ITAC ACTE
INFORMATION TECHNOLOGY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DE LA TECHNOLOGIE DE L'INFORMATION

CAIP ACFI

THE CANADIAN CHAMBER OF COMMERCE
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Canadian Wireless Telecommunications Association
Association canadienne des télécommunications sans fil
acts

August 25, 2006

Ms Suzanne Hurtubise
Deputy Minister
Public Safety and Emergency Preparedness Canada
340 Laurier Avenue West
Ottawa, ON K1A 0P8

Dear Deputy Minister:

re: Legislation regarding Lawful Interception of Telecommunications

Canada's telecommunication industry has for many years cooperated with law-enforcement and national-security agencies by facilitating lawful interception of telecom services for investigations relating to crime and national security.

However, as noted in our March 10, 2006 letter to the Minister, our industry does not want to see new lawful-interception requirements that will hamper the development and introduction of new services and technologies, increase costs and diminish the competitiveness of Canadian telecom service providers.

We have had productive meetings with staff from your department in recent weeks. The attached paper restates our fundamental concerns and proposes conceptual solutions as requested. We will be very pleased to meet to discuss these issues in more detail.

Sincerely,

Bernard A. Courtois
President and CEO
Information Technology Association of Canada

David Elder
Chair, Lawful Access Committee
Canadian Association of Internet Providers

Peter Barnes
President
Canadian Wireless Telecommunications Association

Nancy Hughes Anthony
President and CEO
Canadian Chamber of Commerce

Comments on the Proposed *Modernization of Investigative Techniques Act*
(August 2006)

1. INTRODUCTION

ITAC, the Canadian Chamber, CAIP and the CWTA,[1] four leading Canadian industry associations, offer the following thoughts on the potential reintroduction of what was Bill C-74, the *Modernization of Investigative Techniques Act* (MITA). We represent a broad range of telecommunication service providers (TSPs) and equipment manufacturers, and our members collectively provide the overwhelming majority of residential and business telecommunication connections in Canada (wireline, wireless and internet services).

Our members have a long history of cooperation with Canada's law-enforcement and national-security agencies (LEAs) and of facilitating lawful access to electronic communications – subject to appropriate legal process and judicial oversight. The associations are therefore supportive of what we understand to be the basic objective that underpins MITA – to maintain LEAs' ability to lawfully intercept communications by ensuring that it covers all TSPs and new communication technologies as they are developed.

Recognising the overarching societal interest in public safety and security, the associations' members must at the same time carefully balance their desire for good corporate citizenship with the rights and expectations of their customers and the realities of their businesses. We are strongly of the view that the cost of providing a lawful-access regime for the benefit of society should be borne by society as a whole and not just by consumers of telecom services. Furthermore, we would not want to see legislative initiatives that would detract from the privacy protections that Canadian TSPs are bound to maintain and on which their customers and clients have come to depend.

We note that there seems to be general acceptance of the following key points:

- The current framework for lawful access in Canada is generally working well, with broad cooperation from the ICT industry. LEAs are able to effect lawful interception, even for newer services – though not using standardised technology provided by TSPs.
- New legislation is needed to extend requirements equally to all TSPs and all technologies so as to ensure universal availability of lawful-access capability and to extend LEA access to basic subscriber identification information from traditional telephony to newer technologies.

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[1] The Information Technology Association of Canada, the Canadian Chamber of Commerce, the Canadian Association of Internet Providers and the Canadian Wireless Telecommunications Association, respectively.

- Lawful-access requirements are not intended to have a detrimental impact on Canadians – by stifling innovation, by unduly impeding or delaying the roll-out of new products and services (including the extension of voice and broadband service to underserved communities) or by compromising personal privacy unreasonably.
- New legislation is not intended to download additional costs of policing from government and law enforcement to TSPs and their customers, recognising that TSPs, as a subset of the larger business community, already have a unique and disproportionate burden and responsibility for lawful access.
- New legislation is not intended to alter the scope or frequency of electronic surveillance in Canada, or the current balance between personal privacy and public safety.

However, the associations have serious concerns about MITA as drafted and introduced previously, and would be unable to support it in that form. Essentially, MITA as introduced is at odds with the above key points in terms of the following: mandated infrastructure capability that may not yet be supported by manufacturers and recognised standards; a lack of compensation for TSPs' operational costs; and a "transition" period that amounts to mandated retrofit.

2. ASSOCIATION PROPOSALS

2.1 Mandated Capability before Standards

2.1.1 The Problem

A key concern with MITA, as previously introduced, is that it required TSPs to meet specified operational requirements without regard to the availability of commercial standards-based equipment and software that would meet those requirements.

