PROVINCIAL COURT OF NOVA SCOTIA

Citation: *Application for production order (Re)*, 2020 NSPC 55

Date: 20201224
Docket: 8488417
Registry: Pictou

In the matter of an *ex parte* application for a production order in relation to data in the possession of Facebook, Inc

Between:

DECISION REGARDING GENERAL PRODUCTION ORDER, NON-DISCLOSURE ORDER AND SEALING ORDER

Restriction on Publication: 486.4: Any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way

Judge:	The Honourable Judge Del W Atwood
Heard:	29 October 2020 in Pictou, Nova Scotia
Charge:	Sections 487.014, 487.0191, and 487.3 of the *Criminal Code of Canada*
Counsel:	Peter Dostal for the Nova Scotia Public Prosecution Service, appearing *ex parte*

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Preamble

[1] This case has to do with the compelled production of data that is in the possession of a business organization incorporated in the United States, but which has a physical presence in Canada.

[2] Proceedings commenced with the prosecution filing an application for directions.

[3] In its written submissions, the prosecution explained that it sought a ruling:

> on whether the provincial courts of Nova Scotia have jurisdiction to consider applications under § 487.014 [of the *Criminal Code*] for the production of records held by social media companies based in the US that do business in the province of Nova Scotia.

[4] The prosecution proceeded in its filed material to advance a detailed argument why general production orders may licitly have extraterritorial effect.

[5] The application for directions was accompanied by the following documents:

- an information to obtain [ITO] a general production order under § 487.014 of the *Criminal Code*; the ITO is on the oath of a police investigator;

- a notice of application for a sealing order under § 487.3 of the *Code*; and

- a notice of application for a non-disclosure order under § 487.0191 of the *Code*.

[6] On 29 October 2020:

- I declined to issue directions on the jurisdictional question posed by the prosecution;

- I granted a general production order in the terms laid out in a draft order filed with the court by the prosecution;

- I declined to grant a sealing order;

- I declined to grant a non-disclosure order;

- I ordered, in accordance with § 486.4 of the *Code*, that any information that could identify a victim or witness in this proceeding not be published in any document or broadcast or transmitted in any way.

- I stated that reasons would follow.

[7] These are the reasons of the court.

Application for directions

[8] The application for directions seeks a ruling by the court on a jurisdictional issue: can the court grant a production order that might have extraterritorial effect? While the *Code* does contain provisions—in Part XVIII.1, § 536.4 and 645(5)—for the pre-hearing/pre-trial adjudication of non-verdict issues, none of these provisions applies to an application for a production order. Rule 4 of the Nova Scotia Provincial Court Rules provides for the issuance of judicial directions; however, once again, this applies to trial proceedings only.

[9] From a practical perspective, the issuance of directions to a party generally has to do with telling somebody how the court would prefer to have something done. "Directions" deal with the efficient management of a case that is able to be heard; they deal with the question: "How to do it?" "Jurisdiction", on the other hand, is a fundamental predicate of being able to hear a case; it raises the question: "Can it be done?" Were a court to conclude that it was without jurisdiction to grant a particular relief or order being sought, no volume of directions would get around such an obstacle.

[10] Furthermore, subject to statute—*eg*, the *Supreme Court Act*, RSC 1985, c S-26, § 53; the *Constitutional Questions Act*, RSNS 1989, c 89—it is not the function of the judiciary to offer legal opinions to the executive branch of government. The executive branch has its own counsel for getting legal opinions. The principles constraining courts from offering opinions to the executive were laid out in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at 91-92.

[11] Accordingly, I find that the court does not have the authority to issue directions with respect to the jurisdictional issue raised by the prosecution.

[12] In any event, as I shall explain shortly, extraterritoriality is not in play in this case, at least with respect to the granting of the production order.

[13] Accordingly, I dismiss the application for directions.

Application for a general production order

[14] Section 487.014 of the *Code* 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

> (a) an offence has been or will be committed under this or any other Act of Parliament; and
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> (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

[15] Subsection 487.019(2) provides that production orders have effect throughout Canada.

[16] I have reviewed in detail the ITO, which is properly before the court on oath, and is in Form 5.004. Based on the contents of the ITO—which is an inventory of the evidence gathered by the police investigator—the court is able to make the following findings of fact:

- In July 2020, a person in Nova Scotia made available child pornography using a social-media platform known as Instagram; this material was viewed by a young person in the United States, who reported it to authorities in that country.

