

Resolution

Be it resolved that the Board of the National District Attorneys Association approved the attached Memorandum of Understanding on Trans-border Crime as a model and template for use by prosecutors in the United States with the Directeur des Poursuites Criminelles et Pénales (DPCP) of Québec, a province in Canada.

Adopted by the National District Attorneys Association, July 17, 2011 (Sun Valley, Idaho).

Memorandum of Understanding on trans-border crime between the NDAA and the DPCP (Quebec)

Frequently Asked Questions

1. What is the MOU designed to do?

The purpose of the MOU is to build capacity to fight trans-border crime by facilitating cooperation among prosecutors in Quebec and the U.S. It is designed to assist prosecutors in determining the appropriate forum in the case of concurrent jurisdiction over an offence, and also to improve the information-sharing process.

The MOU is non-binding and will not affect any existing laws or agreements; it will simply assist prosecutors by improving communication and cooperative practices.

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.¹ Like the MOU, these agreements do not change the state of the law; they are designed merely to facilitate necessary cooperation.

3. If the understanding is non-binding, why should I bother entering into it?

Entering into the MOU will allow for the development of infrastructure for cooperation between the participating jurisdictions. This framework will encourage the continuity of this cooperation, even as the individual prosecutors in these jurisdictions change.

Entering into the MOU is thus a way to add to the tools available for the effective handling of trans-border crime in your jurisdiction.

4. 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.

5. 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.

6. What if I don't want to give up my power to prosecute a particular case, even if there is overlapping jurisdiction? Will I be obligated to allow the prosecution to take place outside my jurisdiction?

A prosecuting attorney'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.

7. Where can I get more information?

Members of the NDAA trans-national subcommittee are happy to answer questions regarding the MOU.

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¹ 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>

TEMPLATE:

**MEMORANDUM OF UNDERSTANDING BETWEEN THE DIRECTEUR DES
POURSUITES CRIMINELLES ET PÉNALES OF QUÉBEC, AND THE OFFICE
OF THE DISTRICT ATTORNEY OF X COUNTY ON MATTERS OF
EXTRATERRITORIAL AND CONCURRENT JURISDICTION**

Introduction

The Directeur des poursuites criminelles et pénales of Québec (hereinafter, “the Director of Criminal and Penal Prosecutions”) and the office of the District Attorney of X County (hereinafter collectively, “the Parties”),

CONSIDERING the significance of the movement of people and goods between Québec and the County of X;

CONSIDERING the continually evolving technologies which allow for the rapid transmission of information between jurisdictions;

CONSIDERING the continuing expansion of trans-national criminal activity and the threat posed by this activity to public safety and security within both jurisdictions;

CONSIDERING the consequent increase in crimes which are subject to the extraterritorial and concurrent jurisdictions of prosecuting authorities in Quebec and the County of X;

CONSIDERING the need for the Parties to strengthen cooperation and to coordinate efforts in order to improve the joint response to trans-national crime;

RECOGNIZING that it is in the best interests of the administration of justice that a single prosecution service undertake the prosecution of related crimes and that the splitting of related prosecutions among jurisdictions be avoided;

RECOGNIZING that it is in the best interests of the administration of justice that prosecutions be undertaken in the forum in which the whole of the circumstances allows for the accused to be most fully held to account and for the needs of victims to be appropriately addressed.

HAVE REACHED THE FOLLOWING UNDERSTANDING:

Principle 1. Non-binding nature

1. This understanding does not create binding obligations as between the Parties.

2. Nothing in this Memorandum of Understanding shall oblige any signatory to undertake any action which they determine would be in violation of state, federal or municipal law or statute.

Principle 2. Purpose

1. The purpose of this Memorandum of Understanding is to facilitate cooperation and collaboration between the Parties in order to build capacity to fight trans-national crime.

