

Towards More Effective Cross-Border Cooperation

NDAA Endorsement of a Draft Memorandum of Understanding to be Implemented by District Attorneys and Quebec Prosecutors

BY JENNIFER BESNER, PROSECUTOR FOR THE QUEBEC DIRECTOR OF PUBLIC PROSECUTION IN MONTREAL

YOU'VE PROBABLY HEARD THIS BEFORE: 5,522 miles (that's 8,891 kilometres) of shared border, one trillion dollars in bilateral trade annually, and, of course, the numerous professional hockey players Canada generously exports to the U.S. to try to keep the NHL interesting. The importance of the relationship between the United States and Canada hardly requires explanation; as the world grows ever smaller, we are connected in more ways than ever before.

But though our economic and cultural ties may be obvious, Canada and the U.S. are also bound together by some of the less desirable realities of a more globalized world, including the phenomenon of cross-border crime. As the flow of goods, people and information across the border has increased, law enforcement has become more complex as authorities are faced with offences which sometimes touch multiple jurisdictions.

Organised criminal activity, drug-trafficking, cyber-crimes including the dissemination of juvenile pornography, and telemarketing frauds are just a few of the areas that raise cross-border concerns. In cases such as these, events associated with the offence may have occurred in

more than one territory, and evidence may be located in places under the authority of different police and prosecution services. Determining the appropriate forum for prosecution and how the relevant evidence and information may be efficiently collected and shared are just a few of the issues facing prosecutors dealing with these cases. To proceed successfully in these situations, there is an obvious need for effective cooperation among district attorneys and their Canadian counterparts.

Recognizing this need, the NDAA's Working Group on Extraterritorial Jurisdiction, headed by James Walsh (County Attorney for Pinal County, Arizona) and Sabin Ouellet (Chief Prosecutor in Quebec City, Quebec), set itself the task of developing an agreement to facilitate cross-border cooperation among prosecutors.

These efforts culminated, at the 2011 summer conference, in the adoption by the NDAA Board of Directors of a draft Memorandum of Understanding. This draft is intended to serve as a template for agreements to be signed subsequently by the Quebec Director of Criminal and Penal Prosecutions and individual district attorneys.

The function of the MOU is not to change any exist-

ing laws or to create powers that are not already available to prosecutors on both sides of the border. Its purpose is merely to facilitate the practice of cooperation by building stronger relationships and improving communication. The agreement is simply a tool intended to help build capacity to respond to trans-national criminal activity.

The following questions and answers offer an overview of the agreement.

1. Doesn't a process for cooperation already exist under the Treaty on Mutual Legal Assistance in Criminal Matters? How does the MOU fit in?

Canada and the United States signed the Treaty on Mutual Legal Assistance in Criminal Matters in 1985 (it entered into force in 1990) in order to enhance cooperation between our countries' authorities in the investigation and prosecution of crime. The MLAT process involves requests made via central authorities (i.e. federal justice officials in Washington and Ottawa). This means that if a district attorney in Pensacola, Florida wants to use the MLAT process to obtain evidence located in Montreal, Quebec, he or she must contact officials in Washington so that they may send the request for assistance to officials in Ottawa. If the request is approved by Ottawa, it is then transferred to prosecutors in Quebec for execution. The necessary steps are then taken to obtain the evidence, i.e. police investigations, obtaining court orders for production, taking testimony, etc. After the evidence has been obtained, Quebec prosecutors request an order from the court so that it may be sent to the U.S.; it is then sent first to the officials in Ottawa, who send it to those in Washington, who in turn send it to the D.A. in Pensacola.

This attempt at a brief summary of the MLAT process is indicative of how cumbersome and lengthy this method of cross-border cooperation can be. When it is necessary to act quickly, this process does not always meet the needs of the justice system or of the victims of crimes. Greater efficiency is required. Fortunately, prosecutors are able to cooperate directly with their counterparts across the border without engaging in the MLAT process.¹ What is needed is to develop the relationships among prosecutors in Canada and the U.S. and to cultivate cooperative practices; this is what the MOU is designed to do. The MOU

would therefore not replace or affect cooperation under the MLAT, but would simply exist alongside it.

2. Is this constitutional? How do I know that, as a District or County Attorney, I have the power to enter into this understanding?

The MOU does not create binding obligations between prosecutors. It does not establish any practices that are not already permitted by law. It addresses the discretionary exercise of the powers of individual District Attorneys, and contemplates exchanges among American and Canadian prosecutors in which they already engage.

Despite the constitutional restriction on state participation in foreign relations, there are many instances of state actors engaging in international agreements on matters of mutual interest.² Like the MOU, these agreements do not change the state of the law; they are designed merely to facilitate necessary cooperation

3. To which kinds of crimes would the MOU apply?

The MOU could apply to any file with a cross-border aspect. This could include situations where crimes occurred in part on both sides of the border such as drug trafficking, cyber-crime, or telemarketing scams.

The MOU could also apply to crimes specifically subject under Canadian law to extraterritorial jurisdiction, such as sex crimes against children committed by Canadian citizens or permanent residents, or crimes committed by Canadian federal public servants.

4. If I enter into the MOU, will I have to give up my power to prosecute a particular case if there is overlapping jurisdiction?

A prosecutor's decision as to whether to conduct a prosecution or to accept that the prosecution be conducted in another forum in the case of an overlap in jurisdiction is discretionary. The parties who enter into this understanding will at all times retain their discretion to prosecute any case under their authority.

5. My jurisdiction doesn't have much to do with Quebec; we have greater ties with other Canadian provinces. Can I implement this understanding with other jurisdictions?

The heads of the Canadian provincial prosecution services are aware of the MOU project, and some of them, such as Ontario, have indicated their interest in developing a similar document. The MOU template approved by the NDAA Board of Directors should be viewed as an available tool which may be adapted and implemented according to the needs of interested jurisdictions.

The need to build capacity to fight crime is clear. Enhanced cooperation among authorities on every level is key to developing solutions to deal with multi-jurisdictional problems. The NDAA has adopted the draft MOU in the interest of encouraging its members to participate in these efforts to strengthen their relationships with international counterparts and in so doing to continue to provide the best public service possible.

Questions regarding the MOU may be addressed to members of the Working Group:

- Sabin Ouellet, Chief Prosecutor, External Affairs, Security and Development Bureau at the Quebec Director of Criminal and Penal Prosecutions
–sabin.ouellet@dpcp.gouv.qc.ca
- James Walsh, Pinal County Attorney, AZ
–james.walsh@pinalcountyaz.gov
- Curtis Hill, Elkhart County Prosecutor, IN
–chill@elkhartpa.com
- Kevin Baxter, Erie County Prosecuting Attorney, OH
–kbaxter@eriecounty.oh.gov

¹ Indeed, the MLAT itself provides for the possibility of other forms of cooperation among authorities. See the Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, article III, paragraph 1, available at: <http://www.treaty-accord.gc.ca/text-texte.asp?id=101638>

² For example, forty-one states have entered into reciprocal agreements with the province of Quebec regarding commercial vehicle registration. See: <http://www.canlii.org/en/qc/laws/regu/rq-c-c-24.2-r0.1.5/latest/rq-c-c-24.2-r0.1.5.html>

