

Federal Court



Cour fédérale

~~TOP SECRET~~

Date: 20230822

Docket: C-1-23

Citation: 2023 FC 1128

Ottawa, Ontario, August 22, 2023

**PRESENT:** The Honourable Madam Justice Kane

**IN THE MATTER OF AN APPLICATION  
BY [REDACTED] FOR WARRANTS PURSUANT  
TO SECTIONS 12 AND 21 OF THE  
CANADIAN SECURITY INTELLIGENCE  
SERVICE ACT, RSC 1985, C. C-23**

**AND IN THE MATTER OF [ CYBER THREATS ]**

**REASONS**

[1] In the context of the above noted warrant Application [the Application], the Canadian Security Intelligence Service [CSIS] sought four Assistance Orders pursuant to subsection 22.3(1) of the *Canadian Security Intelligence Service Act* [the Act]. An Assistance Order requires that a person, which would include a legal person such as an organization or entity, provide assistance to give effect to a warrant issued pursuant to section 21 or 21.1 of the Act. In

the present matter, the Assistance Orders were sought to give effect to the warrant, which was issued.

[2] While CSIS sought one warrant and four Assistance Orders, these reasons deal only with the fourth Assistance Order, which would be directed to a foreign-based entity with a virtual presence within Canada. CSIS submits that the assistance of a communication service provider [CSP], [ ... ], is required in order to intercept and obtain communications and information authorized by the warrant.

[3] The affiant explained that [ ... ] is incorporated and headquartered in [ ... ] does not have physical offices or employees in Canada. It has a virtual presence in Canada that consists of [ some physical presence in Canada ]. It solicits business from Canadians and [ ... ].

[4] The affiant also explained that [ ... ] has been fully cooperative in providing assistance to CSIS to date, but has advised CSIS that it requires a judicial authorization from a Canadian court to minimize its legal risk in the event that CSIS uses the collected intelligence beyond analysis; [ ... ]. [ ... ] advised that it would continue to be cooperative pending and upon receipt of an Assistance Order.

[5] The affiant further explained that CSIS prefers to engage directly with [ ... ] rather than conduct a foreign agency request. The direct approach permits CSIS to safeguard the personal

information of Canadians by reducing the number of organizations/agencies with which the information is shared.

### The Issue

[6] The issue is whether the Court has jurisdiction to issue an Assistance Order to an organization or entity that does not have a physical presence in Canada—in other words, whether *in personam* jurisdiction can be established—and if so, whether the Court should exercise its discretion to issue the Order.

[7] Assistance Orders have been likened to production orders that may be issued by a judge in accordance with the relevant provisions of the *Criminal Code* to assist law enforcement in the investigation of a criminal offence. A production order may be issued where the judge is satisfied that there are reasonable grounds to believe that an offence has been or will be committed and where the document(s) or data sought will afford evidence respecting the commission of the offence. A production order is directed to a person to produce documents or data in their possession or control and not—as in the case of a search warrant—to a place. Given this similarity with an Assistance Order that may be issued pursuant to subsection 22.3(1) of the Act to a person, the jurisprudence regarding production orders in the criminal context has been considered.

[8] The Attorney General of Canada provided written submissions in support of the Application which focussed on the issue of the Court's jurisdiction to issue the Assistance Order with respect to [REDACTED]. In February 2023, I granted four Assistance Orders directed at various

entities. The Assistance Order directed to [REDACTED] was issued for a limited period pending further consideration of the legal issue, given its novelty. Mr. Matthew Gourlay was appointed as *amicus curiae* [amicus] to assist the Court. I convened an *in camera, ex parte* hearing on June 7, 2023 to receive the submissions on the legal issue. Mr. Gourlay substantially agreed with the submissions of the AGC and provided additional analysis of the issue and the jurisprudence. At the conclusion of the hearing, I granted the Assistance Order directed to [REDACTED] for a further period and advised that the reasons would follow.

#### The AGC's Submissions

[9] The AGC submits that the Court has jurisdiction to grant an Assistance Order with extra-territorial effect.

