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# *Council of Europe Second Additional Protocol to the Convention on Cybercrime: Considerations for Implementation Article 7*

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Gareth Sansom – Department of Justice Canada

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## Canada's Process: Steps toward Implementing and Ratifying the 2AP

- **Phase 1: Summer 2023 to May 2024**
- The Government of Canada reached out to stakeholders for views on the *Second Additional Protocol to the Council of Europe Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence* (2AP or the Protocol), signed by Canada in June 2023 (see Website on last slide)
- This Protocol would provide law enforcement new tools to better access electronic evidence in other countries to combat crime while at the same time ensuring privacy safeguards.
- The input is intended to allow the Government to:
  - better assess the potential impacts of this Protocol;
  - understand concerns around the tools and privacy protections; and
  - consider the development of any new laws or processes to enable Canada to ratify (officially approve) and implement the Protocol.



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## Canada's Process: Steps toward Implementing and Ratifying the 2AP

**Phase 1: Summer 2023 to May 2024**

Identified various stakeholder groups in Canada:

- Law Enforcement (federal and provincial)
- Prosecutors
- Private Sector (Service Providers)
- Civil society
- Advocacy NGOs for Victims/Survivors of Cybercrime
- Federal and Provincial Privacy Commissioners

- Conducted a series of online and in-person meetings with stakeholders
- Invited and received written submissions from various organizations from the above stakeholder groups



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## Policy Development Process

**Phase 1: Summer 2023 to May 2024**

- Analyzed specific provisions of the 2AP to explore policy options
- Consulted on specific provisions with federal legal counsel who have expertise in specific areas (including privacy, human rights, retention of records, international law, treaty law)
- Analyzed (i) records of discussion from consultation meetings and (ii) written submissions from stakeholder groups
- Assessment of whether existing domestic legislative and other measures meet the requirements of each of the provisions or whether new legislation and/or other measures are required

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## Toward Implementing the Protocol

**Considerations**

- What is the relevant **domestic** context with respect to this procedural power?
  - Is it covered by existing legislation and/or other measures?
  - Is there relevant jurisprudence (such as Supreme Court decisions)?
- What legislative or other measures are needed for **outgoing orders**?
- What legislative or other measures are needed for **incoming orders**?



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## Considerations - Article 7

- **Key Features:**
- Direct disclosure
- Voluntary request (unlike Article 8 which is compelled disclosure)
- **Pros:** (law enforcement/victims) ability to investigate and prosecute more swiftly criminal offences that have digital evidence
- Relieves pressure from existing Mutual Legal Assistance channels.
- **Cons:** how to ensure protection in accordance with the Constitutional (Charter) Rights and Freedoms, including measures to mitigate and safeguard privacy risks associated with personal data?

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## Considerations - Article 7

- **Scope:** given the definition of "subscriber information" in the Budapest Convention, what is "in scope" in terms of "subscriber information"? What data elements or what types of data?
- How expansive might this be and could there be differences between Parties as to what is in an out of scope?
- How would such differences be handled in a direct request regime?
- **Important Policy Options:**
- It is possible to take a reservation on Article 7 as a whole
- **"Fine tune"** Article 7: Potential reservation under Art 7(9)(b) and declarations Art 7 (2)(b) and (5)(a) and/or (b)



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## Chapter II, Measures for Enhanced Co-operation: Article 7

- Article 7 sets out the procedure for **direct co-operation** between a competent authority of one Party and a service provider in another Party to obtain subscriber information
- Article 7 is **not mandatory**; a Party to the Protocol could take **a reservation under Art.7(9)(a).**
  - This could have reciprocal consequences (comity)
- **Making a declaration** under Article 7 (2)(b), a Party could require oversight by a **prosecutorial, judicial, or independent authority** at the time of ratification.
- A Party may choose to require notification (para 5(a)): if so, the Requesting Party must notify the specified authority in the requested Party
- Whether or not notification is asserted, a requested Party's service providers may be required to consult with the specified authorities prior to disclosure (para 5(b))
- One rationale of Para 5(a) or(b): A Party implementing Article 7 would specify an authority to monitor requests under Article 7 to ensure that there are not conflicting law enforcement activities (possibility of multiple investigations) and ensure the appropriate law enforcement activities are prioritized (aka "de-confliction")

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## Example: Canadian Considerations – Articles 6- 8

- Canada can specify what type of authorization would be required for investigators both **internationally and domestically** to obtain different types of data for criminal justice purposes from Canadian ISPs.
- Through consultations, Canada sought feedback on potential new "made for purpose" authorizations.

| | Type of Data | Canadian Requirements |
|---|---|---|
| **Existing Procedural Powers** | (Stored) Content data | Prior judicial authorization (threshold = reasonable grounds to believe); aka **general production order (487.014)** |
| | Transmission (aka traffic) data | Prior judicial authorization (threshold = reasonable grounds to suspect); aka **transmission data production order (s. 487.016);** IP addresses [*R. v Bykovets* (2024)] |
| **New "Made for Purpose" Procedural Powers** | Subscriber Information | Authorized under reasonable "lawful authority" or warrantless in exigent circumstances [e.g., R v. Spencer (2014)]; IP addresses & privacy [*R. v Bykovets* (2024)] |
| | Domain name registration data | An explicit provision would resolve a process that varies domestically and continues to evolve globally |



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## Exploring Possible Options

With respect to Article 7 if this was transposed into domestic law, there are various considerations:

**Examples:**

- Pursuant to Art. 7 (9)(b): "if disclosure of certain types of access numbers … would be inconsistent with fundamental principles of its domestic legal system **reserve** the right to not apply this article to such numbers "
- Such a reservation could be engaged and Art. 7 would then be used for "customer, name, address information" but not extend to "certain types of access numbers"; this could make possible a lower threshold (judicial prior authorization may not be required – for example, could create a domestic statutory authority)
- Does a reservation under Art.7(9)(b) imply that a declaration under Art.7(2)(b) requiring an "order issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent authority" is not needed or can the reservation and declaration be used together? Meaning, what is the trigger for the higher threshold indicated by the declaration?
- It may be possible to have different thresholds for subscriber information having different data elements or different data types or different circumstances (a bifurcated scheme).



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# Canada – Consultations - Background

- **Canada: Fall 2023-Spring 2024 Consultations on the Council of Europe Second Additional Protocol to the Convention on Cybercrime on Enhanced Cooperation and Disclosure of Electronic Evidence (Background Information)**

- **English**

https://www.justice.gc.ca/eng/cj-jp/cyber/index.html
https://www.justice.gc.ca/eng/cj-jp/cyber/id-di/index.html

- **French**

https://www.justice.gc.ca/fra/jp-cj/cyber/index.html
https://www.justice.gc.ca/fra/jp-cj/cyber/di-id/index.html