While commercial equipment and software that meets most of the operational requirements is available from manufacturers for established wireline services, it is not always available for newer and developing services. This is in part because the operational requirements set out in MITA do not yet apply to as broad a spectrum of telecom technologies in other countries, including the United States, so there is little market incentive to build in capabilities.

The associations do not object to Canadian TSPs shouldering the additional incremental cost when acquiring new equipment when intercept-capable, standards-based equipment and software is commercially available. However, we have serious concerns about the application of lawful-access capability requirements before standards-based equipment and software is readily available. This is because the costs of custom-built lawful-access solutions could

be significant and the time required to develop such solutions could produce a significant impediment to productivity and speed-to-market.

Furthermore, the need for the custom solutions is likely to be short-lived as standards-based commercial solutions become available within a short period of time. This could have a number of negative implications for TSPs, including stranded investments or the need to continue to expand and service an expensive custom-built solution due to incompatibility between the jerry-built solution and the later commercial standards-based solution.

MITA attempted to address this issue by providing for Ministerial orders suspending, for particular TSPs, the obligation to comply with certain operational requirements while the TSPs built out alternative solutions. In addition, time-limited Governor-in-Council exemptions would be available for certain classes of TSPs; however, each application for relief would be entirely discretionary, potentially time-consuming, costly and procedurally daunting. Moreover, such a scheme will prove to be extremely inefficient and taxing for TSPs and the Minister and Cabinet during the early years of implementation, when commercial capability is much less likely to be available for newer services and technologies.

It should be emphasised that a gap between the application of MITA's infrastructure capability requirements and the commercial availability of standards-based transmission apparatus may not be limited to an initial transition period following legislation being passed and the coalescing of international standards for lawful intercept. Indeed, should there be future uncertainties with respect to lawful-access capability requirements in other jurisdictions – particularly the United States – standards-based, intercept-capable equipment may not be available with respect to future services or technologies that Canadian service providers may want to introduce.

Situations might arise where new products or services are available for use in the US without any imposed lawful-access requirement, but where Canadian consumers are prevented from using the services until Ministerial forbearance has been applied for, processed and granted. This would be bad for TSPs, for Canadian consumers and business, and for Canada's productivity, innovation and competitiveness.

2.1.2 The Solution

The associations submit that a more appropriate approach would be to create two types of infrastructure obligations for TSPs:

- one where standards-based, lawful-access capable equipment is commercially available
- one where such equipment is not yet available.

In the first scenario, TSPs would be required to purchase new transmission apparatus with lawful-access capability, consistent with the regime contemplated in MITA, and would absorb the incremental cost of doing so. In the second, the associations submit that the Government should determine whether, where and to what extent lawful-access capability is required, and then require affected TSPs to develop and implement customised solutions – on the understanding that the TSPs will be compensated for doing so.

The approach would be similar to that contained in the United Kingdom's *Regulation of Investigatory Powers Act* (RIPA), which allows the Secretary of State to impose obligations on TSPs to maintain a reasonable intercept capability, but requires the Secretary of State to ensure that the TSPs in question receive fair compensation for the costs of providing that capability.[2] In this way, infrastructure deployment is efficiently targeted to services, service areas or service providers of interest to LEAs, and service providers do not bear a disproportionate burden in funding lawful-access capability.

Whereas RIPA does not contain a general requirement to provide lawful-access capability and includes infrastructure capability requirements that are triggered only by order of the Secretary of State, the associations would accept the general obligation for lawful-access capability contained in section 10 of MITA. However, the obligation would be limited to circumstances where commercially available standards-based transmission apparatus is available. In order to deal with circumstances where such apparatus is not available, we propose that MITA be amended to include provisions, similar to the RIPA provisions discussed above, empowering the Minister of Public Safety to order specified TSPs to implement specified lawful-access capability in specified areas – with compensation to the TSP coming from funds provided by Parliament for the purpose. A similar power currently exists in section 15 of MITA, but applies only to extraordinary infrastructure capability that the Minister may require beyond the standing obligations elsewhere in MITA.

The question of when standards-based transmission apparatus is commercially available, and the appropriate compensation for infrastructure capability built pursuant to Ministerial order, would be decided by a joint government / industry technical committee, similar to one proposed by the Department of Public Safety and Emergency Preparedness (PSEPC) during industry consultations prior to the introduction of Bill C-74 or to the Technical Advisory Board created by section 13 of RIPA.

