PROVINCIAL COURT OF NOVA SCOTIA

Application for production order (Re), 2020 NSPC 35

Date: 2020-09-08
Docket: 8465503, 8465504
Registry: Pictou

In the matter of an *ex parte* application
for a production order pursuant to
§ 487.014 of the *Criminal Code*

DECISION REGARDING ISSUANCE OF PRODUCTION ORDER

Judge:	The Honourable Judge Del W Atwood
Heard:	2020: 3, 8 September 2020 in Pictou, Nova Scotia
Charge:	Section 487.014 of the *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service

By the Court:

Synopsis

[1] An investigator has applied to the court for a production order under § 487.014 of the *Criminal Code*; if granted, this order would compel a health authority to turn over to police certain emergency-treatment-related medical records for two people who survived a motor-vehicle accident in which a third person died.

[2] For the reasons that follow, I decline to issue the order.

Ex parte proceedings

[3] This is an *ex parte* hearing, with only the prosecutor present.

[4] The *Code* admits of a number of *ex parte* proceedings; these operate as statutory exceptions to the norm that a court hear from both sides in a criminal case.

[5] A review of the *Code* reveals that most *ex parte* proceedings deal with preliminary, interlocutory or investigative matters that do not involve final verdicts; this includes the making of orders regarding tracing, seizure and restraint of terrorism-implicated property or proceeds of crime (*eg* § 83.13, 462.32, 462.48,

490.8, 492.1), firearms-safety measures (*eg* § 111, 117.01, 117.05), private-communications interception (*eg* § 184.2, 184.3, 185, 188), and issuance of process (*eg* § 507, 508). Exceptionally, final adjudication of summary proceedings in default of appearance may be concluded by *ex parte* hearing (§ 800, 803); similarly, a preliminary inquiry may advance to a committal decision should an accused person abscond before things wrap up (§ 544).

[6] The most extensive reliance on *ex parte* process will be found in the provisions for prior-judicial-authorisation warrants and orders in Part XV of the *Code*. Section 487.014 of the *Code*—which lets police apply for general production orders—is one of them; it is the section in play in this case.

[7] Because an *ex parte* application for an investigative order will have the court hearing from the state only, full disclosure and factual accuracy will necessarily be important characteristics of a properly drafted information-to-obtain document [ITO]: *R v Wright*, 2014 CMAC 4 at ¶ 67; see also *R v Araujo*, 2000 SCC 65 at ¶ 46. While an ITO need not be a model of legal writing—*R v Downey*, 2017 NSSC 65 at ¶ 7, *R v Nguyen*, 2011 ONCA 465, at ¶ 57—it should not be an exercise in cherry-picking or hyping the best bits from the investigative file.

Production orders

[8] Part XV contains several production-order measures which allow police to gather evidence from third parties, under circumstances when the evidence custodians are unlikely to be opposed to the search process, but need to paper-off their privacy-protection obligations with a fiat from a court. Production orders authorised in Part XV are:

- Production order for transmission data of unknown person—§ 487.015;
- Production order for transmission data of known person—§ 487.016;
- Production order for tracking data—§ 487.017;
- Production order for financial data—§ 487.018.

[9] In generic terms, the standards of proof which must be met for a judicial authorisation under any of these provisions are the reasonable grounds to suspect that (1) an offence has been committed, (2) the material sought is in the possession of the targeted custodian, and (3) the material sought will assist in the investigation of the suspected offence.

[10] There is one more type of production order, which is the one being sought in this case:

- Production order for a document—§ 487.014.

[11] The governing section states:

> 487.014 (1) Subject to sections 487.015 to 487.018, 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.
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> (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
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> > (a) an offence has been or will be committed under this or any other Act of Parliament; and
> >
> > (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.
>
> (3) The order is to be in Form 5.005.
>
> (4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

[12] A "document" is defined in § 487.011 as a "medium on which data is registered or marked"; the term "data" is defined as "representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device." The term "data" would seem to have the potential to capture highly private material, encompassing a "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state" (as in *R v Plant* [1993] 3 SCR 281 at ¶ 20)—*eg* personal health records of the sort being

sought by police in this case. Given that higher level of expectation of privacy in such documents, Parliament made the standard of proof for the issuance of a § 487.014 production order the same as for search warrants, investigative DNA warrants, general warrants and Part VI interceptions: reasonable grounds to believe—not merely suspect—that an offence has been committed.

Problematic features of this application

[13] I turn now to the ITO submitted to the court by police in this case.

[14] The application by the investigator got off to an improvident start with the correspondence that transmitted the ITO to the court:

> Attached is the production order and ITO for Judge Attwood (sic) to review and authorize . . . . Once completed Judge Attwood (sic) can fax back the signed Warrant to the Stellarton RCMP Detachment.

