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Domestic Production Orders re: Foreign-Stored Evidence

Production Orders

Criminal Code, section 487.014:

“...may order a **person** to produce a **document** that is in their possession...”

1. Is the “person” (subject of the order) within Canadian jurisdiction?
2. Is the “document” (object of the order) within Canadian jurisdiction?
3. Would an order to produce the data violate the sovereignty of a foreign state?
4. Will the subject comply with an order?

Production Orders

- A search warrant is directed at “a place” – which must be within the territorial jurisdiction of the issuing court.
- A production order is directed at “a person” (e.g. Google Canada Inc.) – who must be within the territorial jurisdiction of the issuing court.
 - And the “document” (i.e. data) sought must be within that “person’s” possession or control
- But in what sense must the corporate person be within the jurisdiction for s.487.014 to apply?
 - is physical presence required?
 - or is virtual presence sufficient?

Production Orders

- The “person” must be within Canada’s jurisdiction
- *R. v. Brecknell*, 2018 BCCA 5 (re Craigslist)
 - “in the Internet era it is formalistic and artificial to draw a distinction between physical and virtual presence. Corporate persons, as I have noted, can exist in more than one place at the same time.” [¶40]
- Contra *Brecknell* – see e.g. *Re Criminal Code*, [2018] N.J. No. 21 (Prov. Ct.)
- But *R. v. Love*, 2022 ABCA 269 (re Facebook) sides with *Brecknell*
 - “A Canadian court has jurisdiction where there is ‘a real and substantial connection’ between Canada and the activity in issue. The virtual presence provided the connection.” [¶41]

Production Orders

- The *information* need not be present in Canada. It is sufficient that the *person* is in Canada (and has control of the information):

Brecknell, ¶39

Love, ¶36

eBay v. Canada, 2008 FCA 348

- Legislative intent: see excerpt from Parliamentary debates in *Tele-Mobile v. Ontario*, 2008 SCC 12 at ¶40

Production Orders

- But, in the case of parent companies vs. subsidiary companies...

“David Fraser, outside legal counsel for Google LLC and Google Canada, indicates that all Google consumer services in Canada are provided by Google LLC and not Google Canada Corporation.

As a result, the sought-after data is not under the control of Google Canada Corporation and it cannot comply with a production order for Canadian user information.”

R. v. Strong, 2020 ONSC 7528 [¶102]

Production Orders

- What about conflict of laws?
- Multinational corporations are subject to different legal obligations in different countries
- Is there a risk that ordering the company to produce information in Canada would force them to violate privacy laws in another jurisdiction?
- Corporation can seek variation or modification of the production order:
 - *Criminal Code* s.487.0193
 - *Google Inc. v. Equustek*, 2017 SCC 34 at ¶46

Production Orders

R. v. Strong, 2020 ONSC 7528:

“Google LLC, an American company, will voluntarily provide information in response to Canadian court orders but only where doing so does not conflict with other legal obligations.

One such obligation is found in the *Stored Communications Act*, a United States federal statute that prohibits disclosure of communication content except pursuant to a qualifying warrant issued by a United States federal or state court. A user’s saved location history falls within the definition of “content”, and as such is captured by the disclosure prohibition in the Act.”
[¶103]

Production Orders

Equustek Solutions Inc. v. Jack, 2018 BCSC 610

- In response to *Google Inc. v. Equustek*, 2017 SCC 34, where SCC issued a worldwide injunction ordering Google to de-index certain websites.
- Google subsequently obtained an order from California federal District Court making the worldwide injunction issued by the SCC unenforceable in the United States.

Foreign law enforcement
obtaining foreign stored
evidence

Informal Requests

- *Schreiber v. Canada*, [1998] 1 SCR 841
 - Canadian officials “request” that Swiss authorities obtain bank records
 - Search was by the Swiss – Canadian request not a search
- *R. v. Graff*, [2015] AJ No 717 (QB)
 - Child-luring investigation
 - Police requested administrative of subpoena of Yahoo! Through Department of Homeland Security
 - Section 8 of the *Charter* not engaged – even though the Crown agreed that police lacked sufficient basis to get a Canadian production order

Informal Requests

- *R. v. Souvannarath*, [2017] NSJ No 138 (SC)
 - Halifax Regional Police investigating conspiracy to murder
 - Gave Illinois authorities information they obtained from questioning the accused
 - Then asked Illinois authorities to obtain production from Facebook of messages among alleged conspirators
 - Section 8 did not apply

Informal Requests

- *R. v. Mehan*, [2017] BCJ No 53 (CA), leave to appeal refused [2017] SCCA No 89
 - US authorities obtained a warrant to intercept email communications from US server
 - US authorities then re-transmitted messages to RCMP, almost in real time
 - Email participants were Canadian residents who emailed in Canada
 - US search, not Canadian one – Part VI and s. 8 did not apply

Mutual Legal Assistance Treaty

- Unlike informal requests, MLAT must go through “competent authority” (*i.e.*, AG Canada)
- MLAT governs in the absence of informal sharing or where court order is required
- Stage 1: Competent authority applies *ex parte* to court for “evidence gathering order” or search warrant
 - RPG
 - No dual criminality requirement
- Stage 2: Competent authority applies to court for order to release evidence to requesting state

Domestic law enforcement
obtaining foreign stored
evidence extraterritorially

Extraterritorial Evidence-Gathering

- *R. v. Hape*, 2007 SCC 26 governs.
- Comity = “when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide assistance within its borders”
- But, that deference “ends where clear violations of international law and fundamental human rights begin”
- Also, a s. 7 remedy can be granted to protect trial fairness

Extraterritorial Evidence-Gathering

- *Hape* was an RCMP investigation into money laundering.
- Turks and Caicos Police allowed RCMP to investigate on the islands
- RCMP searched the accused's office on the Islands
- No search warrants entered into evidence
- SCC did not apply s. 8 of the *Charter* and found no s. 7 trial fairness concerns

Extraterritorial Evidence-Gathering

- Is there a difference?
- Why does *Charter* apply to international human rights exceptions but not otherwise?
- Why does s. 7 of the *Charter* apply, but not s. 8?

Extraterritorial Evidence-Gathering

- *Canada (Prime Minister) v. Khadr*, 2008 SCC 28
- Canadian officials interviewed Omar Khadr in Guantanamo Bay and passed information to US officials
- SCOTUS had held that Guantanamo process of detention and prosecution violated the Geneva Conventions
- *Charter* applied and disclosure of fruits of interviews was ordered

Extraterritorial Evidence-Gathering

- *R. v. McGregor*, 2023 SCC 4
- Accused was member of Canadian Armed Forces
- Suspected of voyeurism
- Canadian Forces National Investigation Service sought help from Alexandria police to execute search warrant in accused's residence
- Majority refused to overrule *Hape*
- No need to decide whether s. 8 of the *Charter* applied because s. 8 of the *Charter* was complied with