Submission to the Standing Senate Committee on Legal and Constitutional Affairs regarding Bill C-47, An Act to implement certain provisions of the budget tabled in Parliament, Division 39

Canadian Civil Liberties Association

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Introduction

The Canadian Civil Liberties Association ("CCLA") is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental constitutional freedoms. Working to achieve government transparency and accountability with strong protections for personal privacy lies at the core of our mandate.

CCLA believes that the right to privacy is essential to Canadian democracy. CCLA has long endorsed the proposition that privacy is a human right and that privacy rights should be protected by law. Canada's privacy laws, however, fall short of protecting the public from Canada's political parties. Despite many calls by experts and civil society organizations, Canadian governments have been slow to have privacy laws apply to Canadian political parties.

Bill C-47, Division 39 thus constitutes a big step in the wrong direction: it amends the *Canada Elections Act* to further entrench political parties' exclusion from meaningful national privacy legislation. Moreover, what minimal recognition of privacy rights it does offer, Division 39 provides no mechanism to review, enforce, or subject political parties to independent oversight. CCLA believes that this is not in the Canadian public's best interest and that the Bill should be abandoned. Failing that, this legislation should be substantially revised to respect fundamental rights by protecting privacy and democratic interests in Canada. Canadian political parties must not be allowed to escape their responsibility to respect the fundamental human right to privacy.

Background

The *Canada Elections Act* sets out how federal political parties can collect, use, and distribute voter information.[1] Under the act, political parties must "adopt a policy for the protection of personal information and to publish it on its Internet site."[2] Parties may only use that information to communicate with electors about election-related matters, but they are otherwise unrestricted under statute regarding the storage, use, or sharing of voter information.

This gap in the *Canada Elections Act* also highlights a gap in Canada's current and proposed privacy legislation. Political parties are subject to neither the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which applies to private sector organizations, nor the *Privacy Act*, which regulates government agencies' handling of personal information. There is also no mention of political parties in the recently proposed *Consumer Privacy Protection Act* (CPPA), which was designed to replace PIPEDA as Canada's new national standard for privacy in the private sector.

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[1] *Canada Elections Act* (SC 2000, c 9).

[2] *Elections Modernization Act* (SC 2018, c 31), Summary.

The *Canada Elections Act* has long been criticized for its failure to provide a clear and meaningful statutory framework for how political parties should respect individuals' privacy.[3] Parliament has also long ignored calls to provide recourse for infractions, remedies for damages done, or even mandatory reviews of parties' privacy policies.[4] This lack of guardrails will allow political parties to collect and use their supporters' personal information for years to come.[5]

Concerns about Canadian political parties' use of individuals' privacy and personal information are at the foreground of public consciousness right now because of an ongoing legal dispute between the BC Information and Privacy Commissioner (BC IPC) and the Liberal, Conservative, NDP, and Green parties of Canada. In 2022, the Commissioner's office had found that the parties were subject to BC's *Personal Information Protection Act* (PIPA). The parties contested this finding, prompting a still-ongoing judicial review of that decision. Shortly thereafter, the government introduced Bill C-47, which includes amendments to the *Canada Elections Act*'s privacy provisions for political parties. Lawyers for the parties are now arguing that the judicial review should be put aside until after Bill C-47 passes.[6] In CCLA's view, robust privacy regulations for political parties—including protections for individuals' privacy rights—are long overdue.

CCLA's Concerns About Division 39

Three hallmarks of good regulations are consistency, oversight, and accountability—hallmarks which Division 39 lacks. Division 39 states that it provides for "a national, uniform, exclusive and complete regime" for Canadian political parties' "collection, use, disclosure, retention, and disposal of personal voter information." The proposed amendment, however, instead provides a framework for the opposite: political parties can set their own rules so long as they play by their own rulebooks. The amended language provides that:

> **385.2** In order to participate in public affairs by endorsing one or more of its members as candidates and supporting their election, any registered party or eligible party, as well as any person or organization acting on the party's behalf, ... may, subject to this Act and any other applicable federal Act, collect, use, disclose, retain and dispose of personal information in accordance with the party's privacy policy.

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[3] Canada, Parliament, House of Commons, Standing Committee on Access to Information, Privacy, and Ethics, *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly,* 42nd Parl, 1st Sess (December 2018) (Chair: Bob Zimmer).