2. This Memorandum of Understanding creates a structure which will facilitate efficient communication and exchange of information for the purposes of determining the jurisdiction(s) in which a prosecution may be undertaken, and sharing such information and evidence as may be necessary for these prosecutions. It is intended for operational purposes; it does not affect the legal framework established by the *Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* nor does it affect the state of the law in either jurisdiction. Nothing herein creates or extends any right, privilege, or benefit to any accused person or entity.

Principle 3. Scope

1. The Parties will work together within the limits of their respective authorities.^{1, 2}

2. Nothing in this Memorandum of Understanding should be interpreted to limit or narrow the powers of the Parties to prosecute international or trans-national conduct over which they have jurisdiction.

Principle 4. Communication

1. The Parties will each designate a prosecutor as a Liaison Officer for the purpose of cooperating under the Memorandum of Understanding.

2. The Liaison Officers will serve as the primary points of contact in their respective jurisdictions; they will facilitate cooperation and the exchange of information among prosecutors in both jurisdictions.

3. The Liaison Officers will work together to develop and implement methods and guidelines for sharing information.

Principle 5. Determination of forum

1. The Parties shall begin discussions at the earliest opportunity when a matter involving concurrent or extraterritorial jurisdiction presents itself.

2. The Parties shall consider each case in which concurrent or extraterritorial jurisdiction arises, and determine the appropriate forum for prosecution. The Parties shall take into account the following criteria
- a. The jurisdiction in which the effects of the offence were felt or were intended to be felt;
 - b. The jurisdiction best able to ensure the protection of the interests of the victims;
 - c. The police force which had the major role in investigating the offence;
 - d. The jurisdiction with the most comprehensive case;
 - e. The jurisdiction where the evidence is located;
 - f. Whether the evidence is mobile;
 - g. The number of accused persons and whether they may be brought together in one location for trial;
 - h. The jurisdiction where most of the acts in furtherance of the crime were committed;
 - i. The nationality and primary residence of the accused.
 - j. The jurisdiction with the greatest interest in prosecuting the offence.

The criteria above should not be regarded as an exhaustive checklist, but rather as factors to be considered as part of a global evaluation.

Principle 6. Cooperating prosecutors

1. Once the appropriate forum has been determined, the Party which will not be conducting the prosecution, but in whose jurisdiction evidence, witnesses or other relevant information may be located, may designate a Cooperating Prosecutor to collaborate with prosecutors conducting the prosecution.
2. The Cooperating Prosecutor will assist the Party undertaking the prosecution by facilitating the availability of evidence, witnesses, etc that emanate from his or her jurisdiction and will maintain communication with the Party which will not be conducting the prosecution in order to ensure the flow of information.

Principle 7. Information sharing

1. Confidentiality is of the utmost importance for the continued health and functioning of relations between the parties. Subject to their domestic laws, the Parties shall assist each other in the course of cross-border prosecutions and investigations and may, for these purposes, share such information as may be necessary, while at all times respecting the need to keep this information confidential.
2. Each party is responsible for the security and integrity of the information entrusted to them as a result of cooperation, and will make reasonable efforts to safeguard the information against accidental or unauthorized access, disclosure, use, modification or deletion.

3. The Parties may request that information or evidence furnished be kept confidential or be disclosed or used only subject to terms and conditions they may specify in accordance with their domestic laws.

(a) For greater clarity, any personal information released by the Director of Criminal and Penal Prosecutions must receive protection in the jurisdiction to which it is released which is equivalent to the protection afforded to it in the jurisdiction of Quebec.

(b) [Information regarding terms and conditions associated with the protection of personal information regime in the partner district may be included here if necessary.]

4. When the Party receiving a request believes that information, evidence or testimony sought pursuant to this Principle may include or give rise to the disclosure of information that it views as privileged or otherwise sensitive, it shall so advise the requesting Party. Either Party may request consultations to determine whether there are limitations on disclosure, assertions of privilege, restrictions on a potential witness's testimony or other conditions that may be sufficient to address the concerns of the Party receiving the request.

