Worried about C-51? You're probably a terrorist.

R. Gary Dickson, Q.C.

“The modern totalitarian state relies on secrecy for the regime, but high surveillance and disclosure for all other groups.”

Alan F. Westin, Privacy and Freedom

Agenda

- What has been said about the Bill?
- Antecedents in terrorism counter-measures
- Analysis of information sharing
- Recommendations from the PCC
- Resources

Daniel Therrien, PCC

- “The scale of information sharing being proposed is unprecedented, the scope of the new powers…is excessive, particularly as these powers affect ordinary Canadians, and the safeguards protecting against unreasonable loss of privacy are seriously deficient”

Daniel Therrien (2)

- “In a country governed by the rule of law, it should not be left for national security agencies to determine the limits of their powers”
- “…the law should prescribe clear and reasonable standards … [which] should be subject to independent and effective review mechanisms.…”

Prof. Ron Diebert

- “C-51 takes us in a dramatically different direction than we need to go.”

Canadian Civil Liberties Association

- “Bill C-51…imperils principles of transparency and accountability critical to a liberal democracy, undermines fundamental rights and freedoms and threatens to criminalize legitimate acts.”
- “Collecting everything may mean learning nothing of value while subjecting everyone to mass surveillance.”

CCLA cont'd

- "If you are looking for a needle in a haystack, it does not make sense to create more hay"
- The breadth of the information sharing regime and the absence of meaningful review "demonstrates wilful blindness about the Arar saga".

Canadian Bar Association

- “Promising public safety as an exchange for sacrificing individual liberties and democratic safeguards is not, in our view, justifiable. Both are essential and complementary in a free and democratic society.”

ANTECEDENTS

October 1970 crisis

- Front de liberation du Quebec (FLQ)
- Publication of "*White Niggers of America*" (Vallieres & Gagnon)
- Wave of hundreds of bombings (radio station, mail boxes, federal buildings, military bases, Montreal stock exchange)
- Banks robbed
- Kidnapped British Trade Commissioner
- Kidnapped and killed Quebec cabinet minister

October crisis (2)

- G.of C.invoked the *War Measures Act*
- This gave sweeping dictatorial powers to federal cabinet
- Suspended the civil liberties of all Canadians
- Military patrolling Ottawa and Montreal streets

October crisis (3)

- Within hours 3,000 searches, 497 people detained without charge
- Denial of due process & habeas corpus
- Denial of access to lawyers, held incommunicado
- Intimidation of media

October crisis (4)

- In Quebec, the police commission had dossiers on more than 30,000 citizens after the 2 months in Oct.
- The RCMP illegally opened people's mail, distributed false communiques and raided PQ HQ to seize membership lists
- RCMP raided media offices, burned a barn, conducted intense surveillance on civil society groups

The Aftermath

- Mr. Justice David McDonald appointed to head Commission of Inquiry into RCMP actions
- His 1981 report made 284 recommendations, most important:
  - Identified many abuses of Canadians' rights in the name of security
  - Civilian control (& 3rd party review) of police and security intelligence activities is essential

Aftermath (2)

- Creation of a new civilian security intelligence agency (CSIS)

Antecedents

- Air India Inquiry (Justice Major)
- Mahar Arar inquiry (Justice O'Connor)
- Jailing & torture of 3 Canadians inquiry (Justice Iacobucci)
- 2001 *Anti-Terrorism Act*
- Eric Snowden revelations

Scope of C-51

- Omnibus bill
- 2 new security laws
- Amends 15 existing laws (including Criminal Code and CSIS Act)
- Sharing of all PI with 17 agencies

Anatomy of C-51

- Part 1 Information Sharing
- Part 2 Air Travel
- Part 3 Criminal Code
- Part 4 CSIS Act
- Part 5 Immigration & Refugee Protection Act

SECURITY OF CANADA INFORMATION SHARING ACT

Part 1 of Bill C-51

SCISA

- “An Act to encourage and facilitate information sharing between [G. of C.] institutions in order to protect Canada against activities that undermine the security of Canada…”

Preamble, in context, has provocative elements

- …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 G.of C. institutions are accountable for the effective and responsible sharing of info.

Section 2

- s. 2 defines “activity that undermines the security of Canada” means any activity, including any of the following activities, if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada:
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- (a) interference with the capability of the G.of C in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations or the economic or financial stability of Canada;
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Section 2 (2)

- (f) interference with critical infrastructure
- (g) interference with the global information infrastructure, as defined in section 273.61 of the *National Defence Act*
- (h) an activity that causes serious harm to a person or their property because of that person's association with Canada; and
- (i) an activity that takes place in Canada and undermines the security of another state.