- Instagram is a photo-and-video sharing service owned by Facebook, Inc. It appears to be both a trademark and a computer application. Users of the application may upload media which may be viewed by other users. Anyone may register as a user by providing an email address and a

telephone number. Users are issued unique ID numbers when their accounts are created.

- Facebook, Inc is incorporated in the United States.
- Facebook, Inc has a physical office in Canada.
- Facebook, Inc has the possession or control of Instagram user data that would help police in Nova Scotia identify the person in Nova Scotia who made child pornography available on Instagram in July 2020;
- Facebook, Inc has informed the police investigator that it will comply with a general production order from a Canadian court.

[17] Based on these findings, I am satisfied that there are reasonable ground to believe that:

- a child-pornography offence under § 163.1(3) of the *Code* has been committed in Nova Scotia;
- data in the possession of Facebook, Inc will afford evidence respecting the commission of the offence;
- Facebook, Inc has a physical presence in Canada.

Extraterritoriality

[18] The prosecution raised the issue whether the court would have the jurisdiction to grant a general production order with putative extraterritorial effect, and drew to the attention of the court two competing lines of authority:

- *British Columbia (Attorney General) v British Columbia (Provincial Court Judge)*, 2018 BCCA 5 [*BC (AG)*], which would seem to admit of such orders, even when a record custodian might have merely a virtual presence in Canada; and
- *Reference re: Criminal Code*, [2018] NJ No 21 (PC) [*NL Reference*], which would exclude the granting of general production orders with any element of extraterritorial effect.

[19] The prosecution advocated in favour of *BC (AG)* (and in favour of a case that follows it: *Re Application for a Production Order, s 487.014 of the Criminal Code*, 2019 ONCJ 755), and urged that the court not follow the decision in *NL Reference*.

[20] In my view, it is not necessary for this court to decide whether one case or the other was decided correctly, as the facts in this case are distinctive.

[21] I find that there is no jurisdiction-barring element of extraterritoriality arising in this proceeding, based on the record before the court.

[22] Unlike the facts before the Court in *BC(AG)*, the present application deals with a data custodian that has an actual, physical presence in Canada, with an office in the Province of Ontario. Accordingly, it is not necessary for this court to reckon with the sufficiency of "virtual presence".

[23] Moreover, unlike the investigative plan in the *NL Reference*—which had an investigator seeking to execute a production order in the US—no one will have to go bounding across an international boundary with an order in hand. All investigative steps necessary to have Facebook, Inc fulfil the terms of a production order will be able to be completed by the police investigator from her workstation in Nova Scotia.

[24] Production orders compel persons to produce data. Facebook, Inc, as a body corporate, is a person (see § 2 of the *Code*, definition of "every one", "owner", "person" and "organization"). Facebook, Inc has a physical presence in Canada, with an office in the Province of Ontario. Facebook, Inc is in the possession of likely relevant data being sought by the state pertinent to a criminal allegation arising in Nova Scotia. These conditions are sufficient for an *in-personam* jurisdiction for the exercising of judicial authority under § 487.014. It is not necessary for the court to run down a rabbit hole, trying to figure out where the data are stored—a nebulous and possibly insoluble question anyway, in an age of

offshore server farms and cloud computing. It is enough that the data custodian have a physical presence in Canada. The investigator will not have to do anything outside Canada to carry the production order into effect. This will be an exercise of an in-Canada, *in-personam* jurisdiction. The statute authorises the granting of a production order in a case when the data custodian has a physical presence in Canada, but the data might be stored elsewhere. I am reinforced in this view by the Legislative Summary which accompanied Bill C-13, *An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence-Gathering)*, 3rd Sess, 37th Parl, 2004; this became the enactment which brought into force § 487.014. The relevant portion of the Summary states: "[Production] orders allow for the acquisition of information held outside Canada where it is under the control of a custodian in Canada." Accessed online at: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/37-3/c13-e.pdf (Legislative Summaries have been utilized frequently as interpretive aids: see, *eg*, *R v Jarvis*, 2019 SCC 10 at ¶ 51; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at ¶ 34; and see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, LexisNexis Canada: 2014) at ¶ 23.11). This point was reiterated at second reading by the Parliamentary sponsor of the bill:

> These production orders are for the most part based on similar standards and safeguards as search warrants. Whereas a search warrant allows police to search a certain place for evidence, a production order compels a person to produce the relevant information, *even if stored outside Canada*, to the police within a specified time and at a specified place. [Emphasis added]

Debates of the Senate, 3rd Sess, 37th Parl, No 11 (18 Feb 2004) at 264 (Hon Wilfred P Moore)

[25] Were there any uncertainty on this jurisdictional point, it would be proper to resolve it in favour of granting a general production order, for these reasons:

- The Canadian investigation is being assisted by authorities in the US; from my reading of the ITO, it is safe to infer that US authorities have handed off this part of the project to the ITO informant; accordingly, the Canadian part is not trenching on any conflicting US-sovereignty interest.

