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## LEGISLATIVE SUMMARY



***Bill C-51:  
An Act to amend the Witness Protection  
Program Act and to make a consequential  
amendment to another Act***

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**Lyne Casavant  
Christine Morris**

Legal and Legislative Affairs Division  
Parliamentary Information and Research Service

## ***Legislative Summary of Bill C-51***

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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# LEGISLATIVE SUMMARY OF BILL C-51: AN ACT TO AMEND THE WITNESS PROTECTION PROGRAM ACT AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT

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## 1 BACKGROUND

Bill C-51, An Act to amend the Witness Protection Program Act and to make a consequential amendment to another Act (short title: Safer Witnesses Act) was introduced in the House of Commons on 11 December 2012, by the Minister of Public Safety, the Honourable Vic Toews.

This bill amends the *Witness Protection Program Act*<sup>1</sup> (WPPA) with the aim of improving the effectiveness of the Federal Witness Protection Program (FWPP), which is administered by the Royal Canadian Mounted Police (RCMP), and better meeting the needs of sources and witnesses<sup>2</sup> involved in investigations or prosecutions related to national security. The amendments concerning the protection of sources and witnesses in terrorism cases are intended to respond to some of the concerns raised by the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (the Air India Commission) in its report published on 17 June 2010. The bill is also a response to a request from the provincial governments with their own witness protection programs to allow witnesses in those programs to change their identities without having to enter the FWPP.<sup>3</sup>

When the Minister introduced the bill, he stressed the importance of protecting witnesses in the fight against crime, especially organized crime and terrorism.<sup>4</sup> Protecting witnesses against intimidation, violence or retaliation is crucial to maintaining the rule of law. The experts agree that without effective measures to protect vulnerable witnesses and their families, many would be reluctant to cooperate with the authorities.

The changes to the WPPA proposed to enhance the performance of the FWPP include:

- Expanding the purpose of the WPPA to allow persons to be admitted to the FWPP who assist a federal security, defence or safety organization and to allow the admission of persons who, because of their relationship to or association with such persons, require protection. At present, only individuals who cooperate with a law enforcement agency or an international criminal court with whom an agreement has been signed<sup>5</sup> and those who may require protection because of their relationship with these individuals can be admitted to the FWPP. In other words, if the bill is passed, not only law enforcement agencies, but also federal security, defence and safety organizations, will be able to refer their sources to the FWPP (see clause 5 of the bill, in particular).
- Implementing procedures that aim to facilitate the administrative process for changing the identities of witnesses who are in a designated witness protection program administered by a province or municipality (clause 11 of the bill).

- Strengthening the provisions for the protection of information relating to witnesses and the disclosure of information concerning individuals in the FWPP and designated provincial or municipal witness protection programs (clause 12 of the bill).
- Providing for the extension of emergency assistance to a person who has not entered into a protection agreement with the RCMP. The maximum period is increased from 90 days to 180 days (clause 6 of the bill).

### 1.1 PROTECTING VULNERABLE WITNESSES AND WITNESSES WHO HAVE BEEN THREATENED

Recognizing the crucial role of witnesses in criminal investigations and prosecutions, governments and police services in Canada have adopted various measures over time that are designed to protect vulnerable witnesses or witnesses whose safety is in jeopardy because of their cooperation with the justice system.<sup>6</sup>

A police service that intends to base its investigation on the testimony of a witness is responsible for protecting that witness. To ensure the safety of vulnerable witnesses, encourage them to cooperate, and improve the chances of criminal investigations being successful, police services may exercise various protective measures before, during and after the court proceedings. Those measures include police escorts in court, at home or at work, enhanced surveillance of the witness's home, or temporarily relocating the witness and family members.

Protective measures, including the measures provided for in section 486 of the *Criminal Code*,<sup>7</sup> may also be applied at court hearings. They include imposing a publication ban or having the court allow witnesses to testify outside the hearing room by closed-circuit television, or from behind a screen. In its report, the Air India Commission stated:

These measures may reduce the threat and discomfort that witnesses feel when they testify. Nevertheless, none of these measures would prevent a determined person from learning the identity of a witness.<sup>8</sup>

The federal government and some provinces, as well as municipalities, have also established official witness protection programs; this is the case in Ontario, Quebec, the City of Montreal, Alberta, Manitoba and Saskatchewan. The federal program and those in Alberta, Manitoba and Saskatchewan are provided for in legislation.<sup>9</sup>

#### 1.1.1 FEDERAL WITNESS PROTECTION PROGRAM

In June 1996, Parliament enacted the *Witness Protection Program Act* and thus provided a legislative foundation for the witness protection program set up by the RCMP in 1984 to encourage individuals to disclose information that could assist in prosecuting members of organized crime who were involved in drug trafficking. From 1984 to 1996, the program was based on:

a series of internal policies and guidelines that were kept secret in order to prevent criminals from discovering the methods used by the RCMP to protect the individuals who had disclosed information about them.<sup>10</sup>

The administration of the program was widely criticized for such issues as the lack of transparency in its management and failure to honour protection agreements. In fact, some protectees who were dissatisfied with their treatment by the RCMP jeopardized their own safety by publicizing their disputes with the RCMP.<sup>11</sup>

The WPPA gave the FWPP a more accessible and transparent administrative structure. For the first time, the objective of the program was clear: to promote compliance with the law by facilitating the protection of persons involved in providing assistance to a law enforcement agency or an international criminal court with which an agreement had been signed. The WPPA also expanded the scope of the FWPP to include witnesses involved with law enforcement agencies in Canada other than the RCMP, as well as certain foreign nationals, in cases where agreements had been entered into with the Minister. Admitting witnesses from an agency other than the RCMP is based on the cost recovery principle.

