

CANADA / JUDGMENT

British Columbia (Attorney General) v. Brecknell

2018 BCCA 5

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 5 British Columbia (Attorney General) v. Brecknell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

British Columbia (Attorney General) v. Brecknell,

2018 BCCA 5

Date: 20180109

Docket: CA44298

Between:

Attorney General of British Columbia

Appellant

(Applicant)

And

The Honourable Judge M.J. Brecknell of the

Provincial Court of British Columbia

Respondent

(Respondent)

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia,
dated February 9, 2017 (British Columbia (Attorney General) v. Brecknell,
2017 BCSC 460, Vancouver Registry OTR2017001).

Counsel for the Appellant:

D.M. Scanlan

Appearing as Amicus Curiae:

M. Klein, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 10, 2017

Place and Date of Judgment:

Vancouver, British Columbia

January 9, 2018

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Hunter

Summary:

The RCMP were refused a production order for records relating to a posting on Craigslist made in BC. Both a Provincial Court judge and a Supreme Court judge found no jurisdiction to grant the order because Craigslist is an American company with only a virtual presence in BC. The Attorney General appealed. Held: Appeal allowed. Production orders are effective against persons in Canada and may require those persons to produce documents located elsewhere. Craigslist's business activities in BC are sufficient to establish it as a person in the jurisdiction. The application is remitted to the Provincial Court for reconsideration.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] The issue on this appeal is whether jurisdiction lies under s. 487.014(1) of the Criminal Code, R.S.C. 1985, c. C-46, to issue a production order to a company, Craigslist Inc. ("Craigslist"), with only a virtual, but not a physical, presence in British Columbia, requiring it to produce documents located outside Canada to a peace officer in British Columbia.
- [2] A first application for a production order was rejected by a judicial justice on the basis that Craigslist is an American company and so the authority to issue the order was unclear. The RCMP was instructed to provide evidence that Craigslist had an office in British Columbia or case authority in support of the application.
- [3] A second application was then made to the Provincial Court, relying on the authority of this Court in *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265 [Equustek], subsequently upheld on appeal to the Supreme Court of Canada (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34), to support the jurisdiction to issue the production order on the basis that the company carried on business in British Columbia and that there was a real and substantial connection between the province and the facts on which the proceeding was based. The Provincial Court judge dismissed the application, stating that Equustek is inapplicable to the jurisdictional question under the Criminal Code because it is a civil case in which territorial jurisdiction was conferred by the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28.
- [4] The Attorney General applied to the Supreme Court for an order in the nature of certiorari with mandamus in aid to quash the order dismissing the application in the Provincial Court and compelling that court to exercise its jurisdiction and make the production order. That application was dismissed. The judge concluded:
- [43] While it is true that production orders may well gather records from outside the country, the legislative history of the provision indicates there needs to be a custodial or record-keeping presence within our own borders. While Craigslist does business in B.C. and, by virtue of the decision in *Equustek*, has a real and substantial connection to the province through its business, in my view, that does not give the Court jurisdiction to issue an order for evidence gathering to be served and implemented in a foreign country. In my view, a Criminal Code production order cannot be issued from a Canadian court against Craigslist, an American company with only a virtual presence in B.C.
- [5] The Attorney General appeals.

Factual Background

- [6] The production order is sought in connection with an investigation into alleged criminal offences committed in a community in British Columbia. The investigation is into serious criminal offences of a type often facilitated by the use of the Internet.

[7] The relevant provision of the Criminal Code providing for the issuance of a production order is s. 487.014(1) which provides:

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.

[8] The production order sought relates to records of a specific Craigslist posting made in the province. The RCMP also seeks the following information from Craigslist:

- a. the user's name or physical address;
- b. the user's email address;
- c. the IP address assigned to the user when the post was created;
- d. phone numbers used to verify the user account;
- e. dates and times for the creation of the post; and
- f. the record of the posting.

[9] The materials filed in support of the production order would appear to justify its issuance, but for the jurisdictional issues engaged in this appeal. There is no issue that Craigslist possesses the information subject to the production order, including a record of communications between parties in relation to the posting.