5. Before denying or postponing the provision or facilitation of information, evidence or testimony pursuant to this Principle, the Party receiving a request shall promptly inform the requesting Party of the reason for considering denial or postponement. The requesting Party will determine whether it may accept the information, evidence or testimony subject to such terms and conditions as the other Party may deem necessary.

6. A requesting Party shall not use or disclose information, evidence or testimony provided by the other Party other than for the purposes for which it was requested without the prior consent of the other Party. However, information, evidence or testimony made public in such prosecution or proceeding may thereafter be used for any purpose.

7. Nothing in this Memorandum of Understanding is intended to alter or supersede any law enforcement information exchange agreement in effect between the Parties.

Principle 8. Cooperation in Proceedings

1. The Parties shall fully cooperate in providing information, evidence and testimony that may be needed in any investigation and subsequent prosecution or other proceeding resulting from the MOU.

2. Cooperation shall include:

(a) subject to Principle 7, using best efforts to facilitate a request by the other Party to provide any relevant information or evidence in the possession or control of the participating agencies; and

(b) using best efforts to facilitate the availability and appearance of any prosecutor or other employee of a participating agency in order to give testimony relevant to any prosecution or proceeding resulting from crossborder prosecutorial cooperation.

3. Nothing in this MOU constitutes consent to the extraterritorial application of the procedural or constitutional legal standards governing one party.

4. Nothing in this Principle shall limit or otherwise affect the rights and obligations of the Parties under other agreements or treaties governing cooperation and mutual assistance in the investigation, prosecution and suppression of crime.

Principle 9. Preferring domestic prosecution

1. Each Party reserves the right to conduct a prosecution regardless of a prior discretionary decision not to conduct such prosecution.

2. If a Party decides to conduct such a prosecution it shall duly notify the other Party.

Principle 10. Amendments

1. This Memorandum of Understanding may be amended by mutual written consent of the Parties at any time.

2. The Parties will enter into consultations with respect to any amendments to this Memorandum of Understanding at the written request of either of the Parties at any time.

Principle 11. Termination

This Memorandum of Understanding may be terminated by either of the Parties at any time.

Principle 12. Application

This Memorandum of Understanding shall be applicable upon the signature of the Parties.

Done at _____ this ____ day of 2011.

Louis Dionne for the Director of Criminal and Penal Prosecutions

for the Office of the District Attorney of X County

¹ In Canada, matters of provincial jurisdiction under s.92 of the *Constitution Act, 1867* include “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts” (s.92(14)). The subject matter of this Memorandum of Understanding thus falls within the powers of Quebec’s authorities. The power of the provinces to conclude international non-treaty agreements has been recognized by the courts, *AG v. Scott*, [1956] S.C.R. 137, *Bazylo v. Collins*, [1984] C.A. 268.

² The United States constitution places limits on the ability of states to engage in foreign relations, which is seen primarily as the ambit of the federal government. However, states do engage in some foreign relations activities and do at times conclude informal (typically, non-binding) agreements with foreign governments on matters of mutual interest. For example, reciprocal agreements exist between the Government of Quebec and the state of New York (as well as other states) regarding traffic sanctions and commercial vehicle registration. (See Regulation Respecting the Reciprocal Agreement Between the State of New York and Québec Concerning Drivers’ Licenses and Traffic Offenses, R.Q. c. C-24.2, r.0.1.2 (Can.), *available at* <http://www.canlii.org/qc/laws/regu/c-24.2r.0.1.2/20050809/whole.html>; Regulation Respecting Reciprocal Commercial Vehicle Registration Agreements Between the Gouvernement du Québec and Certain American States, R.Q. c. C-24.2, r.0.1.5 (Can.), *available at* <http://www.canlii.org/qc/laws/regu/c-24.2r.0.1.5/20051019/whole.html> (listing agreements between Québec and forty-one different states). It is thus clear that it is not solely the federal government which engages in these kinds of arrangements. Further, this MOU deals with the exercise of the powers and the discretion which emanate from the office of the District Attorney.