The WPPA also sets out the criteria for admission,<sup>12</sup> the protective services that may be offered to protectees (including relocation and accommodation services, change of identity, and financial support) and the obligations of protectees and those in charge of administering the program. In addition, it creates an obligation to submit an annual report to Parliament on the operation of the program (section 16 of the WPPA).

Witnesses who are admitted to the FWPP are generally exposed to serious threats.<sup>13</sup> As we will see in the next section, most undergo a change of identity. At present, when a change of identity is being considered to protect a witness or a source, police services must apply to the RCMP to have their witness admitted into the FWPP.<sup>14</sup> Bill C-51 eliminates that step for protectees who have been admitted to designated provincial and municipal programs. The amendments for facilitating a change of identity for witnesses in provincial and municipal programs are discussed in this legislative summary under the heading “Description and Analysis.”

## 1.2 DATA ON THE FEDERAL WITNESS PROTECTION PROGRAM<sup>15</sup>

### 1.2.1 PROTECTEES

Between 1 April 2011 and 31 March 2012, the RCMP assessed 108 cases for admission to the FWPP, an increase of two cases over the previous year. During that period, 18 people refused to enter the FWPP, a decline from 2010–2011, when 28 people refused to enter the program. The RCMP ultimately admitted 30 protectees in 2011–2012, about a 50% increase over the previous year. According to the 2011–2012 annual report prepared pursuant to the WPPA:

Fluctuations related to admissions from year to year are largely due to: i) law enforcement activities during the fiscal year, ii) single protectees, rather than those with dependants, being admitted to the Program, and iii) variables outside the administration of the Program.<sup>16</sup>

A majority (26) of the individuals admitted to the FWPP during that period were RCMP protectees. Only four had been recommended by other law enforcement agencies.

In addition, the identities of 27 of the 30 individuals admitted were changed. Change of identity is an extreme protective measure in personal terms; it is difficult to carry out and it is particularly hard on protectees and their families. In a report on witness protection programs worldwide, the author made the following observation on the subject of change of identity:

A change of identity, which is often requested too hastily, literally means losing one's identity and the civil death of the original identity. The new identity can only be obtained at that cost. Changing identity safely means lying about one's origins and past life, abandoning biographical continuity and being unable to establish intimate, honest and genuine interpersonal relationships, and inevitably results in feelings of isolation and loneliness.<sup>17</sup>

Moreover, between 1 April 2011 and 31 March 2012, eight protectees voluntarily terminated the protection they had been granted, while two were forced to leave the program because of breaches of the protection agreement.

During that period, three civil litigation cases were filed against the RCMP, one each in Quebec, British Columbia and Ontario. The annual report does not contain details regarding those lawsuits.

In 2007, the House of Commons Standing Committee on Public Safety and National Security was informed that there were about 1,000 protectees in the FWPP, 700 of whom resulted from RCMP cases and 300 from other police services.<sup>18</sup> Of that total, about 30% had been admitted to the program because of their relationships with witnesses. Those figures are not presented in the annual reports on the management of the FWPP. The information in the reports of the Standing Committee on Public Safety and National Security and the Air India Commission also indicates that most witnesses admitted to the FWPP had ties to the criminal underworld before cooperating with law enforcement agencies.

### 1.2.2 PROGRAM COSTS

The costs incurred by the RCMP for administering the FWPP in 2011–2012 totalled a little over \$9 million. That figure does not include expenses incurred by other law enforcement agencies or the awards that may have been paid to protectees. It does include wages paid to protection personnel, administrative expenses, expenses relating to the civil actions against the RCMP and protectee travel and relocation expenses.

Table 1 – RCMP Expenditures in 2011–2012 for Administering the FWPP

RCMP compensation	\$4,528,423.18
Public servant compensation	\$553,885.74
Other police department secondment	\$255,301.85
Travel	\$467,372.61
Administration	\$349,539.79
Witness protection expenses	\$1,735,840.10
Miscellaneous	\$1,243,767.95
Civil litigation costs	\$13,472.00
<i>Total</i>	<i>\$9,147,603.22</i>

Source: Public Safety Canada, [Witness Protection Program Act – Annual report: 2011–2012](#).



### 1.3 CALLS TO STRENGTHEN THE FEDERAL WITNESS PROTECTION PROGRAM

In recent years, two House of Commons committees and the Air India Commission have submitted recommendations to the federal government for ways to strengthen the FWPP or to protect witnesses and sources in general. This section sets out the main recommendations that emerged from their studies.

