protecting Canada and its people against activities that undermine the security of Canada often transcends the mandate and capability of any one Government of Canada institution;

Whereas Parliament recognizes that information needs to be shared — and disparate information needs to be collated — in order to enable the Government to protect Canada and its people against activities that undermine the security of Canada;

Whereas information in respect of activities that undermine the security of Canada is to be shared in a manner that is consistent with the Canadian Charter of Rights and Freedoms and the protection of privacy;

And whereas Government of Canada institutions are accountable for the effective and responsible sharing of information;

This section repeatedly states that the primary obligation of government is to protect itself and its people, while suggesting in its first paragraph that there is form of guarantee to be free from even threats to Canadians' lives and security. Eventually the preamble does acknowledge, somewhat grudgingly, that its exercise of these new information sharing powers is subject to the *Charter of Rights and Freedoms*, and that the massively increased information sharing is to somehow be done in a way that is consistent with "the protection of privacy".

Presumably this choice of words, rather than actually citing the *Privacy Act* or its principles, will allow government to share information according to its interpretation of what constitutes "the protection of privacy."

2. Consultation with the provinces and territories

The Premiers of British Columbia and Quebec have voiced concern about Bill C-51, but have no direct mechanism to bring these concerns to the federal government other than normal intergovernmental channels.

In contrast, s. 44 of the *Emergencies Act* provides that:

44. Before the Governor in Council issues or continues a declaration of a war emergency, the lieutenant governor in council of each province shall be consulted with respect to the proposed action to the extent that, in the opinion of the Governor in Council, it is appropriate and practicable to do so in the circumstances.

Note the use of the word 'shall', making this consultation mandatory. The method and timing are left to the discretion of Cabinet, but this does not remove the obligation to consult.

There is no equivalent to this in C-51.

3. Time-limited Powers

The government also has to seek Parliamentary confirmation of a declaration of emergency under the *Emergencies Act*. It must put a motion before each House, "together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces" seven sitting days after the declaration is issued.⁶

First of all, under the *Emergencies Act*, before proclaiming that a "war emergency" exists, the government must believe, "on reasonable grounds, that a war emergency exists and necessitates the taking of special temporary measures for dealing with the emergency."⁷ The declaration must also "specify the state of affairs constituting the emergency" without jeopardizing any special temporary measures proposed to be taken for dealing with the emergency."⁸

⁶ *Emergencies Act*, s.58(1)

⁷ *Emergencies Act*, s.38(1)

⁸ *Emergencies Act* s.38 (2)

These declarations only last 120 days, but can be renewed. In contrast, C-51's provisions do not have any kind of time limit or even a sunset clause.

4. Parliamentary oversight

Bill C-51 provides no element of parliamentary oversight, despite a massive increase in surveillance and other powers to be exercised in vaguely defined circumstances.

This compares unfavourably with what Parliament saw fit to provide in an actual emergency in time of war, which is presumably a more serious threat to this country and its people than whatever threats we are currently facing.

Not only that, but this part of the *Emergencies Act* includes a Parliamentary Review Committee that examines the "exercise of powers and the performance of duties and functions pursuant to a declaration of emergency."⁹

This Committee would have members from all parties in both Commons and Senate. Those members would be sworn to secrecy and its meeting would be private, but the Review Committee would report to Parliament on how the government is exercising its powers and functions every 60 days for as long as the declaration of war is in effect.¹⁰

The Review Committee also has the power to revoke or amend government regulations referred to it.

Once the war emergency is over, the *Emergencies Act* requires the government hold an inquiry within sixty days "into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency."¹¹

Nothing like this exists in C-51, nor has the government provided any rational explanation of why not.

CONCLUSION

The B.C. Freedom of Information and Privacy Association asks this Committee to recommend the government withdraw this bill.

⁹ *Emergencies Act* s.62

¹⁰ *Emergencies Act* s.62(6)

¹¹ *Emergencies Act* s.63