

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *Bell Canada Corporate Security (Re)*, 2023 NSPC 40

Date: 20230801

Docket: 2930041

Registry: Antigonish

In the matter of an *ex parte* application for a production order relating to data in the possession of Bell Canada Corporate Security

***DECISION REGARDING THE ISSUANCE OF
A GENERAL PRODUCTION ORDER***

Judge: The Honourable Judge Del W Atwood
Written decision released: 2023: 1 August 2023 in Pictou, Nova Scotia
Charge: Section 261.1(1)(a) of the *Criminal Code of Canada*
Counsel: Constable Adam Merchant, RCMP, applicant

NOTE: The Court deferred publication of this decision until all related proceedings were concluded.

By the Court:

Synopsis

[1] There are no publication bans in effect in relation to this matter.

[2] The applicant seeks a general production order under the provisions of § 487.014 of the *Criminal Code*, in order to attempt to identify the person responsible for making a threatening telephone call. The application is granted, as it is clear that the criteria for the making of an order are well satisfied.

[3] However, it is necessary for the Court to provide additional commentary, given the manner in which the application was advanced. Specifically, there is an issue regarding the authority of a data custodian to refuse to comply with an order of the Court.

Application history

[4] This is the second application brought by the investigator in this case.

[5] The first application was made two months prior to the present one. The first application was brought under the production-of-transmission-data provisions of § 487.015 of the *Code*. It sought to have Bell Canada Corporate Security [Bell] turn over the same data as captured in the present application: transmission data for

the purpose of identifying a device or person involved in the transmission of a communication. I granted the earlier application, and issued an order [the first order].

[6] A problem arose, as an official with Bell refused to comply with the first order; he sent an email to the investigator confirming his position. It appears that the official in question was working with an outdated version of § 487.015 of the *Code*, and believed that the statute did not authorize the production of transmission data.

Legislative history

[7] It is correct that, prior to 9 March 2015, § 487.015 of the *Code* did not deal with the production of data; rather, it allowed records custodians to apply for exemptions from the requirement to produce data.

[8] The law changed on 9 March 2015. The *Protecting Canadians from Online Crime Act*, SC 2014, c 31, § 20, in force 9 March 2015 in virtue of § 47 of the *Act*, reconstituted § 487.015 to authorize the production of transmission data.

[9] There is overlap between general-production orders for documents or data under § 487.014, and production orders for transmission data under § 487.015, such that there might be situations when either type of order might work in aiding

an investigation; however, there is authority for the proposition that the general-production-order provisions of § 487.014 should not be used when the data sought by police would be covered by one of the more specific production provisions, such as § 487.015—see *Alberta (Attorney General) v Alberta (Provincial Court)*, 2015 ABQB 728.

[10] Just so, here. The first order specifically compelled production of transmission data for the purpose of identifying a device or person involved in a transmission or communication, precisely the type of data covered by § 487.015.

Disobedience of court orders

[11] It is entirely possible that I might have missed something in granting the first order. However, that does not excuse the refusal by Bell to comply with it.

[12] An order issued by the Court has the force of law. If a person or entity subject to a court order believes that the order has been issued invalidly or illegally or in excess of jurisdiction, the remedy is due process, not defiance: *R v Jordan*, 2016 NSPC 39 at ¶ 15. In fact, § 489.0193 of the *Code* provides records custodians, such as Bell, with a process to have production orders judicially reviewed.

[13] Failure to comply with a production order is an offence under § 487.0198 of the *Code*.

[14] Over the years, the Court has encountered a number of problems arising from public and private organizations exempting themselves from compulsory, court-ordered process. A case in point was a former local public-health authority that consistently refused to comply with court-issued subpoenas for the production of evidence; the grounds were said to be that the subpoenas were not in accordance with the policies of the authority.

[15] This harboured belief, that an entity need not abide by a court order if it is felt that there is a good enough reason, has been persistent, burgeoning, and it must be addressed effectively by the judicial branch.

[16] A good object lesson is found in *R v Gunn*, 1997 ABCA 35, leave to appeal refused, [1997] SCCA No 175. In that case, a lawyer believed—no doubt very sincerely—that a court had illegally issued a warrant for the arrest of his client, and sought to frustrate the arrest. The lawyer was convicted of obstruction of justice; the conviction was ultimately upheld. Disobeying court orders carries elevated legal risks.

[17] As stated at the outset, the general-production order sought by the applicant is granted. However, in future, should a records custodian refuse to comply with a production order issued by a court, investigating authorities would do well to have reference to the penalty provisions of the *Code* rather than giving defiance of a court order a pass.

JPC