- Facebook, Inc, through someone who appears to be a lawful representative, has stated that it will comply with a production order of a Canadian court; in other words, Facebook, Inc has acceded to the jurisdiction of Canada. This, in my view, renders essentially moot that element of jurisdiction referred to in *R v Hape*, 2007 SCC 26 at ¶ 58 as "enforcement jurisdiction": It is not necessary to anticipate whether a judicial order will be enforced when there is a reasonable assurance that the entity on the receiving end will abide by it. (Unlike, say, in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, which saw a US-based search-engine

company fight a losing battle against an injunction proceeding in Canada, waged all the way up to our highest court—and then succeed in getting the Canadian order enjoined permanently as unenforceable in the US: *Google LLC v Equustek Solutions Inc* Case No Case No. 5:17-cv-04207-EJD (ND Cal 14 Dec 2017)). Even if enforcement jurisdiction were to remain a live issue, it is clear from the ITO that Facebook, Inc maintains an office in Canada for service of enforcement process, should a production order issued to the company not be followed.

- While Facebook, Inc cannot waive the privacy rights of users of its services, the contractual terms imposed by Facebook, Inc for use of those services contain a stipulation putting users on notice that the company will respond to legal requests from jurisdictions outside the US in cases involving the criminal abuse of its Instagram platform.

- Finally, even if the issuance of a general production order in this case could be said to have an element of extraterritorial effect, it would be no different to similar orders authorized under US federal law in the *Stored Communications Act*, 18 USC § 2703, as amended by the *Clarifying Lawful Use of Overseas Data Act*, Pub L No 115-141; the granting of an order in

this case would not violate any principle commanding comity or symmetry, where the US side does the same thing as Canada.

[26] The general production order, directed to Facebook, Inc, is granted in the form submitted by the prosecution.

Application for a sealing order

[27] The prosecution seeks a sealing order under § 487.3 of the *Code*.

> 487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
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> > (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
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> > (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.
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> Reasons
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> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
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> > (a) if disclosure of the information would
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> > > (i) compromise the identity of a confidential informant,
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> > > (ii) compromise the nature and extent of an ongoing investigation,
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> > > (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[28] Section 487.3(1) provides for the issuance of sealing orders in the discretion of a competent court. Subsection 487.3(2) sets out the criteria to be applied by courts in exercising that judicial discretion. The application of § 487.3(2) is to be informed by the principles set out in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *R v Mentuk*, 2001 SCC 76 [*Dagenais/Mentuk*]. These principles apply to all discretionary actions which might limit the open-court principle. See also *R v Verrilli*, 2020 NSCA 64 at ¶ 30.

[29] The reason given by the prosecution for the issuance of a sealing order is set out in the Notice of Application: "[T]he investigation is ongoing and . . . the ITO contains private information concerning an innocent 3rd party who is a youth."

[30] These grounds appear to implicate ¶ 487.3(2)(a)(i)-(ii) and (iv) of the *Code*.

[31] I have reviewed the production-order ITO in detail. The identification of the person in the US who made the initial report to authorities in that country has been fully anonymized by the ITO informant. In my view, were the ITO to be exposed to public scrutiny (which is a remote possibility, as I shall explain shortly), there is no risk that the identity of the young person might be revealed.

[32] Further, I order and direct, pursuant to ¶ 486.4(2)(b) of the *Code*, that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way. A non-publication order is mandatory under the statute. A non-publication order operates as an alternative measure, which would obviate a sealing order: *Dagenais* at ¶ 73.

[33] Finally, I consider the practicality of a sealing order. In the period of time that I have been the resident Provincial Court judge in this judicial centre—which now stands at over a decade—the court has entertained only one application for access to search-warrant/production-order material (other than routine applications

by the prosecution for unsealing orders under § 487.3(4), brought to comply with disclosure obligations, or applications by police brought after discovering they have not retained copies of ITO materials for their files). That one application was brought by a person who had been charged with a drug-related offence, and who sought access to a § 487 ITO after charges against him had been dropped. Significantly, that ITO had not been ordered sealed; nevertheless, the court appropriately regulated access to the ITO in accordance with the common-law supervisory authority described in *Nova Scotia (Attorney General) v MacIntyre*, [1982] 1 SCR 175 at 189 [*MacIntyre*].