#### 1.3.1 REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY (2008)

The Standing Committee on Public Safety and National Security decided to review the FWPP in March 2007, in response to the media attention focusing on an FWPP protectee who was convicted of murder while under the protection of the RCMP. In its report, which was released in March 2008, the Committee acknowledged the importance of the FWPP in the fight against serious crime. Nonetheless, to improve the effectiveness of the FWPP, the Committee recommended amendments to the WPPA that included:

- Entrusting the administration of the FWPP to an independent office within the Department of Justice. In the Committee's view, this would make a clear distinction between investigations and prosecutions and the FWPP and would "[make] it plain that protection is not a reward for cooperating with the authorities."<sup>19</sup> The Committee believed that the role of the RCMP should be limited to assessing the threat to a witness, determining the level of security needed for protecting the witness and implementing protective measures. (Recommendation 1)
- Automatically carrying out a psychological assessment of candidates over the age of 18 before admission to the FWPP, particularly when a change of identity is being considered as a protective measure. (Recommendation 2)
- Automatically offering candidates the aid of legal counsel during the negotiation and signing of protection contracts, to increase the likelihood of fair and equitable negotiations. (Recommendation 3)
- Expediting the processing of witness protection files from a law enforcement agencies other than the RCMP. (Recommendation 6)

#### 1.3.2 FINAL REPORT OF THE COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182 (2010)

In September 2006, the Government of Canada tasked retired justice John C. Major with inquiring into the investigation of the bombing of Air India Flight 182. The terms of reference for the Commission required the Commissioner to make findings and recommendations with respect to:

whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases.<sup>20</sup>

The Commission found that the FWPP “is not fully attuned to the needs of sources and witnesses in terrorism investigations and prosecutions.”<sup>21</sup> It said that the FWPP is not appropriate in these situations for three main reasons:

- It is poorly equipped to provide continuity in the handling of sources. The Commission concluded, in particular, that the Canadian Security Intelligence Service (CSIS) “should have access to programs to protect vulnerable witnesses and sources.”<sup>22</sup>
- It is too rigid and is based on an implicit assumption that most sources and witnesses have criminal backgrounds.<sup>23</sup>
- There is a lack of autonomy between the management of criminal investigations and the management of the program. Like the Standing Committee on Public Safety and National Security, the Commission concluded that witnesses and sources must firmly believe that it is the primary mission of the people responsible for managing the program to protect them, rather than to complete the investigation. To that end, it stated that it is essential that management of the program be assigned to an independent body.

The only recommendation that the Commission made in relation to the FWPP is Recommendation 24:

A new position, the National Security Witness Protection Coordinator, should be created. The Coordinator would decide witness protection issues in terrorism investigations and prosecutions and administer witness protection in national security matters. The creation of such a position would require amendments to the *Witness Protection Program Act*.

The National Security Witness Protection Coordinator should be independent of the police and prosecution. He or she should be a person who inspires public confidence and who has experience with criminal justice, national security and witness protection matters.

Where appropriate and feasible, the Coordinator should consult any of the following on matters affecting witness and source protection: the RCMP, CSIS, the National Security Advisor, the proposed Director of Terrorism Prosecutors, Public Safety Canada, Immigration Canada, the Department of Foreign Affairs and International Trade and the Correctional Service of Canada. The Coordinator would generally work closely with CSIS and the RCMP to ensure a satisfactory transfer of sources between the two agencies.

The National Security Witness Protection Coordinator’s mandate would include:

- assessing the risks to potential protectees resulting from disclosure and prosecutions, as well as making decisions about accepting an individual into the witness protection program and the level of protection required;
- working with relevant federal, provincial, private sector and international partners in providing the form of protection that best satisfies the particular needs and circumstances of protectees;
- ensuring consistency in the handling of sources and resolving disputes between agencies that may arise when negotiating or implementing protection agreements (this function would be performed in consultation with the National Security Advisor);
- providing confidential support, including psychological and legal advice, for protectees as they decide whether to sign protection agreements;

- negotiating protection agreements, including the award of payments;
- providing strategic direction and policy advice on protection matters, including the adequacy of programs involving international cooperation or minors;
- providing for independent and confidential arbitration of disputes that may arise between the protectee and the witness protection program;
- making decisions about ending a person's participation in the program;
- acting as a resource for CSIS, the RCMP, the National Security Advisor and other agencies about the appropriate treatment of sources in terrorism investigations and management of their expectations;
- acting as an advocate for witnesses and sources on policy matters that may affect them and defending the need for witness protection agreements in individual cases.

The National Security Witness Protection Coordinator would not be responsible for providing the actual physical protection. That function would remain with the RCMP or other public or private bodies that provide protection services and that agree to submit to confidential arbitration of disputes by the Coordinator.

### 1.3.3 THE REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS (2012)

In its report entitled *The State of Organized Crime*, the Standing Committee on Justice and Human Rights made two recommendations to strengthen witness protection in Canada.<sup>24</sup> The Committee, like the Standing Committee on Public Safety and National Security, noted that one of the difficulties associated with the FWPP is a lack of resources, and it recommended that the federal government allocate dedicated resources to manage the FWPP. The Committee also recommended that changes be made “to facilitate the ability of provincial witness protection programs to obtain federal identification documentation without having to enter their protectees into the federal WPP.”<sup>25</sup>

## 2 DESCRIPTION AND ANALYSIS

### 2.1 CHANGES TO THE PURPOSE OF THE *WITNESS PROTECTION PROGRAM ACT*

#### 2.1.1 PROMOTION OF NATIONAL SECURITY, NATIONAL DEFENCE AND PUBLIC SAFETY (CLAUSES 3, 5, 6 AND 7)

As noted above, the enactment of the *Witness Protection Program Act* in 1996 created a legislative basis for the FWPP. It identified the purpose of the WPPA as being the promotion of law enforcement by facilitating the protection of persons involved in providing assistance in law enforcement matters in relation to activities carried out by any law enforcement agency or an international criminal court or tribunal with which an agreement or arrangement had been signed.

