

Cross-border investigations: B.C. Court affirms broad power to issue legal process against foreign companies

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Law enforcement authorities in Canada have always had broad search and seizure powers to obtain records located in Canada that are relevant to an ongoing criminal or white-collar investigation. In 2004, law enforcement authorities acquired yet another powerful investigative tool when Parliament adopted amendments to the *Criminal Code*. This new tool allows the Crown to seek an order from the court that compels a third-party custodian of data or records to produce information that is relevant to an ongoing investigation.^[1] In recent years, law enforcement authorities have sought to test whether they can invoke these relatively new powers to compel the production and disclosure of private email communications, messages and other information that is held outside Canada in the cloud or on foreign-based data services.^[2] This year, these efforts met with notable success in *Attorney-General (B.C.) v. Brecknell*, a decision of the B.C. Court of Appeal with potentially serious implications for foreign companies that have a “virtual presence” in Canada.

The significance of the Brecknell case

Before *Brecknell*, decisions in criminal and white-collar cases were mixed as to whether production orders could be obtained against foreign companies that host data of Canadians on servers outside Canada. Some courts refused to grant such orders, taking the view that the court’s compulsive powers under the *Criminal Code* do not extend outside Canada. In other instances, courts granted such orders on the basis that a foreign company that contracts with users in Canada and that hosts the private data of Canadians must be subject to the jurisdiction of the Canadian courts.

In *Brecknell*, which was released in January 2018, the B.C. Court of Appeal issued the first appellate decision in Canada that considered the territorial and international scope of the Court’s production order powers under the *Criminal Code*. In *Brecknell*, the Court unanimously held that a British Columbia court has jurisdiction to issue a production order against a foreign company that has a “virtual presence” in British Columbia (i.e., the company contracts with users in Canada over the internet, even if it has no physical presence or subsidiary in Canada). On its face, the Court’s decision represents a broad assertion of judicial authority over foreign-based companies that hold or possess data or information relating to Canadians.

The *Brecknell* case raises a host of constitutional, international law and privacy questions that likely have to await a future case to resolve. But in the immediate future, the Court’s decision in *Brecknell* signals that foreign companies that hold data relating to Canadians may now be exposed to legal process issued by Canadian courts.

The basis for the exercise of jurisdiction under Canadian law

Under Canadian law, a court may generally exercise personal jurisdiction over a foreign defendant if there is a “real and substantial connection” between the defendant, Canada and the conduct or activity in question. On that basis, the courts in Canada have previously held that they may exercise jurisdiction over a foreign defendant in a proceeding where the foreign defendant sells goods or services to Canadians, or contracts with Canadian users. In addition, the courts have held that they may issue civil injunctions and other relief as against foreign defendants, even as against non-parties to a proceeding in Canada. For instance, in the Supreme Court of Canada’s recent decision in *Google, Inc. v. Equustek Solutions, Inc.*, the Court upheld a worldwide injunction against Google that required Google to remove and delist certain links from its search engine.^[3]

However, a Canadian court’s ability to exercise its broad compulsive production powers under the *Criminal Code* and under other regulatory statutes against a foreign defendant that has no physical presence in Canada raises serious issues of international comity. The production order powers under the *Criminal Code* do not, on their face, suggest that Parliament intended such orders to have extraterritorial effect. There is also an existing mutual legal assistance treaty between Canada and the United States that is applicable to criminal matters. This treaty (and others like it) provides mechanisms for the two countries to request assistance in obtaining evidence and executing requests for searches and seizures (among other things). In the past, law enforcement authorities have generally relied on these international instruments when they are seeking to obtain evidence outside Canada, particularly out of respect for the sovereignty of a foreign state.^[4]

Effect of the Brecknell case

In *Brecknell*, as part of an ongoing criminal prosecution, the Crown applied to the B.C. Provincial Court for a production order against Craigslist. Craigslist is based in California, where it operates a popular internet classified advertisement site. The Crown sought disclosure regarding a posting on the site that was advertised and targeted to certain residents of B.C. In particular, the Crown sought the user’s name and address, the user’s email and IP address, the user’s phone number used to verify the account, and the records of the user’s advertisement postings. However, Craigslist had no physical presence in Canada – Craigslist had no subsidiaries in Canada, no facilities in Canada and no data servers in Canada. It was not even clear whether the underlying data was stored in the United States or in other countries. To further complicate matters, Craigslist did not acknowledge service of the application and did not participate in the proceedings.

The B.C. Provincial Court refused to grant the order. The Court found that Craigslist conducted business in B.C. and had a real and substantial connection to the province through its advertisements to B.C. residents. However, the court concluded it could not issue a production order against a U.S. company that had only a “virtual presence” in B.C. The court concluded that Parliament intended that a production order could only be issued against a company that had some custodial or record-keeping presence within Canada’s territorial borders. Moreover, from a practical perspective, the court noted that Craigslist has no office in Canada for service of enforcement proceedings in the event the order was not complied with. In other words, there was considerable doubt as to how to enforce a court order against a company that is not present in Canada.