[34] The risks of disclosure are non-existent as there is virtually no risk of the ITO being disclosed.

[35] Ironically, as recent proceedings in an unrelated case have made clear, it is often the efforts by police and the prosecution to prevent disclosure that will tend to heighten public and media interest.

[36] I decline to grant a sealing order, as one is not necessary in the circumstances. However, I do grant a non-publication order, as that one is mandatory.

Application for a non-disclosure order

[37] The prosecution sought a non-disclosure order—directed to "Instagram", rather than Facebook Inc—under § 487.0191 of the *Code*:

> 487.0191 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may make an order prohibiting a person from disclosing the existence or some or all of the contents of a preservation demand made under section 487.012 or a preservation or production order made under any of sections 487.013 to 487.018 during the period set out in the order.
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> Conditions for making order
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> (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.009 that there are reasonable grounds to believe that the disclosure during that period would jeopardize the conduct of the investigation of the offence to which the preservation demand or the preservation or production order relates.
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> (3) The order is to be in Form 5.0091.
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> Application to revoke or vary order
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> (4) A peace officer or a public officer or a person, financial institution or entity that is subject to an order made under subsection (1) may apply in writing to the justice or judge who made the order - or to a judge in the judicial district where the order was made - to revoke or vary the order.

[38] The statute does not seem to circumscribe the extent of a disclosure prohibition; that is, it does not address the question" "Disclosure to whom?"

[39] The draft order prepared by the prosecution is directed to Instagram (which would seem to be a trademark); however, the ITO describes Facebook, Inc as the

actual data custodian. Accordingly, I will address this issue as an application seeking to impose a prohibition upon Facebook, Inc.

[40] Orders under this provision are discretionary; the exercise of judicial discretion is to be informed by the criterion in § 487.0191(2): would disclosure of a production order jeopardize the conduct of the investigation?

[41] The prosecution seeks an open-ended order, which would seek to prohibit Facebook, Inc from disclosing the existence of the order to anybody—which would, presumably, include outside legal counsel, as well as investigative and regulatory authorities in the US and elsewhere.

[42] This last point is, in my view, pivotal. While it is true that Facebook, Inc has a physical presence in Canada, it is a US organization. It remains subject to US laws.

[43] There is a common misconception that social-media organizations and other internet-service providers operate in spheres—at least in the US—of total immunity from the law. This is incorrect. While these businesses do enjoy some degree of qualified immunity from civil and criminal liability arising from the actions of third-party users (and I say this recognizing that this statement is a great

oversimplification of the complexity of the issue), they are not free of legal obligations.

[44] Of particular application to Facebook, Inc is the *Communications Decency Act*, 47 USC § 230 [*CDA*]. Under the terms of the *CDA*, Facebook, Inc is subject to positive duties which it must fulfil if it becomes aware that its services are being exploited for criminal purposes. It must remove the content. It must report the content to proper authorities. It must discontinue the services provided to the user. It must cooperate in law-enforcement, and, when applicable, child-protection investigations.

[45] My reading of the legislation leads me to conclude that it is inevitable that Facebook, Inc, would be required, in order to comply with the *CDA*, to disclose to US authorities the existence of the production order which I have issued.

[46] Further, Facebook, Inc, may need to seek legal advice.

[47] In fact, one may comprehend readily an array of due-diligence steps that might have to be done by Facebook, Inc which would involve disclosing the existence of the production order.

[48] Again, I return to the prior question: "Disclosure to whom?" It seems to me that the only disclosure that might pose a jeopardy to the investigation would be

disclosure to the person police are seeking to identify as having made child pornography available.

[49] I feel confident that it is unlikely that Facebook, Inc would seek to tip-off that person. Even if one were to question the company's sense of civic duty (which I am not inclined to doing so in this case, given its level of cooperation with Canadian authorities) it seems unlikely that it would do something that would put it in conflict with the *CDA*.

[50] Finally, I would note that, if the objective of the disclosure prohibition is to avoid alerting the person who is the target of the investigation of the existence of surveillance, it might be too late to worry about that, given that Facebook, Inc likely already will have terminated that person's account and removed the offending content, in compliance with the *CDA*.

[51] I find the prosecution not to have established the necessity for granting a non-disclosure order; the order is not granted.

[52] The court will regulate access to the materials filed with the court in this case in accordance with *MacIntyre*. I will refrain from publishing this decision until any review period will have expired or any review concluded.

JPC