[10] The AGC notes that the jurisdiction of Canadian courts is generally limited to Canada. Any extra-territorial application of the law must be expressly provided by Parliament in the applicable legislation (*R v Hape*, 2007 SCC 26). Despite this settled law, the AGC submits that Canadian courts have recognized that in the digital age, physical boundaries may not be the only factor to determine whether the Court has jurisdiction.

[11] The AGC first points to *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Equustek*] where the Supreme Court of Canada upheld a worldwide interlocutory injunction against Google. The Supreme Court of Canada agreed with the British Columbia Court of Appeal [BCCA] that the Court had *in personam* jurisdiction because Google carried on business in the

province through its advertising and search operations. The Court, therefore, could issue an order with extra-territorial effect.

[12] The AGC submits that Assistance Orders are akin to production orders issued pursuant to section 487.014 of the *Criminal Code*. The AGC notes that entities with a virtual presence, but no physical presence in Canada, have been ordered to produce documents and information located outside of Canada to assist law enforcement in Canada pursuant to production orders.

[13] The AGC points to *British Columbia (Attorney General) v Brecknell*, 2018 BCCA 5 [Brecknell]. In *Brecknell*, the BCCA found that a production order could be issued to compel Craigslist, an internet-based advertising company based in California, to provide information. The BCCA found that *in personam* jurisdiction could be established given that Craigslist provided advertising services to internet users in British Columbia and all over the world.

[14] The AGC also points to *R v Love* 2022, ABCA 269 [Love] (leave to Supreme Court of Canada denied), where the Alberta Court of Appeal [AltaCA] upheld a production order compelling Facebook, based in the US, to produce subscriber information related to an Instagram post by a person charged with child pornography offences. The AltaCA applied the reasoning in *Brecknell*.

[15] The AGC adds that in *textPlus Inc. (Re)*, [2022] O.J. No. 4959 [ONSC], the Ontario Superior Court of Justice considered *Brecknell* and *Equustek*, among other jurisprudence, in

concluding that a production order directed at a US based company should be issued. The Court noted that the weight of the jurisprudence supports the issuance of a production order for records held by a company with a virtual presence in Canada.

[16] The AGC further submits, relying on *Brecknell*, *textPlus* and other jurisprudence, that any difficulty that may arise in enforcing an Assistance Order extra-territorially is a separate issue from that of whether the Court has jurisdiction to issue the Order. Although enforceability may be a factor in the Court's consideration whether to exercise its discretion to issue the order, it does not preclude the Court from doing so.

[17] The AGC notes that in *Brecknell*, the Court accepted that the existence of alternative ways to obtain the information, such as relying on the Mutual Legal Assistance Treaty [MLAT] process, did not deprive the court of the jurisdiction to issue the production order. The Court in *Brecknell* also observed that, although the MLAT process exists, it provides a slow and uncertain mechanism of investigation given the speed at which information moves and is stored. The AGC also notes that the affiant explained the alternate methods available to CSIS in this matter, indicating that it would be preferable for CSIS to deal with the CSP directly rather than via a partner in order to better safeguard the information.

[18] In summary, the AGC submits that in the present circumstances, there is *in personam* jurisdiction to issue the Assistance Order given the virtual presence of [REDACTED] in Canada and that the enforceability of the Order is a consideration, but not an impediment to establishing the

Court's jurisdiction to issue the Order. The AGC reiterates that in the present matter, [REDACTED] has indicated its intention to continue to provide threat-related information to CSIS.

The *Amicus* ' Submissions

[19] The *amicus* is in substantial agreement with the submissions of the AGC. The *amicus* refers to the same jurisprudence cited by the AGC and also to *In the Matter of an application to obtain a Production Order pursuant to section 487.014 of the Criminal Code of Canada, 2018 CanLII2369 (NL PC) [the Newfoundland decision]*, where the Court reached the opposite conclusion.

[20] The *amicus* notes that consideration of the two different approaches highlights the issues that are relevant to the Court's determination in this matter.