[4] Phillip Dufresne, Appearance before the Standing Senate Committee on Legal and Constitutional Affairs (LCJC) on Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023.* 3 May 2023. Available online: </www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2023/parl_20230503/>.

[5] Vincent Gogolek, "Federal political parties are arguing for less protection of personal information in B.C," *Policy Options* (4 August 2022), online: <https://policyoptions.irpp.org/magazines/august-2022/personal-information-protection/>.

[6] Alex Boutilier, "Liberals try to delay fight over privacy rules for political parties". *Global News* (8 May 2023), online: <https://globalnews.ca/news/9681510/liberals-fight-privacy-rules/https://globalnews.ca/news/9681510/liberals-fight-privacy-rules/>.

So, whereas the Act's purpose is to provide for a 'uniform' and 'complete' regime, it ultimately provides no substantive rules for how political parties must protect individuals' privacy. Each party's rulebook could be different—and inadequate—and could be changed by the parties at any time and at their whim. CCLA believes that privacy protections should have deeper roots than that.

And even if the proposed amendments set more consistent standards, the amendments do not provide an oversight mechanism to ensure that these standards are met because despite the existence of federal, provincial and territorial privacy regulators, there is no body designated to oversee and enforce parties' compliance with their own privacy policies. This problem is longstanding and needs to be addressed: in 2018, Dr. Michael Pal, Associate Professor of Law at the University of Ottawa, highlighted how previous amendments to the *Canada Elections Act* would not give the Privacy Commissioner sufficient oversight authority, would not establish an effective enforcement mechanism, or even require that privacy policies contain a common floor of provisions.[7] The Canadian public has nothing but each political parties' word that they are respecting individuals' privacy. This is insufficient protection for a fundamental democratic right. And it is all the more concerning given recent controversies surrounding the Liberal Party of Canada's use of facial recognition technology.[8] CCLA has argued that all political parties should cease and desist use of facial recognition technology at least until it is "ready for prime time" and until legislators address the "the legal and policy vacuum" surrounding its use.[9] That legal and policy vacuum still exists, and Division 39 does little to fill it.

Maintaining public confidence in the electoral system requires careful management and attention. In cognate jurisdictions, such as Australia, eroding public trust in electoral systems has led to persistent concerns about political integrity, accountability, and the rule of law. In a submission to a parliamentary inquiry into the 2022 Australian election, Digital Rights Watch Australia warned that in the wake of a massive telecommunications breach, voter information kept by Australian political parties—which are also exempt from local privacy laws—was especially vulnerable to abuse and misuse.[10] As Digital Rights Watch Australia found, "Political parties have a responsibility to exhibit best practices when it comes to handling data ethically, lawfully, and minimising digital technology facilitated harms."[11] Canada can better avoid these pitfalls by acknowledging how vulnerable our electoral systems are in an increasingly digital society and moving to protect them. The proposed amendments, however, would likely diminish the public's

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[7] Canada, Parliament, House of Commons, Standing Committee on Access to Information, Privacy, and Ethics, *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly,* 42nd Parl, 1st Sess (December 2018) (Chair: Bob Zimmer).

[8] Marieke Walsh, "Liberals face possible federal, provincial privacy probes for use of facial recognition technology," *Globe and Mail* (24 June 2021), online: <https://www.theglobeandmail.com/politics/article-liberals-face-possible-federal-provincial-privacy-probes-for-use-of/>

[9] Michael Bryant & Brenda McPhail, Cease and Desist - Liberal Party Must Halt Use of Facial Fingerprinting. CCLA. Available online: <https://ccla.org/wp-content/uploads/2021/08/Susan-Cowan_LPC-FRT44.pdf>.

[10] Digital Rights Watch Australia, *Submission to the Joint Select Committee on Electoral Matters on the Conduct of the 2022 Federal Election* (16 September 2022) online: <https://digitalrightswatch.org.au/2022/09/28/submission-inquiry-into-the-2022-federal-election/>.

[11] Ibid. p 2.

confidence in political parties' administration of individuals' personal information, as well as in their commitment to privacy rights more generally.

If Canada adopts C-47, it would be limiting its obligations to protect individuals' privacy while also putting the public's confidence in Canada's privacy laws at risk. This asymmetry cannot be ignored; as we saw in Australia, privacy protections for democratic processes are integral to a trustworthy electoral system. Trust is hard to win and easy to lose and Division 39 gambles with the public's confidence in Canada's electoral system for no clear purpose.