Clause 5 of Bill C-51 extends the purpose of the WPPA to include the promotion of national security, national defence and public safety by facilitating the protection of

persons who provide assistance to a federal security, defence or safety organization (new section 3(b)). In the same vein, clause 6(1) expands the types of agencies and bodies that can refer witnesses for admission to the FWPP to include federal security, defence or safety organizations, which could include the Department of National Defence, CSIS and the Correctional Service of Canada (new section 6(1)(a)).

This change responds to gaps identified in the final report of the Air India Commission relating to the effective protection of sources and witnesses involved in intelligence-gathering and law enforcement activities related to terrorist activity<sup>26</sup> and could include, for example, a person who assists CSIS in its intelligence-gathering function, but who does not become a witness in a related criminal prosecution. The newly afforded protection might influence a source's decision to collaborate with a law enforcement agency as an operation shifts from an intelligence-gathering exercise to a prosecution.

Broadening the mandate of the FWPP to include federal security, defence and safety organizations may also present challenges. As noted above, the FWPP was initially established for witness protection needs relating to organized crime rather than terrorist activity.<sup>27</sup> In this regard, the Air India Commission addressed specific challenges that may arise in relocating members of visible minority communities in view of limited language skills, the limited number of possible relocation sites and the resulting limits on the exercise of religious freedoms. The Commission noted that the FWPP is not fully attuned to the terrorism environment.<sup>28</sup>

Several other amendments in Bill C-51 flow from this change in the purpose of the WPPA:

- Pursuant to clause 3(3), the range of persons that qualify as witnesses is expanded through a modified definition of “witness” that, under the bill, includes a person who has assisted or has agreed to assist a federal security, defence or safety organization and who may, as a result, require protection because of a risk to his or her security (amended section 2). Clause 3(4) defines a “federal security, defence or safety organization” as a federal department, agency or service that has a mandate relating to national security, national defence or public safety matters (amended section 2).
- In the determination of whether a witness should be admitted to the FWPP, the Commissioner of the RCMP must consider the factors set out in section 7 of the WPPA, including:
  - the nature of the security risk to the witness;
  - the danger to the community;
  - the nature of the inquiry, investigation or prosecution;
  - the value of the information, evidence or participation of the witness; and
  - the cost; and
  - the likelihood that the witness will adjust to the FWPP.

Clause 7 adds the nature of the assistance to a federal security, defence or safety organization to these factors (new section 7(c)).

2.1.2 FACILITATION OF THE PROTECTION OF PERSONS ADMITTED TO DESIGNATED PROVINCIAL AND MUNICIPAL PROGRAMS (CLAUSES 3, 4, 5, 11, 12, 13, 18 AND 19)

Bill C-51 facilitates protection (including identity changes) for persons admitted to designated provincial or municipal witness protection programs (clause 5; new section 3(c)). Clause 11 of the bill stipulates that, at the request of a provincial minister who is responsible for a provincial or municipal program that facilitates the protection of witnesses and on the recommendation of the Minister for Public Safety, the Governor in Council may, by regulation, designate provincial or municipal programs that facilitate the protection of witnesses (new section 10.1(1)). Clause 11 also provides for the coordination, by the Commissioner of the RCMP, of the activities of federal departments, agencies and services whose participation is needed to facilitate a change of identity for a designated program protectee (new section 10.3(1)).

Currently, there is no legislative basis requiring inter-jurisdictional and inter-agency collaboration to obtain secure identity changes. Provincial officials seeking to change the identity of a witness are faced with administrative hurdles and delays because they are required to have their witness admitted to the FWPP before new documents required for identity changes, such as passports and social insurance numbers, can be obtained.<sup>29</sup> As a result of Bill C-51 amendments, witnesses in designated provincial and municipal programs will be able to obtain an identity change without having to join the FWPP.

These new provisions respond to FWPP accessibility concerns identified by the Standing Committee on Public Safety and National Security and the Standing Committee on Justice and Human Rights.<sup>30</sup> Although, in theory, all Canadian law enforcement agencies have access to the FWPP,<sup>31</sup> in reality, as noted by the two committees, a number of police forces do not have the financial means necessary to take advantage of the program, because the costs of protecting a witness are billed back to those agencies.

As noted above, some Canadian provinces and municipalities administer their own witness protection programs. Bill C-51 amendments do not affect the ability of these provinces and municipalities to maintain these programs. However, upon the designation of a provincial or municipal program, its officials are required to comply with the information protection and disclosure provisions of the WPPA (clauses 11, 12 and 13).