Section 2 (3)

- For greater certainty, it does not include lawful advocacy, protest, dissent and artistic expression.
- Violation of a municipal bylaw e.g.. marching or demonstrating without a parade permit could trigger full force of SCISA

Purpose of SCISA

- S. 3:
  - The purpose of this Act is to encourage and facilitate the sharing of information among [G.of C.] institutions in order to protect Canada against activities that undermine the security of Canada
  - Note: Not just talking about terrorism

Guiding principles

- S. 4 enumerates 5 principles
- These include:
  - Respect for caveats on and originator control over shared info. is consistent with effective and responsible info. sharing
  - Entry into info-sharing arrangement is appropriate when G. of C. institutions share info. regularly

Guiding principles

- Only those within an institution who exercise its jurisdiction or carry out its responsibilities in respect of activities that undermine the security of Canada ought to receive information that is disclosed under this Act
- *Note* these 3 principles are not consistent with other provisions

S. 5 (Disclosure)

- There are 141 federal government institutions
- Any of them may disclose to information to any of the 17 “recipient institutions” listed in Schedule 3 if:
  - Info is relevant to recipient’s jurisdiction
  - Info is in respect of activities that undermine the security of Canada

S. 5 (Disclosure)

- (2) info. received under subsection (1) may be further disclosed under that subsection

s. 6 (Further disclosure)

- A recipient institution may, in accordance with the law, use that info. or <u>further disclose it to any person, for any purpose</u>
- Note: This appears to offend the clause in the preamble that sharing of info. should be consistent with the protection of privacy.

Immunity vs. accountability

- S. 9 provides that:
  - “No civil proceedings lie against any person for their disclosure in good faith of information under this Act”

Related amendments

- Income Tax Act will allow the disclosure of taxpayer info.if "reasonable grounds to suspect the info. would relevant to investigation of whether acts of a person may constitute threats to security"

Matrix for analysis

- See *A Matter of Trust: Integrating Privacy & Public Safety in the 21st Century* (Privacy Commissioner of Canada – Nov. 2010)
- Privacy + national security/public safety
- R. v. Oakes [1986] 1 S.C.R. 103

Matrix (2)

- The Oakes test:
  - Necessity
  - Proportionality
  - Effectiveness
  - Minimal intrusiveness

Necessity

- Must be clearly defined necessity, in relation to a pressing societal concern

Proportionality

- The measure must be carefully targeted and suitably tailored to be reasonably proportionate to the privacy being curtailed.

Effectiveness

- The measure needs to be shown to be empirically effective at treating the issue and so clearly connected to solving the problem

Minimal intrusiveness

- Must be the least invasive alternative available after all other less intrusive avenues of investigation have been exhausted

Applying the Oakes test to C-51 information sharing

Necessity

- The *Anti-Terrorism Act* of 2001 included extraordinary powers, many of which have never been used
- One person successfully prosecuted in 2010 for terrorist propaganda
- Earlier this year 3 men arrested in Ottawa under the 2001 Act

Necessity

- Where is the evidence that such significant permissive sharing of personal info. is required?
- Where is the evidence that these additional powers are necessary to combat terrorism in Canada?

Proportionality

- The definition of targeted “activities” is exceedingly broad and goes far beyond terrorists and terrorism
- Given the reference in the definition to activities that interfere with the “economic or financial stability of Canada” this seems excessive by any measure

Proportionality (2)

- “This Act would seemingly allow depts. And agencies to share the PI of all individuals, including ordinary Canadians who may not be suspected of terrorist activities…” Commissioner Therrien
- Civil disobedience and lawful protest should not be treated as a threat to national security, unless actually life threatening

Proportionality (3)

- S. 6 creates the opportunity for function creep and misuse of PI
- By reason of s. 8(2)(b) of the *Privacy Act*, any disclosure that may be authorized by another Act permits all kinds of disclosure under SCISA that would otherwise be prohibited.

Effectiveness

- The problem with the principles in s. 4 of SCISA is that there is no mechanism in the Act to enforce them.
- Some of the key provisions in the SCISA conflict with some principles in s. 4
- No safeguards to ensure shared info. is accurate and reliable

Minimal intrusiveness

- Insufficient controls and lack of effective oversight
- No Parliamentary review of SCISA on a regular basis
- *Suresh v. Canada (Min. of Citizenship and Immigration)* showed that a person could cause a “danger to the security of Canada” simply because their actions anger another nation.

Minimal intrusiveness

- 9 examples of activity that undermines the security of Canada but terrorism is only one of them

Privacy Commissioner's Five Recommendations

1. Only info. that meets the necessity standard, rather than the relevance standard should be shared with 17 agencies
2. Review definition of "activities undermining the security of Canada" to ensure it captures only "real threats to security"

PCC 5 Recommendations (cont'd)

3. P.I. that doesn't meet the collectors "legal obligation standards" to be discarded ASAP
4. Should be explicit requirement for written information sharing agreements and PCC should be consulted re: same

PCC Recommendations (cont'd)

5. Need to ensure that all 17 agencies are subject to independent and effective review by an expert body and Parliament and should be mandatory 3 year review

Resources (1)

- Submission to the Standing Senate Committee on National Security & Defence by Privacy Commissioner of Canada (April 16, 2015) https://www.priv.gc.ca/parl/2015/parl_sub_150416_e.asp
- *Who Knows What Evils Lurk in the Shadows?* Ron Deibert OpenCanada.Org (http://opencanada.org/features/c-51-who-knows-what-evils-lurk-in-the-shadows)

Resources (2)

- *Bill C-51, Anti-Terrorism Act, 2015*, Canadian Bar Association March 2015
- *Bill C-51: the Good, the Bad…and the Truly Ugly*, Craig Forcese & Kent Roach (http://thewalrus.ca/bill-c-51-the-good-the-bad-and-the-truly-ugly/

Resources (3)

- *Submission to the Standing Committee on Public Safety and National Security regarding Bill C-51*, (Canadian Civil Liberties Assoc. March 2015)
- Letter from Canada's Information & Privacy Commissioners to Chair of Standing Committee, March 4, 2015

Questions?

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