

# Lawful Access

## BACKGROUND

- “Lawful access” is defined as the interception of communications and the search and seizure of information, which law enforcement and national security agencies use to conduct investigations.
- In 2002, the Department of Justice began informal consultations with the CBA and other non-governmental organizations about proposals to allow state agents to access personal information. This “modernization” was said to be necessary to keep pace with technology, in light of security concerns following events in September 2001.
- In August 2002, the Department of Justice, Solicitor General and Industry Canada released a consultation document on a wide range of vague proposals. A summary of the responses was published in August 2003. The CBA National Criminal Justice Section prepared a submission, urging, among other things, more detail about what the proposals would actually entail, how they would be implemented and how privacy interests would be safeguarded.
- In 2005, the federal government provided greater detail and suggested substantive changes to some of its earlier proposals, in a series of documents circulated only to selected groups, including the CBA. These documents and a meeting between representatives from the National Competition Law and Criminal Justice Sections and government officials in April 2005 permitted a second, more specific response.
- CBA stressed that the new proposals should be evaluated comprehensively, not on an individual basis, and should be assessed in the context of existing laws to determine their overall impact on rights and freedoms.

## CURRENT STATUS

- Because of the complexity of issues and the many laws involved, the interest in lawful access spans several Sections, including Privacy and Access Law, Media and Communications Law, Competition Law, Constitutional and Human Rights Law, and Criminal Justice.
- Bill C-74, *Modernization of Investigative Techniques Act*, tabled in November 2005, would require telecommunications service providers have the capability to enable national security and law enforcement agencies to exercise their authority to intercept communications, and would require service providers to provide subscriber and other information in defined circumstances.
- Bill C-74 was circulated broadly to interested CBA Sections. A working group of Section volunteers planned to respond, but the Bill died on the Order Paper with the election call later that month.
- In July 2006, then CBA President Tabor wrote the Ministers of Justice, Industry and Public Safety about announcements by internet service providers (ISPs) to inform consumers of revisions to service agreements to permit ISPs to monitor or investigate how their

customers use their services, and to “disclose any information necessary to satisfy any laws, regulations or other governmental request from any applicable jurisdiction.” The CBA expressed concerns about the scope and impact of these revisions on privacy, and particularly about the potential to destroy solicitor client privilege by seizing communications between lawyers and clients. CBA urged the government to ensure that all private information remains appropriately protected, and that any privilege accorded to communications between lawyers and clients remains inviolate. CBA President Parker MacCarthy responded to ISP objections, emphasizing the CBA’s concern for the protection of private information.

- Private Members’ Bill C-416 was introduced by MP Marlene Jennings in March 2007, replicating the previous Liberal Bill C-74. The Bill again died on the Order Paper in November 2008.
- In September 2007 Public Safety Canada released a consultation document proposing an administrative model for law enforcement agencies to access customer name and address information from telecommunications service providers. Three CBA Sections collaborated on a response, noting several problems with the proposed administrative search regime that would be avoided by retaining the current requirement for prior judicial authorization.
- In February 2009, MP Marlene Jennings tabled a version of the previous Bill C-74, as Private Members’ Bill C-285. It remains in the current Parliamentary session.
- In June 2009, Bill C-46, *Investigative Powers for the 21st Century Act* and Bill C-47, *Technical Assistance for Law Enforcement in the 21st Century Act* were tabled. Bill C-46 would provide additional investigative powers to law enforcement to deal with computer crime and new technologies. Bill C-47 would require telecommunications providers to be capable of facilitating information gathering by law enforcement about subscribers. Criminal Justice, Privacy and Access to Information Law and Competition Law (Criminal Matters Committee) Sections are collaborating on a response.
- In December 2009, Bills C-46 and 47 died on the Order Paper. Work on the joint submission continued in anticipation of the re-introduction of the Bills, or comparable Bills.
- Bills C-50, *Improving Access to Investigative Tools for Serious Crimes Act*, C-51, *Investigative Powers for the 21<sup>st</sup> Century Act* and C-52, *Investigating and Regulating Criminal Electronic Communications Act* were tabled in November 2010, but died on the Order Paper.

## **NEXT STEPS**

- Legislation and Law Reform staff will continue to monitor further developments. Sections will respond to any legislation reintroduced in the new Parliament.