The Committee should listen to the public and the experts

People in Canada have long recognised the need for political parties to maintain robust privacy standards. In a 2018 poll, 73% of Canadians said that they were concerned or somewhat concerned about how political parties use the personal information that they collect about voters.[12] Elections Canada's polling data from the 2021 general election found that "more than nine in 10 (96 per cent of) respondents agreed that laws should regulate how political parties collect and use Canadians' personal information, including 78 per cent who strongly agreed."[13] These studies show that the status quo is inadequate; in CCLA's view, Division 39 likely offers the public no meaningful relief.

And this is not the first time that CCLA has recognized this issue and called for reform.[14] Now we add our voice to those of key leading privacy experts such as Professors Elizabeth F. Judge and Michael Pal,[15] Colin Bennett and Robin Bayley,[16] as well as the Office of the Privacy Commissioner of Canada,[17] and the Standing Committee on Access to Information, Privacy, and Ethics (ETHI)[18] in saying that more meaningful privacy obligations for political parties are well overdue.

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[12] Bill Curry, "Canadians concerned about how Facebook, political parties protect their privacy: poll," *Globe and Mail* (19 December 2018), online: <https://www.theglobeandmail.com/politics/article-canadians-concerned-abouthow-facebook-political-parties-protect/>.

[13] Alex Boutilier, "Liberals try to delay fight over privacy rules for political parties". *Global News* (8 May 2023), online: <https://globalnews.ca/news/9681510/liberals-fight-privacy-rules/>.

[14] Brenda McPhail, "New Privacy Law to be Tabled Today: What CCLA Hopes to See," *CCLA* (16 June 2022), online: <https://ccla.org/privacy/new-privacy-law-to-be-tabled-today-what-ccla-hopes-to-see/>.
Brenda McPhail, "Canadians Care About Privacy, Politicians Need to Show They Care About Us," *CCLA* (19 December 2018), online: <https://ccla.org/privacy/privacy-law-reform/canadians-care-about-privacy-politicians-need-to-show-they-care-about-us/>

[15] Elizabeth F. Judge & Michael Pal, "Voter Privacy and Big-Data Elections" (2021) 58:1 Osgoode Hall LJ 1 at 33.

[16] Colin J Bennett & Robin M. Bayley, "Canadian Federal Political Parties and Personal Privacy Protection: A Comparative Analysis,"" *Report for the Office of the Privacy Commissioner of Canada* (28 March 2012) online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2012/pp_201203/>.

[17] Office of the Privacy Commissioner of Canada, *Guidance for Federal Political Parties on Protecting Personal Information* (Guidance Document) (Ottawa: Office of the Privacy Commissioner of Canada, 2019) Oonline: <https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/gd_pp_201904>.

[18] Canada, Parliament, House of Commons, Standing Committee on Access to Information, Privacy, and Ethics, *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly,* 42nd Parl, 1st Sess (December 2018) (Chair: Bob Zimmer).

As this and other committees have heard, Canada has long needed exactly what this bill rejects: accountability for those who make the rules. Parliament should not double-down on a broken privacy framework at the public's expense. Rather, it should heed the recommendations made to it by experts and civil society actors. Everyone would be better served by a law that holds political parties to fairer standards, gives the public access to the personal information that political parties hold about them, empowers an independent officer to monitor political parties' compliance with the law, and codifies a framework which recognizes just how essential privacy rights are to democracy. To achieve this, Division 39 requires serious rethinking.

Recommendations

CCLA recommends:

1. That Division 39, the amendment to the *Canada Elections Act*, be removed from Bill C-47;
2. That political parties and political third parties be made subject to PIPEDA and the forthcoming *Consumer Privacy Protection Act* so that they are explicitly covered by appropriate privacy laws;
3. That the Office of the Privacy Commissioner and/or Elections Canada be empowered to conduct proactive audits of political parties and political third parties regarding their privacy practices;
4. That necessary new resources are provided to the Office of the Privacy Commissioner so it can address modern privacy concerns and efficiently exercise its new powers.

CCLA is grateful to the Standing Senate Committee on Legal and Constitutional Affairs for this opportunity to make submissions as a part of your important and timely examination of Division 39.