To incorporate the designation of provincial and municipal protection programs, additional provisions have been added to the WPPA, and some have been amended:

- Pursuant to clause 3, the term “protected person” is defined to include a current or former FWPP protectee, as well as a current or former designated program protectee (amended section 2).
- Pursuant to clause 11, the provincial minister responsible for a designated program must designate a provincial official for the program (new section 10.1).

- Clause 18 extends the responsibility of the minister to allow him or her to issue directions concerning general policy for activities related to designated protection programs administered under the WPPA (new section 17).
- Clause 19 extends the requirement that federal departments, services and agencies collaborate on activities under the WPPA that relate to designated programs (new section 18).

## 2.2 EXTENSION OF THE PERIOD OF EMERGENCY PROTECTION (CLAUSE 6(2))

Clause 6(2) extends the amount of time emergency protection can be provided to a witness. In cases of emergency, the Commissioner of the RCMP can provide protection for up to 90 days to a person who has not entered the FWPP (former section 6(2)). Clause 6(2) adds a second period of protection not exceeding 90 days if the emergency persists (new section 6(2)). Entering the FWPP can be an option of last resort. It entails hardship and major human cost to both protectees and their families, and in the majority of cases, it involves relocation and a change of identity.<sup>32</sup> This extension will allow witnesses a longer period in which to decide whether to enter the FWPP.

## 2.3 TERMINATION OF PROTECTION AGREEMENTS (CLAUSE 9)

Participation in the FWPP is voluntary. Even prior to the Bill C-51 amendments, a protectee could decide to leave the FWPP at any time.<sup>33</sup> Similarly, the Commissioner of the RCMP can terminate protection on the basis of evidence that the protectee materially and deliberately contravened the protection agreement (current section 9).

Bill C-51 clarifies how a protectee can leave the FWPP voluntarily. Clause 9 provides that a protectee may request that the Commissioner terminate the protection, after which the Commissioner must meet in person with the protectee to discuss the request and terminate the protection upon confirmation by the protectee of the request in the form and manner that the Commissioner considers appropriate. The termination takes effect the day on which the request is confirmed or at a later date specified by the protectee (new section 8.1).

## 2.4 PROTECTION OF INFORMATION: NEW PROHIBITIONS AGAINST THE DISCLOSURE OF INFORMATION ABOUT THE MEANS AND METHODS USED TO PROTECT WITNESSES AND PERSONS WHO PROTECT WITNESSES (CLAUSES 3, 12, 13 AND 16)

Bill C-51 expands the prohibitions on the disclosure of information contained in the WPPA. Previously, the prohibitions on disclosure were limited to FWPP protectee location or change of identity information. Subject to specific exceptions, Bill C-51 prohibits the disclosure of information about the means and methods used to protect witnesses in protection programs and the persons working to protect witnesses (new sections 11(1)(b) and (c)). All of the prohibitions will now apply to the information about “protected persons,” which includes both FWPP protectees and designated provincial and municipal program protectees (amended section 2). Any contravention of the prohibition provisions constitutes an offence under section 21 of the WPPA.

Clause 12 of Bill C-51 enhances the safety of those who provide protection to program beneficiaries by prohibiting anyone from disclosing:

- any information about the means and methods used to protect protected persons – including information about covert operational and administrative methods, means used to record, exchange or gain access to confidential information and the location of facilities used to provide protection – knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person (new sections 11(1)(b) and 11(2)); and
- any information on the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to that person, a member of that person’s family, or any protected person (new section 11(1)(c)).

“Substantial harm” is defined as any injury, whether physical or psychological, that interferes in a substantial way with a person’s health or well-being (clause 3, amended section 2).

#### 2.4.1 NEW WORDING OF THE PROHIBITION AGAINST THE DISCLOSURE OF THE LOCATION OF THE PROTECTED PERSON OR A CHANGE OF IDENTITY (CLAUSE 12)

Pursuant to clause 12, the prohibition against the disclosure of the location of a witness or a witness’s change of identity is extended to all “protected persons,” which includes both FWPP protectees and designated provincial and municipal program protectees (amended section 2). In addition, the prohibition is extended to include information from which the location of a witness or change of identity “may be inferred” (new section 11(1)(a)).

The modified wording prohibits the disclosure of information connected with a person known to be a protected person, whereas the former prohibition was against knowingly disclosing, directly or indirectly, information about the location of a witness or a witness’s change of identity. The removal of the word “knowingly” from the section could be interpreted as making the involuntary or inadvertent disclosure of this type of information a possible breach of the section when one knows that the person is a protected person.

#### 2.4.2 EXCEPTIONS UNDER WHICH THE DISCLOSURE OF INFORMATION IS PERMITTED (CLAUSES 12, 13, 14 AND 16)

Previously, only the RCMP Commissioner was authorized to disclose protected information under specified circumstances. Clause 12 allows provincial officials, other parties who have entered into agreements or arrangements with the Commissioner and the courts to disclose confidential information in specified circumstances. These amendments will facilitate the sharing of information required for protection purposes and will standardize disclosure practices.