[21] The *amicus* notes that the *Newfoundland decision* raises similar facts, but distinguishes *Brecknell* and finds that there is no jurisdiction in a Canadian court to issue a production order for an entity without a physical presence in Canada. The *amicus* notes that the *Newfoundland decision* considers the interpretation of section 487.014 of the *Criminal Code* and the broader principles regarding extra-territoriality. The *amicus* submits that the concerns identified in the *Newfoundland decision* were in fact addressed in *Brecknell* and that the BCCA did not ignore the law regarding extra-territoriality.

[22] The *amicus* submits that the BCCA and AltaCA jurisprudence regarding production orders, which has been followed by other courts, is more persuasive and supports finding that

this Court has jurisdiction to issue an Assistance Order on an analogous basis where *in personam* jurisdiction can be established.

[23] The *amicus* submits that in *Brecknell*, the BCCA regarded the virtual presence of Craigslist in Canada, due to their active business here, as a presence in Canada and sufficient to find *in personam* jurisdiction. As a result, there was no extra-territorial effect, which the *Newfoundland decision* regarded as impermissible.

[24] The *amicus* further notes that in *Brecknell*, the *amicus curiae* in that matter acknowledged that a production order directed to a legal person requires that person to provide documents in their possession or control, and is not limited to documents held within Canada. The *amicus* notes that in the electronic era, documents may be housed on servers outside Canada in unknown locations yet still be under the possession and control of a legal person with a presence in Canada.

[25] The *amicus* submits, as does the AGC, that the effectiveness of enforcement of an Assistance Order directed to a legal person without a physical presence in Canada is a separate issue, not influencing the issue of jurisdiction. The *amicus* also agrees with the AGC that enforcement may be one of the factors to be considered by the Court with respect to whether to exercise the discretion to issue the order in a particular case.



[26] The *amicus* notes that the *Newfoundland decision* found that a production order could not be enforced if issued with extra-territorial effect because subsection 487.019 (2) of the *Criminal Code* states that “[t]he order has effect throughout Canada” (current wording). The *amicus* submits that failure to comply with a production order would actually occur within Canada because the production order requires the person to produce the documents to a Canadian peace officer or public officer, based on the virtual presence in Canada of the person with possession or control of those documents, although the documents may be stored outside the country.

[27] The *amicus* also notes that in *textPlus*, the Ontario Superior Court of Justice cited *R v Greco, (2001) 159 CCC (3d) 146 [Greco]*, which addressed the issue whether a probation order issued in Ontario could govern conduct committed outside of Canada and found that the probation order would apply. The Court in *Greco* found that the ability to enforce the probation order abroad should not be confused with the court’s jurisdiction to prescribe terms and conditions that bind the conduct of a probationer within Canada and outside Canada. The *amicus* submits that by analogy, the same considerations would apply to a production order (as in *textPlus*) and to an Assistance Order.

[28] The *amicus* notes that there is little or no jurisprudence with respect to the scope of this Court’s authority to issue an Assistance Order. The *amicus* submits that Assistance Orders are most like production orders in the criminal context in that Assistance Orders are directed to a person. Given the similarities, the *amicus* submits that the jurisprudence regarding production orders provides helpful guidance and supports the Court finding that it may issue Assistance

Orders that have extra-territorial effect. The *amicus* clarifies that in essence, if the virtual presence establishes the *in personam* jurisdiction, the effect of the Order is not extra-territorial. The effect of the Order would be in Canada even though the documents to be produced may be stored outside Canada.

The Court has jurisdiction to issue the Assistance Order

[29] In *Equusteck*, the Supreme Court of Canada noted, at para 38, that when a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, the court can grant an injunction enjoining that person's conduct anywhere in the world.

[30] In *Love*, the AltaCA cited the same passage with respect to production orders issued pursuant to section 487.014 of the *Criminal Code* directing a person to produce documents to a peace officer or a public officer. (As noted, the judge must be satisfied that there are reasonable grounds to believe that the document(s) or data will afford evidence respecting the commission of an offence.)

[31] By analogy, when this Court finds that it has *in personam* jurisdiction, to ensure the effectiveness of the warrants authorized by this Court pursuant to sections 12 and 21, can this Court grant an Assistance Order that will have what could be characterised as "extra-territorial" effect? In my view, the Court may do so.

