THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 15, 2024

Via email: CSAP-DPA@justice.gc.ca

Mr. Gareth Sansom
Deputy-Director, Criminal Law Policy Section
Department of Justice
284 Wellington Street
Ottawa ON K1A H8

Dear Mr. Sansom:

Re: Council of Europe Second Additional Protocol to the Convention on Cybercrime on Enhanced Cooperation and Disclosure of Electronic Evidence

I am writing on behalf of the Criminal Justice and Privacy and Access Law Sections of the Canadian Bar Association (CBA Sections) in response to the government's consultation on the *Second Additional Protocol to the Council of Europe Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence* (Protocol) which aims to address cybercrime and electronic evidence for crimes in general. The CBA Sections support the Protocol but raise concerns about the possibility of other jurisdictions obtaining confidential subscriber information.

The CBA is a national association of 38,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. Criminal Justice Section members include prosecutors, defense counsel and legal academics specializing in criminal law. The Privacy and Access Law Section comprises lawyers with an in-depth knowledge of privacy and access to information law.

The CBA Sections recognize the importance of international cooperation to investigate all offences, but the need for international cooperation in cybercrime offences is heightened given their borderless nature. Nevertheless, they stress that implementation of international cooperation agreements must respect *Charter* rights of Canadian citizens and people living or operating in Canada, as well as protect human rights. Implementation must also ensure that appropriate safeguards for the protection of personal data are in place.

Article 7 of the Protocol deals with measures for enhanced co-operation. With respect to the issue of Canada taking a reservation (opting out) on the implementation of Article 7, which permits law enforcement to request or demand subscriber information from Internet Service Providers (ISP) in Canada, the CBA Sections believe Canada should exercise the oversight authority granted in Article

7(2)(b)[1] of the Protocol to require judicial authorization. Since subscriber information is not defined in the Protocol, a power to directly request information from an ISP permits the disclosure of information beyond an account holder name and address, or information to be registered on the Internet Corporation for Assigned Names and Numbers (ICANN). This can include subscriber activity on a particular IP address, which attracts specific privacy considerations that otherwise require judicial authorization in Canada for a domestic investigation. The Supreme Court of Canada has held that obtaining such information is a search for the purpose of Section 8 of the *Charter*, and that judicial pre-authorization is required: *R. v Spencer*[2], and most recently *R v. Bykovets*[3].

The CBA Sections argue that international bodies should not have greater power to obtain private information about Canadian internet users than domestic authorities. There are legitimate constitutional concerns inherent in the requirement for judicial authorization domestically, and they do not cease when an international authority requests this information. While some subscriber information may be neutral and may be publicly available information through a WHOIS (widely used Internet record listing that identifies who owns a domain) data search, more personal information can be obtained by a subscriber data search.

Article 8 also addresses measures for enhanced co-operation. The CBA Sections are urging the federal government to take a reservation (reserve the right not to apply Article 8 to traffic data) pursuant to Article 8(13) on traffic data due to its highly personal and invasive nature. In drafting legislation for judicial authorization, Canada should require that a specific type of subscriber information be disclosed, along with justification for each type of subscriber data required. The same standards and thresholds applicable to *Criminal Code* production orders should apply to such orders. The CBA Sections recommend that judicial authorization be the oversight standard over prosecutorial or independent authority permitted under Article 7, to mirror processes in place in Canada. This will simplify granting authorizations and drafting legislation, and members of the judiciary are already trained to scrutinize such authorizations under domestic law.

This process may also obviate the need to apply Article 7(5)(a), which requires the requesting party to notify the specified authority and the competent authority that requested the information, as the judicial authorization process can include a validation that the requesting body confirmed with domestic authorities that the request does not compromise any existing domestic law enforcement investigations. Further, using the existing judicial authorization process also keeps such applications *in camera* which protects the need for secrecy in many investigations, especially where the authorization is not granted.

We appreciate the opportunity to comment on the Protocol. We trust our comments are helpful and would be pleased to offer further clarification.

Yours truly,

(original letter signed by Julie Terrien for Kyla Lee and Sinziana Gutiu)

Kyla Lee
Chair, Criminal Justice Section

Sinziana Gutiu
Chair, Privacy & Access Law Section

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1 Article 7(2)(b) permits Canada to require oversight by a prosecutorial, judicial or independent authority at the time of ratification.

2 2014 SCC 43

3 2024 SCC 6.