THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: jacqueline.palumbo@justice.gc.ca, Samir.Chhabra@ised-isde.gc.ca

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Dear Ms. Palumbo and Mr. Chhabra:

Re: Cloud Act Agreement

I write on behalf of the Canadian Bar Association's Privacy and Access Section (CBA Section), to offer high-level comments on an anticipated agreement between Canada and the United States pursuant to the *Clarifying Lawful Overseas Use of Data Act* (US) or CLOUD Act.

The Canadian Bar Association is a national association of 40,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers across Canada with an in-depth knowledge of privacy and access to information law and policy.

The CBA section agrees, in principle, that Canadian companies should be able to give full "faith and credit" to foreign orders related to the investigation of non-Canadians where human rights and rule of law standards are met, and on a reciprocal basis.

Investigations of Canadian persons (aligning with jurisprudence setting out those that have the benefit of *Charter* protection) should continue to be dealt with pursuant to the existing Mutual Legal Assistance (MLA) framework, so that each request is reviewed by the Canadian Central Authority in the current manner. MLA is the formal process by which countries share evidence and provide other types of assistance to one another to advance criminal investigations and prosecutions.

Federal government institutions and provincial public bodies should be exempt from providing data directly in response to foreign orders. Similarly, private sector service providers should be exempt from any obligation to provide data that they are handling on behalf of a government institution or public body. Such requests are best dealt with either via the MLA framework, or another government-to-government mechanism.

While the CLOUD Act is a unique American statute that sets out bilaterial agreements between the United States and other countries, it is likely that such arrangements will become more common in bilateral and multilateral agreements. The evolution of the Budapest Cybercrime Convention may lead us to frameworks like the CLOUD Act. To future-proof enabling legislation, it should anticipate future bilateral and multilateral agreements with the same objectives. Our comments on a "CLOUD Act agreement" would equally apply to other bilateral or multilateral arrangements with a similar purpose.

Canadian *Criminal Code* production orders do not have extraterritorial effect, so we believe that the *Code* should be amended to create a special category of extraterritorial production orders that are limited to requests directed at countries that have a reciprocal arrangement with Canada, where the issuing judge determines that the criteria for issuing the order have been met.

Many Canadian privacy laws permit the disclosure of personal information "where required by law" or pursuant to a valid court order and are generally understood to mean "where required by Canadian law". Canadian privacy laws must be amended to permit the disclosure of personal information in response to a qualifying foreign warrant or order under a similar bilateral agreement between Canada and a foreign jurisdiction. This authorization should be limited to orders that meet the criteria of the relevant agreement. Unless the exception is specific to bilateral agreements, it could inadvertently permit disclosures to countries with problematic human rights records. To avoid this, the existing provisions of Canadian privacy laws should clarify that international disclosures are only permitted if a Canadian law authorizes it.

Enabling legislation should offer protection from liability for any disclosure made in good faith, in reliance on a qualifying CLOUD Act warrant or order.

The CLOUD Act agreement (and other similar reciprocal arrangements) should require that the Canadian government (presumably the existing Central Authority) be notified of service of a warrant or order in Canada. This is consistent with Canada's sovereignty and will serve to ensure that the federal government, including Parliament, have data on how the CLOUD Act agreement is being used to exercise appropriate oversight.

Enabling legislation should also provide a mechanism to allow a recipient of a non-Canadian order to have it reviewed by the Canadian Central Authority for compliance with the agreement. The recipient of such an order should also be expressly authorized to insist that the requesting party proceed via the MLAT if there is any reason to suspect that the order does not comply with the requirements of the bilateral agreement. (For example, there may be circumstances where a Canadian service provider has information that the target of the investigation is a Canadian resident and is unable to share that information with the requesting party.) This review and possible refusal should also be available where important Canadian values are implicated, such as the possibility of the death penalty being imposed in connection with a prosecution.

Canadian service providers should have recourse to Canadian courts to review any requests, as is the present case with the MLAT. Canadian service providers should not be required to seek first judicial review before foreign courts.

We hope that the government of Canada will engage in meaningful outreach to Canadian businesses and important stakeholders who may anticipate receiving US orders under the CLOUD Act, so they will understand how best to respond.

We also look forward to providing further comments on the Canada-US agreement, when it is made public.

Yours truly,

(original letter signed by Julie Terrien for William Abbott)

William Abbott
Chair, Privacy Law and Access Section