2.4.2.1 AUTHORIZED DISCLOSURE BY THE COMMISSIONER  
AND PROVINCIAL OFFICIALS (CLAUSES 12, 13 AND 16)

The exceptions according to which the Commissioner and provincial officials may disclose protected information, and the factors they must consider in determining whether such information ought to be disclosed, apply to:

- the commissioner in respect of FWPP and designated program information (new sections 11.2 and 12); and
- provincial officials in respect of designated program information (new sections 11.3 and 12).

Depending on the basis upon which the disclosure is to be made, the Commissioner and the provincial officials may have to notify protected persons before disclosing information in order to allow them to make representations (new sections 11.2(5) to (8) and 11.3(4) and 11.3(5)).

Disclosure of the location or change of identity of protected persons is authorized in certain circumstances, which include:

- information provided to an FWPP or designated program protectee for the purpose of providing protection (new sections 11.2(1)(a) and 11.3(1));
- information provided with the consent of the protected person (new sections 11.2(2)(a) and 11.3(2)(a)); and
- information that is essential for the purposes of the administration of justice (new sections 11.2(2)(c) and 11.3(2)(c)).

Although the circumstances allowing disclosure are similar for the Commissioner and provincial officials, only the Commissioner may disclose the location of a witness or the witness's new identity either to facilitate a change of identity (new section 11.2(1)(b)) or when it is essential for the purposes of national security or national defence (new section 11.2(2)(d)).

The Commissioner and provincial officials may disclose information about the means and methods used to protect witnesses or about the identity and role of persons who provide protection if this information relates to their respective protection programs or to persons associated with them where the Commissioner or provincial officials have reasonable grounds to believe that the disclosure is essential to the administration of justice or public safety (new sections 11.2(4) and 11.3(3)).

Clause 16 authorizes the Commissioner to enter into agreements or arrangements with federal departments, agencies or services, and it authorizes provincial officials to enter into agreements or arrangements with provincial departments, agencies or services in order to provide for the disclosure between federal and provincial authorities of information relating to the location of protected persons and the new identity of a protected person (new section 14.1). This new measure will facilitate disclosure that is essential for the administration of justice or public safety by permitting the information to be shared with other federal or provincial officials under specified terms (new section 14.1(4)).



2.4.2.2 AUTHORIZED DISCLOSURE: ADDITIONAL EXCEPTIONS  
(CLAUSES 12 AND 14)

Clauses 12 and 14 of Bill C-51 provide additional exceptions connected with the disclosure of protected information:

- As was previously the case, the prohibition against disclosure does not apply to a protectee who discloses information about him or herself, or a person who discloses information received from a protected person. However, pursuant to clause 12, this exception now only applies where the disclosure could not result in substantial harm to any protected person (new section 11.1).
- Pursuant to clause 12, a federal or provincial department, agency or service that has entered into an information disclosure agreement or arrangement with the Commissioner or a provincial official under section 14.1 is authorized to disclose, in accordance with the agreement or arrangement, information that reveals, or from which may be inferred, the location of a protected person or the person's new identity (new section 11.4). Before such disclosure, the party must take reasonable steps to notify the protected person and allow the person to make representations (new section 11.4(2)).
- Pursuant to clause 12, persons to whom protected information is disclosed are authorized to further disclose it, as necessary, to act on a Commissioner's request that is meant to protect a protectee or to change the identity of a designated program protectee, as well to the extent necessary to act on a provincial official's request that is meant to protect a designated program protectee (new sections 11.5(1) to 11.5(3)).
- Pursuant to clause 12, when confidential information is disclosed to a court, the court must take any measures necessary to protect it. A court is authorized to disclose the protected information in order to prevent a miscarriage of justice, but it can disclose only the information necessary for that purpose and only to persons who require it for that purpose (new sections 11.5(4) and 11.5(5)).
- Clause 14 expressly provides that informer privilege found in common law prevails over any authority to disclose information provided under the WPPA (new section 12.1). This privilege prohibits disclosure to the public or a court of the identity of persons who provide, in confidence, information related to criminal matters. The duty to keep an informer's identity confidential applies to the police, the Crown and judges, and the privilege is near-absolute. The only exception is where the accused demonstrates that there is no other way to demonstrate innocence.<sup>34</sup>

2.5 EXEMPTION FROM LIABILITY OR PUNISHMENT (CLAUSE 14)

Pursuant to clause 14, exemption from liability or punishment is provided to anyone who claims that the new identity of a protected person is or has always been the protected person's only identity (new section 13). Previously, the exemption from liability or punishment for such a claim applied solely to the person whose identity had been changed. Furthermore, clause 14 provides additional exemptions from liability or punishment to persons providing protection who claim that they are not providing protection, do not know the protected person or do not know that the

person is protected (new section 13.1). These new measures afford protection against liability or punishment to the persons who must carry out protection activities within witness protection programs.

## 2.6 DELEGATION OF THE POWERS OF THE COMMISSIONER AND PROVINCIAL OFFICIALS (CLAUSE 17)

Pursuant to clause 17, the power to enter into agreements or arrangements with federal and provincial departments, agencies or services to allow the sharing of information between governmental authorities under new section 14.1(1) and the power to designate an Assistant Commissioner responsible for the FWPP must be exercised by the Commissioner (new section 15(1)). The Commissioner also retains the sole authority within the RCMP to decide whether there are grounds to disclose protected information without the consent of the protectee (new section 15(1)(a)). The Commissioner may delegate to the Assistant Commissioner, who is responsible for the FWPP, the power to make all admission decisions, to change the identity of a protectee or to terminate protection (new section 15(2)).