[32] In *Equustek*, the Supreme Court of Canada noted, at para 41, that the internet has no borders and that the only way for the injunction to achieve its objective was to have it apply “where Google operates – globally”.

[33] The Supreme Court of Canada upheld the BCCA, finding that the Court had *in personam* jurisdiction over Google, given that Google operates globally. The Court could, therefore, issue an order with “extra-territorial” effect.

[34] In *Brecknell*, the BCCA addressed the question of whether a court has jurisdiction pursuant to subsection 487.014(1) of the *Criminal Code* to issue a production order to Craigslist, with only a virtual presence in the province, to require Craigslist to produce documents located outside Canada to a peace officer in the province.

[35] The BCCA noted that Craigslist had a specific website for Vancouver and classified service webpages for several communities in British Columbia. The BCCA also noted that ads could be placed and searched by content and category and geographic location.

[36] Among the many considerations, the BCCA noted, at para 38, that a production order is directed to a person requiring that person to produce documents in their possession or control and that such documents can be transmitted at the “click of a mouse”. The BCCA added that “the function of record keeping and exercising custodial authority are not necessarily the same thing

and may be functions exercised in different locations”, and that the “location of documents may bear little or no relation to the business activity that generates them”.

[37] The Court found, at para 37, that Craigslist’s virtual presence was sufficient to provide a real and substantial connection between Craigslist and British Columbia. The Court noted, at para 40, that “in the Internet era it is formalistic and artificial to draw a distinction between physical and virtual presence.” The BCCA further noted that corporate persons can exist in more than one place at a time.

[38] The BCCA acknowledged that service of the production order on Craigslist could not be effected in British Columbia because Craigslist did not have any physical office in Canada and was not registered as a company in the province. The BCCA found, at para 51, that while there may be difficulties in enforcing such production orders, which should be considered when making a discretionary decision, the difficulties of enforcement do not “deprive” the court of jurisdiction to issue the order.

[39] The BCCA explained that service of an order and the extraterritorial effect of that order are different issues. The Court found that service outside the jurisdiction does not show that an order is extra-territorial in its effect noting that service relates to the provision of notice and not to the effect of the order.

[40] In *Love*, the AltaCA applied *Brecknell* and found that a Canadian court has jurisdiction to issue a production order based on a real and substantial connection between Canada and the activity in question. The AltaCA found that the virtual presence of Facebook, of which the lower court took judicial notice, established the real and substantial connection. The AltaCA also found, at para 41, that *Brecknell* is consistent with the principles in *Hape*.

[41] The AltaCA acknowledged the *Newfoundland decision*, which took a contrary position. The AltaCA disagreed with the finding in the *Newfoundland decision* that the production order had extra-territorial effect, noting that where the person subject to the production order has a virtual presence in the local jurisdiction, there is no extra-territorial effect. The AltaCA cited *Equustek* at para 38, “[w]hen a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction’s effectiveness, it can grant an injunction enjoining that person’s conduct anywhere in the world”. In other words, the key issue is establishing *in personam* jurisdiction.

[42] The AltaCA also found, with respect to the *Newfoundland decision*’s characterization of *Brecknell* as a results-driven interpretation that overlooked the clear wording of section 487.014, that the BCCA had taken a modern approach to statutory interpretation, including, among other things, consideration of the legislative intent and the mischief that section 487.014 sought to address.

[43] In *textPlus*, the Ontario Superior Court of Justice found that the weight of the jurisprudence supported the issuance of a production order for records held by a US based

company with only a virtual presence in Canada, although the records at issue originated in Canada. The Court also found that concerns about enforceability of the production order do not impact the court's jurisdiction, relying on *Greco* and *Brecknell*, among others.

[44] In the *Newfoundland decision* the Court denied an application to issue a production order, finding that there was no jurisdiction to issue an order with extra-territorial effect. Although the Court found that there were reasonable grounds to issue a production order (i.e. there were reasonable grounds to believe that the documents will afford evidence respecting the commission of an offence), the documents requested (photos transmitted from within the province via Facebook) were outside Canada.