New Canadian legislation could require TSPs to provide notice of pending service introductions (with strict confidentiality protections in view of the highly competitive nature of the industry), and could also provide the Minister with a power to require TSPs to estimate the cost and time required to implement a customised solution, with such estimates to be provided within a specified period

[2] *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23, ss. 12 to 14.

(e.g., 90 days). In this way, the Minister could balance efficiency and industry productivity against investigative needs and cost requirements, thereby minimising any gaps in the availability of lawful-access capability for services that warrant such cost and effort. The associations understand that this is much the way that LEAs currently assess cases and assign resources and funding; MITA should require nothing less.

2.2 No Compensation for Operational Costs

2.2.1 The Problem

The associations are very concerned by the fact that MITA is entirely silent on the question of compensation for operational costs, notwithstanding that the topic is currently a significant point of dispute between certain LEAs and TSPs, wherein the agencies have refused to pay the service providers in question for a range of services.

Generally, TSPs receive compensation from LEAs to perform many warranted or otherwise mandated services. In our view, such compensation continues to be appropriate, particularly in light of the growing number of interceptions and other warranted actions. MITA does not prohibit TSPs charging LEAs for providing subscriber identification information on request without a warrant. TSPs are private businesses, with mandates wholly unrelated to policing and unconnected to criminal activity, yet TSPs and their subscribers are increasingly called upon to engage significant costs associated with receiving and processing all sorts of lawful-access orders. In so doing, TSPs furnish telecom-transport and technical-support services that in all fairness must be compensated.

2.2.2 The Solution

The associations recommend that MITA be amended so as to include a scheme that would provide reasonable compensation to TSPs for carrying out activities relating to the warranted interception of private communications and the statute-mandated provision of TSP subscriber information. In our view, these requirements apply uniquely to TSPs and, particularly in the case of interceptions, require unique technical and operational advice and assistance. Such compensation would be within the purview of MITA, as opposed to more general forms of search-warrant activity and legislation.

The associations note that precedents for such compensation arrangements exist in other jurisdictions. Along with compensation for the provision of lawful-access capability mandated by the UK Secretary of State, RIPA also provides that the UK government ensure that there be arrangements to ensure that TSPs receive a fair contribution to the costs of providing assistance in respect of individual warrants.[3] The American wiretap statute provides explicitly for

[3] *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23, s. 14.

reasonable compensation to those furnishing facilities or technical assistance in connection with a wiretap.[4] In Australia, the *Telecommunications Act* requires TSPs to provide assistance to LEAs in connection with wiretaps, among other things, on the basis that the TSP neither profits from, nor bears the cost of, giving that assistance.[5]

As noted above, the associations understand that Parliament, the provinces and municipalities currently provide, through LEA budgets, sums to cover the costs of interceptions of private communications. Indeed, payments are routinely made by most LEAs for both the development of infrastructure capability and the provision of warranted and other assistance. We submit that such funding should continue to be available to compensate TSPs for carrying out wiretap orders and responding to mandated requests for subscriber information pursuant to section 17 of MITA.

2.3 Transition Period amounts to Mandated Retrofit

2.3.1 The Problem

The associations are strongly of the view that a transition period is necessary in order to accommodate the long lead times required to plan and build out networks and network components. Network elements that were planned 18 months earlier cannot be made to comply immediately with operational requirements that come into force two days before the new components are turned up.

In discussions with PSEPC staff prior to the introduction of MITA, the associations were led to believe that there would be an initial transition period, following the coming into force of the legislation, to allow TSPs to incorporate the newly mandated operational requirements into their construction programs. While a 12-month transition period was provided for in section 58 of MITA, at the end of the transition period TSPs would have to retrofit the equipment built or installed during the transition period in order to meet the operational capabilities. Frankly, this amounts to no transition period at all, since retrofitting solutions will always be more cumbersome and expensive than building in capability at the outset.

2.3.2 The Solution

The associations recommend that the transition period be amended so that the requirements of section 10 come into force 12 months after the rest of the Act is proclaimed in force. Transmission apparatus installed during this 12-month period would be grandfathered as fully compliant with MITA, unless it is

[4] *Electronic Communications Privacy Act*, 18 U.S.C. §2518(4).
[5] *Telecommunications Act 1997* (Aus.), s. 314.

subsequently upgraded in a way that would trigger lawful-access capability requirements pursuant to other provisions of the legislation.

3. CONCLUDING REMARKS

The associations will be unable to support MITA if it is reintroduced in its current form. The proposals offered above are narrowly targeted to address our most significant concerns so as to minimise the impact on the existing framework of MITA and thus the need for revision. Although each was discussed at a conceptual level only, we will be pleased to discuss these proposals in detail or to propose specific wording to capture these proposals in any new bill.