Previously, admission decisions other than those arising from agreements with other law enforcement agencies and arrangements with foreign authorities for the protection of some witnesses could be made by members of the RCMP holding a rank no lower than Chief Superintendent. Such decisions may now only be made at the highest levels.

Similarly, pursuant to clause 17, a provincial official may delegate to any official of the same province or municipality all or some of his or her powers, duties and functions under the WPPA. However, the power to decide whether to disclose confidential information and the power to enter into agreements or arrangements aimed at sharing information between governmental authorities under new section 14.1(2) must be exercised by the provincial official designated by the provincial minister responsible for the designated program (new section 15.1).

## 2.7 COMING INTO FORCE, CONSEQUENTIAL AND COORDINATING AMENDMENTS (CLAUSES 22, 23 AND 24)

Clause 24 provides that the provisions of the bill, with the exception of clause 23, shall come into force on the day or days to be fixed by order of the Governor in Council.

Clauses 22 and 23 both deal with access to the information that is protected under section 11 of the WPPA.

Pursuant to section 24 of the *Access to Information Act* (ATIA),<sup>35</sup> the head of a government institution must refuse to disclose any requested record that contains information whose disclosure is restricted by any provision set out in Schedule II of the ATIA. Clause 22 of Bill C-51 adds the WPPA to Schedule II of the ATIA, as well as a specific reference to section 11 of the WPPA, which prohibits the disclosure of information about the location of protected persons, their new identities, and the means and methods used to protect them and persons who provide protection.

Clause 23 coordinates the amendments prohibiting the disclosure of information that are found in new section 11 of Bill C-51 with the amendments to the *Royal Canadian Mounted Police Act* (RCMP Act) proposed in Bill C-42, which is currently before Parliament.<sup>36</sup> When both bills have entered into force, part of the definition of “privileged information” in the RCMP Act will include information protected under section 11 of the WPPA. When the new civilian review commission of the RCMP seeks access to such information, special rules will apply.

### 3 COMMENTARY

Although Bill C-51 has been described by some as a positive step forward that will expand the categories of admissible witnesses, better integrate provincial programs with the federal system and make it easier to secure new identities for witnesses,<sup>37</sup> it has been argued that the proposed reforms do not go far enough and that they do not allow a suitable balance to be established in the FWPP between the need to adequately protect sources and witnesses from intimidation and violence, on the one hand, and the needs of law enforcement agencies, on the other. The following paragraphs summarize the points of view expressed in the media with regard to these matters.

The main concern raised by the bill’s critics is that Bill C-51 does not address the RCMP oversight and conflict of interest issues raised by the Air India Commission, which was mandated by the government in 2006 to investigate and to make recommendations regarding the “adequate protection of witnesses against intimidation in the course of the investigation or prosecution of terrorism cases.”<sup>38</sup>

The Commission recommended the establishment of an independent body, the National Security Witness Protection Coordinator, to oversee the FWPP.<sup>39</sup> Establishing an independent body to administer and manage the FWPP was also recommended by the Standing Committee on Public Safety and National Security in its 2008 report on the witness protection program.<sup>40</sup> The Air India Commission and the Committee suggested that it was not appropriate for the police agency responsible for getting witnesses to testify to also decide whether they would be admitted to the federal program.

In response to these observations, the Honourable Vic Toews noted that, while the Department of Justice was considered for the task, it was determined that it did not have the expertise and that the RCMP was better positioned to decide whether a witness should be admitted to the FWPP and the extent of the protective measures required.<sup>41</sup>

Concerns have also been raised that Bill C-51 fails to create a specific independent dispute resolution mechanism to address disputes between protectees and FWPP officials.<sup>42</sup> The availability of access to a reasonable mechanism for appealing decisions made by the FWPP administrators and for making complaints heard was also raised by witnesses in the course of the review of the Witness Protection Program undertaken by the Standing Committee on Public Safety and National Security.

The Commission for Public Complaints Against the Royal Canadian Mounted Police is currently empowered to hear complaints about the FWPP. However, the RCMP Act limits the scope of the Commission's reviews, by allowing the RCMP to refuse to disclose certain information.<sup>43</sup> This led to the recommendation of the Standing Committee on Public Safety and National Security that the Commission should have access to documents needed to carry out its review effectively.

Amendments to the RCMP Act proposed in Bill C-42 will establish a new Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, which will replace the current Commission.<sup>44</sup> Amendments proposed in Bill C-42 and Bill C-51 will broaden the categories of information the new Commission may be authorized to obtain, including information that reveals the identity and the location of protected persons, information about the means and methods used to protect those persons, and information about the people who protect them.<sup>45</sup>

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## NOTES

1. [Witness Protection Program Act](#) [WPPA], S.C. 1996, c. 15.
2. In this legislative summary, the term "source" is used to describe individuals who cooperate with the authorities (for example, by providing information) in the course of an investigation, while the term "witness" refers to individuals who agree to testify in a court.
3. House of Commons, Standing Committee on Justice and Human Rights [JUST], [The State of Organized Crime](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, March 2012, p. 50.
4. Public Safety Canada, "[The Harper Government introduces the Safer Witnesses Act](#)," News release, 11 December 2012.
5. WPPA, s. 14.
6. The vulnerability of sources and witnesses varies based on a range of factors, such as the type of offence to which the investigation relates and the age of the victim. As noted by the House of Commons Standing Committee on Public Safety and National Security in its 2008 report:
 

It is generally recognized that witnesses involved in investigations concerning criminal and terrorist organizations are the target of serious intimidation; children are also targeted because they are perceived as being easy to intimidate.

