

The Law Society
of British Columbia



Bill C-51, Anti-Terrorism Act, 2015

**Submissions to Standing Committee on Public Safety and
National Security**

Law Society of British Columbia

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Introduction

The Law Society of British Columbia (the Law Society) is an independent organization whose origins date back to 1869. Its membership comprises all lawyers who have been called to the Bar in British Columbia who remain in good standing pursuant to the *Legal Profession Act* S.B.C. 1998 c.9 and the Law Society Rules. It is governed by the Benchers, being 25 lawyers who have been elected by the membership, together with up to six persons who are not members of the Law Society appointed by the Lieutenant Governor in Council of British Columbia, as well as the Attorney General of British Columbia.

Pursuant to s. 3 of the *Legal Profession Act*, the Law Society's object and duty is "to uphold and protect the public interest in the administration of justice by" (inter alia) "preserving and protecting the rights and freedoms of all persons."

The Law Society supports measures to protect and preserve public safety, and recognizes the exceptional challenges that government is now faced with today from the threats of terrorism worldwide. Canada has an enviable position in the world as a tolerant and just country that promotes personal rights and freedoms and that encourages diversity. Ensuring that there is a robust protection of public safety is both consistent with Canadian values and, in turn, further protects the society in which those values are practised.

There is always a delicate balance to be struck, however, in the promotion of public safety and the protection of rights and freedoms, and the Law Society recognizes that the balance is not always an easy one to strike.

The Law Society is concerned that several aspects of Bill C-51 do not appropriately balance efforts to protect public safety with rights and freedoms guaranteed to all Canadians. We are aware that many commentators have reached similar conclusions, and we know this Committee is actively considering those submissions. We will therefore focus on what we consider to be the most constitutionally troublesome provisions of Bill C-51, which are found in amendments to the *Canadian Security Intelligence Service Act*.

Canadian Security Intelligence Service Act

(a) Introduction

Part 4 of Bill C-51 contains amendments to the *Canadian Security Intelligence Service Act*. These amendments alter the function of the Canadian Security Intelligence Service ("CSIS") from an intelligence-gathering agency to an agency whose role will include taking "measures" to prevent "threats to the security of Canada" – a role that is undertaken by every law enforcement agency in Canada.

The Law Society is concerned about the proposed amendments in Part 4 of Bill C-51 given this expanded mandate of CSIS.

(b) Judicial Warrants Authorizing Violations of the Law

Section 12.1 of the Act as amended by Bill C-51 allows CSIS to take reasonable measures to reduce a threat to the security of Canada. The Law Society supports any legislation that seeks to preserve public safety provided it finds the proper balance with and thereby does not unduly infringe on the rights and freedoms of Canadian citizens. And the amended Act does provide limitations that would preclude CSIS, when taking a measure to reduce a security threat, from intentionally or through criminal negligence causing death or bodily harm, willfully obstructing, perverting or defeating the course of justice, or violating the sexual integrity of an individual, and the Act further prevents CSIS taking measures if they will contravene a right or freedom guaranteed by the *Charter* or if they will be contrary to other law. In our respectful view, these are all appropriate limitations.

However, the legislation also provides that these limitations operate *unless CSIS is authorized to do so by a warrant issued under s. 21.1 of the Act* (section 12.1(3)). This provision is concerning.

In brief, section 21.1 provides that in order to reduce a threat to the security of Canada, a CSIS employee can, with ministerial approval, apply to a judge of the Federal Court for a warrant authorizing the person to whom the warrant is directed to do a number of things as set out in that section *without regard to any other law, including that of any foreign state*. The matters that must be specified in the application are set out in s. 21.1(2).

(i) Authorization Required Only Where Proposed Measure “Will” Violate the Law

The application is only required where CSIS has determined that its activities *will* (not *may*) violate the law – see section 12.1(3) - which we believe is the wrong test. It will be difficult, in advance, to know if certain measures *will* contravene a right or freedom or *will* violate the law. While some contemplated measures could undoubtedly be envisioned to violate the law (and we believe in a country governed by the rule of law, these should be discarded as appropriate measures in any event), the legality of others may be much less certain. The intention behind this provision is to allow for judicial consideration of the action before it takes place. Consequently, we consider that any measure that *may* violate the law should be presented to a judge, who may then consider, for the purpose of the issuance of a warrant, whether such measure is justified.

Moreover, we are concerned with the entire concept of a state agency being statutorily authorized to seek judicial approval to violate the law. While judicial oversight of police powers is a longstanding function of the courts, it has always been to ensure compliance with the law, not to authorize its violation. The history of courts in Canada is not one of ruling on permissible violations of the law and it would be unfortunate to start now.

(ii) Assistance Orders

We are also concerned that, through section 22.3 (assistance orders), a judge may order any person to provide assistance in the execution of a warrant authorized under s. 21.1 – effectively requiring a person named in the assistance order to assist in the violation of a law. Conscripting a citizen into assisting the state in taking measures against a third party through the violation of the law, no matter how authorized, is a worrisome prospect.

(iii) Oversight

We appreciate that there are two levels of preliminary oversight. First, the Minister must approve the application. Second, the application must be made to and approved by a judge of the Federal Court. We are unaware of any requirement that CSIS report back to the court on the execution of the measures it took pursuant to the warrant so that the court could assess whether the measures complied with the extraordinary authorization that it may have given. While we recognize that there is some limited oversight available through the Security Intelligence Review Committee (section 38(1.1)), we believe that specific judicial oversight of each authorization given under s. 21.1 would be the very least that ought to be required by way of oversight. Knowing that one's actions will be reviewed by the body giving the authorization is a significant deterrent to exceed – even with the best of intentions – the authorization granted.

