THE CANADIAN BAR ASSOCIATION
British Columbia Branch

SUBMISSIONS TO THE BC MINISTRY OF HEALTH SERVICES

***MISCELLANEOUS STATUTES AMENDMENT ACT* (NO. 2), 2010 (BILL 11)**

CANADIAN BAR ASSOCIATION, BC BRANCH

FREEDOM OF INFORMATION AND PRIVACY SUBSECTION

MAY 25, 2010

INTRODUCTION

The Canadian Bar Association of British Columbia, Freedom of Information and Privacy Section ("Section") is pleased to make submissions on the *Miscellaneous Statutes Amendment Act (No. 2), 2010* (Bill 11), which passed Third Reading in the B.C. Legislature on May 4th, 2010.

Bill 11 includes amendments to the *Health Authorities Act*, the *Ministry of Health Act* and the *Public Health Act*. In these submissions, any reference to Bill 11 means sections 149, 166 and 167 of Bill 11 which contain amendments to these Acts.

The comments expressed in this submission reflect the views of the Section only and are not necessarily the views of the CBABC as a whole. This submission is based on feedback from a working group set up to consider Bill 11 and the implications for privacy. Section members have also been provided with opportunity to comment generally.

CONTENTS

This submission is divided into the following areas:

1. Powers of the Minister of Health

Bill 11 creates a new statutory scheme for the Minister of Health ("Minister") to collect, use and disclose personal information for a broad set of purposes. While many of our members supported Bill 11 in principle and considered that Government access to information is necessary to manage the health care system and ensure its long-term sustainability, they expressed significant concerns that Bill 11 should not provide the Minister of Health with 'free reign' to collect, use and disclose personal information held by public bodies, without adequate accountability mechanisms and safeguards in place to protect privacy.

Some members were concerned that the new powers vested in the Minister could be exercised to capture highly sensitive personal information from a broad range of public bodies in a manner that would not be consistent with FIPPA and without notice to the information subjects. These members further expressed concern that the current wording of Bill 11 may authorize the Minister to disclose this highly sensitive information to other public bodies or to external non governmental entities, also in a manner that would not be consistent with FIPPA. In addition, some members commented that there may be implications under the Canadian Charter of Rights and Freedoms ("Charter"), depending on how the Minister's powers are applied in practice with respect to sensitive personal information, particularly health information.

The following sections set out more specifically the comments of our members with respect to the amendments.

(a) *Health Authorities Act*

Section 147 amendments to the *Health Authorities Act* provide that the Minister may 'order' the boards of health authorities to report on any matter relevant to a 'stewardship purpose' and to disclose personal information within a report. Under the current amendments health boards have no opportunity to challenge an order to collect personal information, even if they deem it highly sensitive. Members were concerned that this could open up access to personal information quite considerably.

The Minister may make an order where he/she is 'satisfied' that it is 'reasonably needed' to fulfill a stewardship purpose. Some members noted that these powers set a threshold for the indirect collection of personal information by the Ministry that is significantly lower than the test of 'necessary' required under the *FIPPA* as set out by the Information and Privacy Commissioner in various decisions[1]. For example, *FIPPA* authorizes disclosure of personal information to a Minister if the information is 'necessary' for the performance of the Minister's duties or for a common or integrated program with the public body. The test of 'necessity' in these provisions is not qualified by the word 'reasonably', nor do they incorporate the discretion of the Minister.

Some members were concerned that the 'reasonably needed' test is too vague and uncertain. Moreover, this test depends on the definition of "stewardship purpose", which is broadly defined and would encompass health research and any other purpose prescribed by Regulation.

(b) *Ministry of Health Act*

Section 166 amendments to the *Ministry of Health Act* provide that if the minister is 'satisfied' that the collection, use or disclosure of personal information is 'reasonably needed' to fulfill a 'stewardship purpose', the minister may collect personal information from a public body, use it and disclose it to a public body. The public body must comply with the request. 'Stewardship purpose' is very broadly defined and does not comprise an exhaustive list of purposes. More specifically, it includes any 'prescribed purpose' that may be added by regulation at a future date.