[15] It appears that the officer labours under the misapprehension—shared by a number of policing services in this part of the Province—that the role of the court in the warrant-issuance process is an automatic once, merely to rubber-stamp applications by investigative agencies. Not so. This is because the decision whether to issue an order or warrant involves the exercise of judicial discretion.

[16] Then there are problems with the facts recited in the ITO. I do not intend to drill down into those too deeply: although the ITO is not covered by a disclosure-prohibition order under § 487.0191 of the *Code*, I believe that it is necessary to review the facts with restraint to protect the privacy interests of those involved and to safeguard their fair-trial interests in the event charges get laid.

[17] The ITO recites details of a motor-vehicle accident in which one person died; two others survived. The gist of the recital of evidence is that the investigator is attempting to determine whether this is an impaired-operation-causing-death case. My reading of the ITO suggests that there is material ambiguity on a number of important points; it is not clear whether the investigator recognizes this.

[18] The ITO includes a précis of witness statements. In a preliminary part of the ITO, the investigator states: "The RCMP have obtained *statements from witnesses,* which provide evidence to support that [name redacted] was operating the vehicle at the time of collision". [Emphasis added]

[19] Later on in the ITO, the investigator states: "*Statements from witnesses* provide evidence that [name redacted] was operating a vehicle on [location redacted] and was driving at a very high speed." [Emphasis added]

[20] These declarations under oath in the ITO do not appear to be factually correct.

[21] My review of the ITO (which I confirmed as accurate with the prosecutor in a formal hearing) reveals one witness statement—and one only—which identifies [name redacted] as the operator of the vehicle which was involved in the accident.

[22] From this, I draw the inference that either (1) the ITO has failed to disclose other pertinent statements, or (2) the ITO overstates the evidence which has been gathered by police. In either case, I am led to the conclusion that the ITO does not present the court with that full-and-frank disclosure necessary in an *ex parte* application to warrant the issuance of a production order. This would be enough to deny the application.

[23] There is more.

[24] Next, the ITO contains the following recital: "[T]here was *suspicion* that [the] ability to operate the vehicle was impaired by alcohol." [Emphasis added]

[25] The investigator's pledge of his level of knowledge is not an inconsequential issue: *R v DeBot* (1986), 30 CCC (3d) 207 at 218 (OCA); aff'd [1989] 2 SCR 1140. There is a material and significant difference between a reasonable suspicion, on the one hand, and the credibly based probability criterion

that constitutes reasonable grounds for belief, on the other: *R v Morelli*, 2010 SCC 8 at ¶ 127-129. *George v Rockett* (1990), 93 ALR 483 at 490-1 (HC Australia) offers some granularity to the distinction:

> Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam* [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown . . . .
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> . . . .
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> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

[26] Regardless of the epistemological meanings, the fact remains that an ITO that reveals a subjective suspicion only—reasonable or otherwise—does not pass the test; this is because, as noted earlier in this decision, mere suspicion is not sufficient for a § 487.014 order.

[27] A final defect is this: the investigator states in the ITO that the purpose of seeking a production order for access to medical records is that the material sought to be obtained will "further my investigation and will allow me to gather the evidence necessary to prove that [name redacted]'s responsible for the charges of impaired operation of a conveyance causing bodily harm and . . . causing death."

[28] Suffice it to say that the ITO reveals material ambiguity as to the identity of the person who was operating the vehicle involved in this mishap. With exemplary fairness, the prosecution concurred in this assessment of the evidence in hand.

[29] To be sure, an investigation will almost inevitably identify persons of interest; however, a proper investigation will not fix itself prematurely on any one person, but will seek to put theories of liability to the test.

[30] Not so here, it seems. The investigator has locked on a person of interest, and now seeks to gather information, not to test and challenge the accuracy of this preliminary theory, but to nail it down.

[31] This is dangerous territory. I say so because almost every commission of inquiry conducted in Canada into proven instances of wrongful conviction has identified investigative tunnel-vision as being a major factor leading to miscarriages of justice. Tunnel vision involves focussing prematurely on a person of interest, then gathering and analysing evidence selectively: evidence that confirms the identity of the person of interest as the offender will be preserved and made prominent; evidence that might be exculpatory will be discounted and written off.

[32] I believe that this investigation is infected with that very frailty. The investigator does not seek to scrutinize circumstances of ambiguity; rather, he has decided already who is responsible and he seeks evidence to confirm what is clearly a premature conclusion. That is an improper investigative purpose.

[33] Even if I were wrong about the factual and legal inadequacies of this ITO, I find that, exercising residual judicial discretion inherent in this process—see *Baron v Canada*, [1993] 1 SCR 416 at ¶ 24—it would be improper for the court to grant the order sought where the purpose to be advanced by it would be improper.

Conclusion

[34] The application is denied.

[35] The court is grateful to Mr Gorman for his candor and fair assessment of the matter.

JPC