On appeal, the B.C. Court of Appeal issued the order against Craigslist to produce the relevant information. The Court found that it had personal jurisdiction over Craigslist and that Craigslist was a “person within the jurisdiction” given its “virtual presence” in B.C. The Court also held that it had sufficient authority to issue the order despite Craigslist’s lack of physical presence in B.C. and despite the physical location of the data. The court held that

distinguishing between “physical presence” and “virtual presence” for the purposes of the *Criminal Code* “would defeat the purpose of the legislation and ignore the realities of modern day commerce.”^[5] The Court further found that its interpretation of the provision did not raise issues relating to the extraterritorial effect of Canadian laws, and generally accorded with Parliament’s intention to modernize police powers to investigate criminal conduct that is increasingly occurring over the internet.

Implications

Since the decision, numerous law enforcement authorities have obtained production orders against other U.S. companies, and have sought to extend the decision to provinces outside B.C. And while *Brecknell* was rendered under the *Criminal Code*, it has potential implications for the Crown’s ability to seize foreign-based documents under other federal and provincial statutes, including in the competition, securities and tax fields.

The Court’s reasoning also raises distinct privacy issues, particularly as more and more individuals store confidential documents and communications in the cloud. In the past, law enforcement authorities would have had to obtain a warrant to seize paper documents stored (for example) at the individual’s home, with notice to the individual as the search is occurring. However, under the production order provisions to the *Code*, law enforcement authorities may surreptitiously seize private communications that are held by third parties, often without notice to the individual.

Craiglist avoided any participation in the *Brecknell* case, and as a result, there was no application for leave to appeal to the Supreme Court of Canada. Nonetheless, there are good arguments that the Court’s decision was wrongly decided. On its face, the Court’s decision appears to give extra-territorial effect to production orders. In addition to the issues it raises regarding the limits on the ability of Parliament to pass laws with extraterritorial effect, parliamentary intent to limit the effect of production orders to within Canada is arguably reflected in the *Criminal Code*, including the provision dealing with conditions that may be included in production orders which specifically provides that “[t]he order has effect throughout Canada...”^[6]

Moreover, it is not clear how any such orders could be realistically enforced outside Canada. The issuance of an order against a foreign company in a foreign state arguably offends principles of international comity. One court in Newfoundland and Labrador agrees and it refused to issue a production order against a social media company in California. As the court held: “This provision cannot be enforced extraterritorially. ... Thus, *Brecknell* creates a situation in which a Canadian court can issue an order, but without any authority to enforce it. The order becomes meaningless.”^[7]

Given the existence of an established multilateral instrument of co-operation under the MLAT Treaty, there is a compelling argument that representatives of the government of Canada should be precluded from serving legal process on foreign companies in the United States outside the mechanisms of the treaty.

It is also important to keep in mind the specific circumstances of *Brecknell* and the issues that the Court of Appeal did not address. The data sought in the production order was essentially Craigslist’s business records relating to a particular posting. Notably, it did not seek private communications such as emails. As a result, the Court did not consider whether compliance with the production order would potentially violate U.S. federal law such as the *Stored Communications Act*. In that regard, the Court specifically noted that “if a person is subject to other legal obligations that prevent compliance ... then there is an opportunity to canvass those issues before compliance.”^[8]

It remains to be seen whether the B.C. Court of Appeal's reasoning in *Brecknell* will stand the test of time and whether it will be applied to private communications. In the interim, prosecutors and other law enforcement officials in Canada will likely seek to take advantage of their powerful new tool to seek to compel the production of private information and data of Canadians that is held outside Canada.

Footnotes

[1] On March 29, 2004, Parliament passed Bill C-13 to amend certain offences and to grant new investigative powers to combat capital markets fraud and other crimes. See Bill C-13, *An Act to Amend the Criminal Code (capital markets fraud and evidence-gathering)*, 3rd Sess., 37th Parl. Section 487.014 of the Criminal Code was amended by s. 7 of Bill C-13 (SC 2004 c. 3). This section came into force by proclamation on September 15, 2004.

[2] The current language of the provision of the *Criminal Code* that provides for the issuance of a production order reads as follows: "487.014 (1) Subject to sections 487.015 to 487.018 [which target specific types of information], on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time."

[3] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 (CanLII).

[4] *Treaty Between Canada and the United States on Mutual Legal Assistance in Criminal Matters*, 18 March 1985, Can. T.S. 1990 No. 19 (entered into force 24 January 1990)(the "MLAT Treaty").

[5] *Brecknell*, *ibid.*, at paras. 39-40

[6] *Criminal Code*, section 487.019(2).

[7] *In the Matter of an application to obtain a Production Order pursuant to section 487.014 of the Criminal Code of Canada*, 2018 CanLII 2369, at paras 27-28 (NL PC).

[8] *Brecknell*, *ibid.*, at para. 27.