Health boards (i.e. regional health authorities) are by definition also 'public bodies'. It seems that the amendments constitute two alternative procedures through which the Minister could attempt to access information in the custody or control of regional health authorities. One member observed that since the Minister's powers apply to public bodies generally, these powers may be used for much broader collection, use and disclosure of personal health information than provided for under the *E-Health Personal Information Access and Protection of Privacy) Act* (*"E-Health Act"*).

[1] OIPC BC Orders F07-10 and P09-01

Members noted that the definition of personal information in section 166 is broader than under *FIPPA* and that the rationale for this is not entirely clear.

(c) *Public Health Act*

Section 167 amendments to the *Public Health Act* permit information to be *further* collected, used or disclosed for a stewardship purpose in accordance with the *Ministry of Health Act.* One member observed that the proposed changes appear to provide the Minister with a separate category of powers that he may apply to collect, use and disclose personal information for more broadly framed and expandable stewardship purposes.

Personal information collected under the *Public Health Act* includes highly sensitive personal health information such as information about communicable diseases. Some members were concerned that this information may be further used and disclosed for stewardship purposes, including additional 'prescribed purposes' that are not envisaged by or directly related to the *Public Health Act*. The *Public Health Act* has established its own scheme for stewardship of public health information and this should not be expanded by way of separate statute.

(d) Policy Background

One member observed that the Minister has expressed a number of policy arguments justifying the amendments in Bill 11, namely[2]:

- the Ministry has a mandate to monitor and evaluate 'health care bodies' and services;
- the current dilemma arising from the regional health authorities' refusal to disclose some requested information, based on a narrow interpretation of FIPPA, must be resolved to enable the Ministry's stewardship responsibilities to be carried out; and
- only 'secondary' data such as patient identifier and demographic information will be collected, not detailed clinical health and treatment information.

However, the language of Bill 11 does not reflect the narrow scope of the underlying policy arguments. In particular, the broad definition of 'stewardship purpose' and of 'personal information' and the fact that the Minister's powers to collect personal information are not confined to 'health care bodies', means that the powers could be used for purposes that extend far beyond the policy and intent of Bill 11 as expressed by the Minister.

[2] May 4th at paragraphs 5191-1535: http://www.leg.bc.ca/hansard/39th2nd/H00504a.htm

Some members observed that Bill 11 does not grant to the health authority board or other public bodies a right to inquire into or complain about the purpose for the disclosure or whether the purpose falls within the definition of 'stewardship purpose'. It seems that the public body may not refuse such a request even when, in the opinion of the head of that public body, the disclosure would be unauthorized. For example, the head of a public body receiving such a request may consider that the information is not required for a stewardship purpose or does not comply with *FIPPA* or other statutory restrictions upon disclosure.

(e) Interpretation Issues

One member observed that the Minister has indicated that Bill 11 is to work 'in concert' and to be read to be consistent with the requirements of *FIPPA*[3]. The Minister's comment that there are no 'notwithstanding' *FIPPA* provisions in Bill 11 appear to indicate that Bill 11 is not intended to conflict with or to 'override' *FIPPA.*

However, members noted that reading Bill 11 in harmony with *FIPPA*, the *E-Health Act* and the *Public Health Act* or other statutes that contain restrictions with respect to disclosure of personal information may become a very complex task, especially where collection, use and disclosure involves multiple public bodies. It may not be possible in all circumstances to reconcile the Acts. Indeed, two members scrutinized Bill 11 and established that it may be impossible to read *FIPPA*, Bill 11 and the *E-health Act* together in a consistent fashion. For example, Bill 11 appears to impose a new statutory regime of collection, use and disclosure upon public bodies by providing the Minister with what appears to be an effective 'override' of the decision-making authority of the heads of public bodies. This effectively presents an insurmountable challenge to and conflict with the legitimate exercise of the powers of the Head of a public body. There is a further potential conflict with respect to public bodies which are colleges of a health profession as defined by the *Health Professions Act*. Bill 11 does not address the limitations on the disclosure of personal information that are set out in this Act.