(iv) Applications for Warrant are Made in Private

Pursuant to s. 27, the application is heard in private in accordance with regulations. We are unaware of any provision requiring a “special advocate” or other party to be present to ensure a balanced view of the circumstances, although we expect it is possible that the court itself may create such a requirement in the course of its development of law as applications proceed.

The private, *ex parte* nature of the application will place the court in a very difficult position, and will require it, at the very least, to rely on the disclosure of CSIS in the course of the application. There is always a danger that an agency seeking authority to discharge its obligations will present its case in the most favourable light. One of the great checks and balances in a democracy is the ability of the adversarial system to test assumptions. This legislation prevents that important function from taking place.

The private nature of the proceedings also means that the ultimate decision will be unlikely to be made public, creating the possibility of a body of secret jurisprudence on when CSIS can act beyond the law. This outcome offends the rule of law in this country.

(v) No Provisions Permitting Appeals or Applications to Set Aside Warrant

There are no provisions on how to set the warrant aside nor is there any way to appeal the warrant. Either would be difficult to contemplate in any event given that the warrant is applied for in a private proceeding. However, each of these limitations removes a standard safeguard of judicial review and oversight.

(vi) Comments

As a result of the amendments to the *Canadian Security Intelligence Service Act* proposed by Bill C-51, laws, including rights and freedoms guaranteed by the *Charter*, can be violated by CSIS in the course of taking measures to reduce a security threat by virtue of an order made by a court in an *ex parte, in camera* proceeding without any guarantee that any arguments against granting the authorization will be presented to the court.

Through this Act, the state seeks to create a mechanism whereby “the rights and freedoms of all persons” can be violated by the state. It risks making the judge hearing the application an agent of the state in perpetrating otherwise unlawful acts and may thereby violate judicial independence. It strikes the wrong balance between security and freedom.

We agree with comments that have been made by a former Chair of the Security Information Review Committee describing the provisions that allow CSIS agents to apply to a judge for authorization for measures that could potentially contravene a *Charter* right as a “major flaw.” We submit it is a fatal flaw, from a constitutional perspective.

We submit that legislation that specifically authorizes a process by which the rights of Canadians guaranteed by the *Charter* can be violated is itself, by its very terms, contrary to the *Charter*. Law enforcement agencies have many, many investigative tools and legislative powers that permit them, within the law, to investigate crime and criminal activities, including matters that may be commonly thought of as terrorist-related activities. These measures have been shown to be highly effective in discovering and successfully prosecuting these activities.

We must be vigilant in meeting the danger that such threats can pose to the security of Canada, but we do not believe that legislation should conscript judges into permitting the state to violate the law when seeking to preserve the security of a country, whose foundation is based on the rule of law. Nor do we believe that legislation should be drafted that permits the state to violate the rights and freedoms guaranteed to Canadians on the premise, paradoxically, that it may be

necessary at times to do so to preserve the very same rights and freedoms. Such laws do not reflect the values of Canadian society.

(vii) Recommendation

We therefore recommend that the provisions of Bill C-51 that authorize applications for a judicial warrant to violate the laws and the rights and freedoms of Canadians should be removed from the Bill.

Other General Comments

While the focus of our submission is on the concerns identified above about the *Canadian Security Intelligence Service Act*, we would also like to make some general comments about concerns that we have regarding the vagueness of some of the terms in the amendments proposed by Bill C-51.

Canada is founded upon the principle of the supremacy of the rule of law, as recognized in the *Charter*.

In his book *The Rule of Law*¹ Tom Bingham (a former Lord Chief Justice of England and Wales) identified several principles that underlie the rule of law. The first amongst these was that “the law must be accessible and so far as possible intelligible, clear and predictable.” He said:

...if you or I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must do or must not do on pain of criminal penalty.²

We note several problematic definitions or provisions, such as “activities that undermine the security of Canada” as proposed in amendments to the *Security of Canada Information Sharing Act*, as well as proposed amendments to the *Criminal Code* that will create the new offence of “advocating or promoting terrorism,”³ and introduce the concept of “terrorist propaganda” that can be ordered deleted from the internet if available to the public,⁴ to name a few.

Terms, definitions, or general legislative provisions that are overly broad or generally too vague to permit people, without undue difficulty, to know whether their activity is or is not lawful must

¹ Bingham, T. *The Rule of Law* Allen Lane publishers, © 2010

² *Ibid*, page 37

³ *Criminal Code* s. 83.221

⁴ *Criminal Code* s. 83.222

be avoided. They offend the rule of law. If they are capable of more precise definition, further consideration should be given to them to allow them to be more precisely worded or defined. If that proves too difficult, they ought not to be included in the Bill.

Conclusion

We reaffirm that the Law Society supports efforts by Parliament to uphold, protect and enhance the security and safety of Canadians. We support efforts by the government to review and update legislation to make such improvements.

However, all such efforts must be consistent with the rule of law and must find the appropriate balance between preserving public safety and preserving the rights and freedoms for which Canada is envied. The matters that we have addressed in these submissions, in our respectful opinion, do not achieve that balance and should either be removed from the legislation (as we recommend in connection with provisions to authorize judicial warrants to violate the law) or, at the very least, be revised in order to be more precise and to allow Canadians to know what they must, or must not, do in order to avoid criminal sanctions.