

CANADA-U.S. AGREE TO AGREE ON DATA SHARE DEAL: PROSECUTION OF CROSS-BORDER CRIMINAL CASES TO BECOME EASIER

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Canada and the United States have agreed to formally negotiate a bilateral agreement that promises to make it easier for law enforcement agencies to obtain electronic data in cross-border criminal investigations. In the age of Facebook, Instagram, TikTok and the cloud, it is rare for a technology-driven criminal investigation to remain within the confines of one nation's borders.

The agreement to agree was borne out of a revival of the Cross-Border Crime Forum. It signals future increases in cooperation between Canadian and U.S. law enforcement agencies and follows similar cooperation agreements among a number of countries focused on tax evasion prevention.

The intent of the data sharing bilateral agreement will be to remove legal barriers preventing U.S. companies (such as telecoms) from providing data to Canadian law enforcement agencies and vice versa. The aim is to more efficiently investigate and prosecute serious crime in an increasingly technologically advanced age.

Other countries, including the United Kingdom and Australia, already have similar agreements in place with the United States. These agreements have been made pursuant to the U.S. Clarifying Lawful Overseas Use of Data Act (CLOUD Act) enacted in 2018, which enables U.S. law enforcement agencies with a valid court order to require U.S. companies disclose data stored outside the United States.

Currently, in order to obtain evidence located in the United States, Canadian law enforcement agencies must rely on a Mutual Legal Assistance Treaty (MLAT) to engage a cumbersome process whereby Canadian Department of Justice officials request the assistance of the U.S. Department of Justice and local law enforcement to obtain court orders in the United States for the evidence needed. This is a time consuming process – sometimes taking months or even years.

If the agreements with the United Kingdom and Australia are any indication, reciprocal legislation similar to the CLOUD Act will be needed in Canada to permit the extraterritorial application of Canadian production orders in the United States.

Enactment of this data sharing bilateral agreement will enable law enforcement agencies to follow a much streamlined process involving applying for court orders locally and then going directly to the source of the data they are after. For example, the RCMP would be able with a court order to go directly to Meta's headquarters in California for disclosure of the data held by Meta.

A data sharing bilateral agreement would be a welcome development for Canadian authorities tasked with the investigation and prosecution of all manner of quasi-criminal and criminal offences in areas such as securities, fraud, anti-terrorism, tax evasion, anti-corruption and anti-money laundering. Canadian prosecutors are always under the pressure of bringing cases to trial within the stringent time limits set by the Supreme Court of Canada in *R. v. Jordan* (18 months for cases in the provincial courts and 30 months for cases in the superior courts). A data sharing bilateral agreement should make cross-border criminal investigations much less time-consuming thus making cross-border cases easier to investigate and ultimately prosecute.

In a time where resources are having difficulty keeping up with frauds, cases of corruption or money laundering and other similar types of cases, it can be expected that a bilateral data share agreement will increase the scope and frequency of these types of investigations.

While such agreements open up risk to Canadian companies of easier access by U.S. law enforcement agencies to their data, the majority of online data is stored in the United States in any event. Some are also concerned about potential privacy issues for Canadian social media subscribers, among others. Indeed, it is likely that privacy legislation will have to be amended to permit the sharing of data in Canada with U.S. law enforcement agencies.

Canadian corporate and individual clients should take note that one result of a bilateral data share agreement will be a more rigorous landscape of investigation and prosecution across all types of offences. Canadian organizations will likely see an increase in U.S. production orders and search warrants applied to them in Canada. In this context, rigorous detection systems, able management of director and officer exposure, careful consideration of voluntary disclosure, and sound legal advice with respect to cooperation, assessment of potential defences and protecting corporate and individual *Charter* rights will become even more critical.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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