[3] Supra, note 2

Public bodies would benefit from clarification as to how Bill 11 will be applied in practice. The following provide a few, more specific examples of some of the interpretation issues raised by members:

1. The test of 'reasonably necessary' in Bill 11 appears to override the test of 'necessary' under *FIPPA*. Moreover the test of reasonably necessary is linked to the stewardship purposes, which are expandable by regulation. It is therefore possible that the Minister may use Bill 11 to collect, use and disclose personal information in order to circumvent more restrictive rules in *FIPPA* and the *E-Health Act*. Without guidelines, reading the various Acts together will not be an easy task and may not be workable.

2. The situations where the Minister will use the *E-Health Act* to collect, use and disclose personal health information, rather than Bill 11, are not clear from the statutory amendments. Although the Minister had indicated that Bill 11 is not intended to cover highly sensitive personal health information, Bill 11 does not limit the types of information that may be collected, nor does it provide health boards with the opportunity to challenge an order to collect personal information, even if they deem it highly sensitive.

3. Once personal information is collected by the Minister, it is not clear as to whether and to what extent the restrictions in *FIPPA* with respect to subsequent disclosures will apply. Bill 11 could be interpreted to mean that so long as the disclosure is for a stewardship purpose, the Minister has discretion to decide these matters.

4. 'Stewardship purpose' appears to encompass health and other forms of research. It is unclear to what extent the more protective safeguards in section 35 of *FIPPA* would apply to 'research' conducted pursuant to Bill 11.

5. The requirement created by the *Ministry of Health Act* amendments that a 'public body' must disclose personal information to the Minister when ordered to do so may conflict with privacy and confidentiality requirements in other legislation to which the public body or its staff are subject. For example, a College of a Health Profession (a "College") is a 'public body' that would be captured by section 9 of the *Ministry of Health Act*. Given the broad definition of 'stewardship purposes' a College may be required by the Minister to provide personal information considered "necessary or appropriate for the purposes of health human resources planning" even where to do so may be in breach of section 52.2(3) of the *Health Professions Act*.

(f) Safeguards

Members were generally of the view that Bill 11 has very limited safeguards to protect the privacy of personal information. In particular, these safeguards are confined to:

- posting the order requiring disclosure of personal information under the *Health Authorities Act* on a Ministry website;

- a threshold test under both the *Ministry of Health Act* and the *Health Authorities Act* of reasonably needed to fulfill a stewardship purpose;

- if the requested information under the *Ministry of Health Act* is in a health information bank designated under the *E-Health Act*, the information flow may not be inconsistent with the designation order under that Act or the data stewardship policies;

- further, the information flow may not be inconsistent with another enactment (which might or might not be prescribed); and

- under the *Ministry of Health Act*, only the Minister may (but need not) enter into information-sharing agreements, which might contain further safeguards

Members generally considered these safeguards to be inadequate given the broad scope of personal information that may be collected and the importance of protection of privacy. They were of the view that broad information collection powers and privileges of Government should be avoided where possible, used only sparingly, and be accompanied by robust and meaningful safeguards. Others compared the provisions to the safeguards in the *E-Health Act* and considered them to provide substantially less protection, without clear rationale.

Some members expressed concern over the broad definition of "stewardship purposes" and that in encompassing health research it could subject sensitive personal information to lesser protections than currently exist under *FIPPA* and the *E-Health Act*. Both *FIPPA* and the *E-Health Act* include an independent review process through institutional medical ethics boards and/or an independent data stewardship committee. Some members felt that circumventing existing and well-established processes and protections is inappropriate and unnecessary.