House of Commons, Standing Committee on Public Safety and National Security [SECU], [Review of the Witness Protection Program](#), 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament, March 2008, p. 3.
7. [Criminal Code](#), R.S.C., 1985, c. C-46.
8. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 [Air India Commission], *Air India Flight 182: A Canadian Tragedy*, Final report, Volume 3, [The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions](#), June 2010, p. 207.

9. See Alberta legislation ([Witness Security Act](#), S.A. 2010, c. W-12.5); Saskatchewan legislation ([The Witness Protection Act](#), S.S. 2009, c. W-14.2) and Manitoba legislation ([The Witness Security Act](#), C.C.S.M., c. W167). For the situation in Canada, see Yvon Dandurand and Kristin Farr, [A Review of Selected Witness Protection Programs](#), Report prepared for Public Safety Canada, 2010, p. 12.  
  
Note that as indicated in that report, the Council of Europe distinguishes between “protection measures” and “protection programs.” Protection measures are all measures “aimed at protecting witnesses and collaborators of justice from intimidation and retaliation,” while protection programs refer to “a set of individual protection measures which are described in an agreement between the authorities and the protected witness or collaborator of justice.”
10. SECU (2008), p. 8.
11. Ibid.
12. The factors to be considered for admission into the FWPP are listed in section 7 of the WPPA.
13. SECU (2008), p. 1.
14. SECU (2008) and JUST (2012).
15. The information presented in this section is taken from Public Safety Canada, [Witness Protection Program Act – Annual report: 2011–2012](#), 2012.
16. Ibid.
17. Anne-Marie Boisvert, [La protection des collaborateurs de la justice : éléments de mise à jour de la politique québécoise](#), Report submitted to the Minister of Public Safety of Quebec, June 2005, p. 33 [available in French only; translation].
18. SECU (2008).
19. Ibid., p. 24.
20. [Terms of Reference of the Air India Commission](#), P.C. 2006-293, para. b(v). A preliminary report entitled *The Families Remember* was released in December 2007. That report presented the accounts of those closest to the victims, those who assisted them, and others directly affected by the worst terrorist attack in Canadian history. The [final report](#) was released on 17 June 2010, and consists of 3,000 pages in five volumes.
21. Air India Commission (2010), Vol. 3, p. 254.
22. Ibid., p. 198.
23. See *ibid.*, Vol. 3, p. 299: “Witnesses and sources with no criminal antecedents have fewer reasons than criminals for enduring the hardships of witness protection programs.”
24. JUST (2012), pp. 49–51.
25. Ibid., p. 51.
26. Air India Commission (2010), Vol. 3, Chapter 8.
27. Ibid., p. 223.
28. Ibid., pp. 183, 227–228.
29. Boisvert (2005), pp. 36–37; JUST (2012), p. 50.
30. SECU (2008) and JUST (2012).
31. SECU (2008), p. 30; and WPPA, s. 14(1).
32. SECU (2008), p. 7.
33. Ibid., p. 12.

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34. *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, paras. 16, 23, 27 and 28; and *R. v. Barros*, [2011] 3 S.C.R. 368, paras. 1 and 37.
35. [Access to Information Act](#), R.S.C., 1985, c. A-1.
36. *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10; and [Bill C-42: An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts](#) (short title: Enhancing Royal Canadian Mounted Police Accountability Act), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 2012.
37. Jim Bronskill, "Bill Expands Witness Protection Program," *The Globe and Mail* [Toronto], 12 December 2012, p. A8; Tobi Cohen, "Feds to Overhaul Witness Protection Program," *The Gazette* [Montréal], 12 December 2012, p. A11; and QMI Agency, "Feds Move to Bolster Witness Protection," *The Calgary Sun*, 12 December 2012, p. 21.
38. Bronskill (2012), p. 8; Cohen (2012); Kent Roach, "Witness Protection Reforms Fall Short," *Ottawa Citizen*, 14 December 2012; and Patrick White, "Horror Stories of Canada's Witness Protection Program Show Reform Can't Come Soon Enough," *Globe and Mail*, 28 December 2012.
39. Air India Report (2010), Recommendation 24.
40. SECU (2008), Recommendation 1.
41. Bronskill (2012), p. 8; and Cohen (2012).
42. Roach (2012).
43. SECU (2008), p. 29.
44. Bill C-42, cc. 2(3) and 35.
45. The RCMP Commissioner could refuse to provide the new Commission access to this information, in which case Bill C-42 provides a conciliation mechanism. For more information, see Lyne Casavant and Dominique Valiquet, [Legislative Summary of Bill C-42: An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts](#), Publication no. 41-1-C42-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 7 November 2012.