[45] The Court noted that section 487.014 of the *Criminal Code* is silent with respect to any extra-territorial effect and that if Parliament had intended that a production order could issue with extra-territorial effect, it could have so provided.

[46] The Court noted that a production order could only issue against a person and that person must be in Canada. The judge also considered the wording of subsection 487.019(2), which stated (at that time) that a production order "has effect throughout Canada and, for greater certainty, no endorsement is needed for the order to be effective in a territorial division that is not the one in which the order is made." The Court interpreted this as meaning that the order has effect only in Canada.

[47] The Court considered *Brecknell* but found that the BCCA had prioritized the desired result of investigating serious crimes ahead of the proper interpretation of section 487.014 and without acknowledging that Parliament had not provided for extra-territorial effect. The Court noted that *Brecknell* “creates a situation in which a Canadian court can issue an order, but without any authority to enforce it. The order becomes meaningless.”

[48] Although the appellate authority is more persuasive, the concerns noted by the Court in the *Newfoundland decision* were explored by the *amicus* and were also addressed by the AltaCA in *Love*.

The Court has granted the Assistance Order

[49] I find that the jurisprudence in the context of production orders issued pursuant to section 487.014 of the *Criminal Code* provides a good analogy and support for finding that this Court has the jurisdiction to issue an Assistance Order where *in personam* jurisdiction can be established. The two provisions are similar in purpose, albeit in different contexts, both are directed to a person, which includes an organization or entity that is a legal person, and similar considerations arise in determining whether the order should be issued where the subject has only a virtual presence in Canada.

[50] The considerations noted by the SCC in *Equustek* lend further support to taking an approach that reflects the realities of the internet dominated storage and transmission of documents and information. As noted in *Brecknell*, document control may exist in one

jurisdiction, and the documents in another or in several others and “formalistic distinctions” between virtual and physical presence defeat the purpose of the legislation.

[51] Whether an organization or entity with only a virtual presence in Canada can establish a real and substantial connection with Canada sufficient to constitute presence in Canada will be a case-by-case determination. Where such *in personam* jurisdiction is established, the organization or entity that is subject to the Assistance Order and required to provide documents in their possession or control is considered to be in Canada although the documents may be stored elsewhere.

[52] In the present matter, the evidence regarding the virtual presence of [ ... ], although not extensive, is sufficient to establish its virtual presence in Canada and to establish the *in personam* jurisdiction. The evidence to date indicates that [ ... ] has Canadian customers, reaches out to other Canadian customers [ ... ] and [ **some physical presence in Canada** ]. In the future, the details of the virtual presence of such organizations will assist the Court in determining whether there is a real and substantial connection to Canada.

[53] I have considered the issue of enforcement of the Assistance Order on [ ... ]. I note that they have been cooperative to date and indicate their ongoing intention to cooperate. However, I also agree with the submissions of the AGC and *amicus* and the jurisprudence, that the enforcement of the Order is a separate issue from whether the Court has jurisdiction to issue the



Order, but remains a relevant consideration with respect to whether the Order should be issued based on the particular circumstances.

[54] As noted above, I initially granted the Assistance Order for a fixed period pending the considerations of the submissions on the legal issue. On June 7, 2023, I considered the further submissions of the AGC and *amicus* and the jurisprudence and granted the Assistance Order for a further period, noting that the reasons would follow.

“Catherine M. Kane”  
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** C-1-23

**STYLE OF CAUSE:** IN THE MATTER OF AN APPLICATION BY [ ... ]  
FOR WARRANTS PURSUANT TO SECTIONS 12  
AND 21 OF THE *CANADIAN SECURITY*  
*INTELLIGENCE SERVICE ACT*, RSC 1985, C C-23  
AND IN THE MATTER OF [ **CYBER THREATS** ]

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 7, 2023

**REASONS FOR ORDER AND  
ORDER:** KANE J.

**DATED:** AUGUST 22, 2023

**APPEARANCES:**

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