A number of our members observed that while Bill 11 provides that the order of the Minister must be made publicly available on a website maintained by or for the Ministry of Health, it does not stipulate the scope and type of information that must be set out in the order. Concerns were expressed about the lack of transparency to the public concerning information that is ordered to be disclosed. Members also noted that pursuant to the amendments to the *Ministry of Health Act*, the Minister may, but has no obligation to enter into information-sharing agreements with any person. 'Any person' can include non-governmental entities, creating largely unrestricted possibilities for information sharing for broad-based stewardship purposes.

Lastly, several members were concerned about the power in the *Ministry of Health Act* to issue regulations at any future point to prescribe enactments and to expand the stewardship purpose. It is questionable as to whether a regulation is an appropriate instrument to do so, since this may result in inadequate scrutiny over regulatory changes to the scope of stewardship powers. Such a broad potential change in scope of these powers is more appropriately overseen by the legislative process.

2. Privacy Impact

(a) Charter of Rights and Freedoms

Some members expressed a concern that Bill 11 may be used in a privacy-intrusive manner to collect, use and disclose sensitive personal information without the consent or knowledge of the individuals concerned. On the face of it, the broad powers could be used for a broad range of purposes that could be subject to a flexible interpretation by the Minister. There were concerns that information flows to and from the Ministry, which are not accompanied by robust safeguards, would not be minimally intrusive from a privacy perspective or proportional to the benefits to be achieved from the proposed uses and disclosures for stewardship purposes.

More specifically, some members pointed out that depending on the scope and nature of the personal information involved, the exercise of the Minister's powers could result in a possible breach of the Charter. In the Supreme Court case of *R. v. Plant*[4], the court stated the following with respect to the intrusion of the state on an individual's privacy:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

Some members considered that if the powers were used to collect, use or disclose sensitive data, for example clinical data, for broad secondary uses and without adequate safeguards, it could constitute a breach of privacy, engaging section 7 (security of the person) or section 8 (unreasonable search and seizure) of the Charter.

There were some who expressed concern about the retroactive effect of the amendments, which are stated to be effective April 1, 2009. In law, there is a presumption against retroactivity. Some members were concerned that the intended effect of the retroactive provisions could be to attempt to cure past deficits with respect to information-sharing activities.

[4] [1993] 3 S.C.R. 281

(b) Scope of Information-Sharing

More generally, there were concerns expressed about the scope of information sharing across Government and the plans for integrated case management and other initiatives supported by new technology systems. One member voiced concerns about Government adopting a paternalistic approach to privacy that favoured ease of access and efficiency over an approach that was respectful of an individual's autonomy and privacy. The fact that technological advances have made data-sharing more convenient should not obfuscate the need to protect fundamental privacy rights or the real harm that could be caused to individuals through inappropriate disclosures and security risks.

Further, some members saw the potential for Bill 11, which has tenuous safeguards, to be used to 'get around' existing privacy protections in *FIPPA* and the *E-Health Act*. They considered the disclosure provisions in *FIPPA* to be a necessary limitation that should not be weakened by a lesser threshold in a separate statute, and that the 'proportionality' principle recommended by the Information and Privacy Commissioner ("Commissioner")[5] should be applied to Bill 11 by way of express legislative amendment. Some welcomed the Commissioner's proposal in his letter of April 22, 2010 to the Minister that there should be public consultation before further data-sharing initiatives move forward and that appropriate codes of practice should be put in place as approved by the Commissioner. This would reassure the public.

One member observed that the test of necessity for collection, use and disclosure established by the former Information and Privacy Commissioner requires that a public body take account of the scope and sensitivity of the personal information that is collected, the purposes of its collection, use and disclosure and the nature of any privacy intrusions. Where lesser privacy intrusive measures can be adopted, these should prevail. This reflects a similar test applied by the Privacy Commissioner of Canada for proposals that limits privacy rights and which requires that any infringement be proportional to the public benefit to be achieved, with no less intrusive option available. Bill 11 does not reflect these tests and may be used to erode well established 'privacy norms'.

[5] http://www.oipc.bc.ca/pdfs/public/FIPPA_Review_Submission_NS(15Mar2010).pdf

3. Recommendations

Given the latitude granted to the Minister to collect, use and disclose personal information under Bill 11, many members felt that more robust procedures and protections should have been included in Bill 11. Others considered that a number of matters require clarification in order to resolve uncertainties with respect to the intended scope and application of the legislation.

The following represent the collective suggestions of various members to improve the safeguards in Bill 11 through legislative amendments, clarifying guidelines or other mechanisms:

1. An amendment to limit the entities from whom the Ministry can require disclosure and to whom it may disclose under the *Ministry of Health Act* to 'health care bodies', rather than all 'public bodies', consistent with the Ministry's stated policy objectives.

2. Consistent with the well-established 'least collection' principle in privacy law, an amendment to create a narrow definition of 'secondary information', consistent with the Ministry's policy intent and limiting the Ministry's power to require disclosure of such secondary information.

3. A requirement that prior to disclosure the Minister prepare a privacy impact assessment and submit it to the Information and Privacy Commissioner for review and comment, similar to the requirement to do so in Alberta's *Health Information Act.*

4. A requirement that the Minister enter in to information sharing agreements whenever personal information collected by the Minister under the amendments is subsequently disclosed to another public body or non governmental entity.

5. A requirement for an independent oversight mechanism to ensure that safeguards are in place to monitor secondary uses and information-sharing arrangements as necessary and as commensurate with the sensitivity of the information.

6. A requirement that when the Minister makes an order, the order must identify:

    (a) the specific stewardship purpose for which the personal information is requested;
    (b) the type of personal information requested and the form;
    (c) the source of the personal information;
    (d) the public body(ies) from which the information is requested;
    (e) to whom the information will be disclosed; and
    (f) any information sharing agreements.

7. Consistent with the principles of transparency and accountability, a requirement:

    (a) that the Minister's order be placed in a more public location, such as in a newspaper, rather than a website which the public must take proactive steps to find; and
    (b) that the Ministry to make an annual report or summary publicly available, setting out how often the powers have been used and under what circumstances.

8. A requirement that public bodies provide notice to individuals whose personal information is collected under Bill 11 that their personal information may be collected by the Minister for stewardship purposes and that the purposes are defined in the notice, and that they have access to audit records.

9. Clarification as to whether information demands to health boards can only occur under the *Health Authorities Act*, or may be used in conjunction with or as an alternative to the *Ministry of Health Act* and the rationale behind this.

10. Clarification as to the scope of individuals whose personal information may be collected, used and disclosed. For example, it is not clear if the provisions cover personal information of health care workers (employees), as well as personal information of patients and clients.

11. Clarification as to how the Minister intends to apply the *E-Health Act* and Bill 11 to different contexts.

12. With regard to the application of the Minister's discretion, a requirement for guidelines defining the process for assessing whether information, in any particular instance, is 'reasonably necessary for a stewardship purpose'.

Conclusion

In summary, while many members support Bill 11 in principle and consider Government access to certain personal information necessary for the efficient running of the health care system, members were generally of the opinion that more safeguards are needed to protect personal information and that Bill 11 does not impose sufficient limitations on the potential data-sharing and research activities of Government.

Members are also concerned that Bill 11 requires the full "range" of organizations in the public sector to disclose personal health information to the Ministry if requested to do so, without adequate limitations on how this information may be further disclosed and without addressing the potential conflicts that public bodies may face in complying with other legislation to which they are subject. The former and current Commissioners have made it clear that public consultation should be considered and data-sharing projects should be reviewed by the Commissioner before these initiatives proceed. Many members support this view. Recent investigation reports issued by the Commissioner and the Auditor General with respect to privacy breaches and security concerns respectively and reports by the media speak to recurring failures in the system with respect to privacy and security. Some members observed that these concerns are not confined to privacy advocates or other 'special interest' groups, but should be of concern to the public generally.

We hope that some of all of these suggestions for improvement or clarification are helpful. We would be pleased to provide further information concerning the feedback of our members on these matters.

Any communications can be directed to:

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