[10] Craigslist is an Internet-based advertising company with its headquarters in San Francisco, California. Craigslist provides classified advertising services to Internet users all over the world, including British Columbia. Tens of millions of advertisements are posted to Craigslist's service every month. Craigslist advertisements cover all areas of British Columbia, including the location of this investigation. Craigslist has a website for Vancouver, BC, and classified service webpages for a number of communities in British Columbia. Each community has its own separate webpage address that, when selected, offers a number of different classified advertisement categories from which a user can choose.

[11] The advertisements can be placed and searched by content and category and can be filtered by geographic location. For some types of advertisements, Craigslist charges the person placing the advertisement a fee.

[12] Craigslist has no physical office in Canada. Moreover, it is not a registered company in British Columbia. Accordingly, service cannot be effected on Craigslist in British Columbia.

- [13] Craigslist is willing to respond to production orders issued in British Columbia and has provided information in response to court orders in the past. Craigslist requests that peace officers submit production orders by email to their offices in California. A number of other American Internet service providers are willing also to produce documents on a similar basis, although each have physical locations or offices where a production order can be served in Canada.
- [14] Although Craigslist has offices in California, there is no evidence about where the data sought by the production order is located. Accordingly, we do not know if the data is stored on a server in the United States or offshore. Even if instructions to retrieve the data could be given from California or the data could be electronically retrieved from California, we do not know which jurisdiction the data would be retrieved from.

Reasons for Judgment

- [15] The judge included the following summary of the Attorney General's argument:
- [31] Ultimately, the position of the AGBC is succinctly summarized at paras. 35(b) through (h) of its argument as follows:
- (b) Craigslist ... conducts business in this province providing a market for those placing advertisements seeking to sell merchandise and services to persons in this province, people in this province wishing to sell to anyone else and charging British Columbians for certain advertising services;
 - (c) The business of Craigslist has a "real and substantial connection" to this province;
 - (d) The test of "real and substantial connection" is of general application to both criminal and civil law;
 - (e) The courts of this province have "in personam" jurisdiction over companies like Craigslist ... providing Internet-based services to persons in this province;
 - (f) The production order provisions apply to any person within the jurisdiction of the court;
 - (g) The production order provisions were designed to permit orders for production of any records being held at locations outside Canada, but under the control of a person within Canada; and
 - (h) The information to obtain sworn by investigators in the applications herein meets the threshold for issuance of the order sought.
- [16] In support of its argument, the Attorney General relied on this Court's decision in *Equustek* for the proposition that the court has in personam jurisdiction over Craigslist because, by conducting business in BC, it has a real and substantial connection to the province. Moreover, the Attorney General referred to comments made in the House of Commons explaining one purpose of amendments to the Criminal Code providing for production orders. The gist of that explanation was that the new orders would authorize persons having

possession or control over information to produce it no matter where it was located. Indeed, the comments specifically referred to the problem created by "inexpensive overseas data warehousing."

- [17] The judge examined the circumstances underlying the Equustek case, noting that that case involved an injunction requiring Google to block access to a company's websites on a worldwide basis. She summarized the decision thus:
- [36] The Court of Appeal dismissed Google's appeal. It found that the trial court had territorial competence over Google as well as in personam jurisdiction because Google did business in the province. It also found it was appropriate to seek relief against Google to give effect to the original injunctions that were ignored by Datalink. Finally, the Court of Appeal held that the global takedown order did not violate principles of comity because Datalink's breach of intellectual property laws was illegal in those countries and it was not a matter of free speech.
- [37] Furthermore, the Court of Appeal found that Google's search results are generated using Google's highly confidential propriety algorithm. Google collects a wide range of user information to generate results such as user searches, IP addresses, location, search terms, and user behaviour - i.e., whether the user clicks through the search results generated: Equustek at paras. 23 and 49. Google also links ads to the subject matter of the user's search as well as the user's history and location: Equustek at para. 54.
- [38] Even though Google did not have resident employees, business offices, or servers in British Columbia, the Court of Appeal found that the information which Google collects from British Columbia residents to generate results was a key part of their business model. This was sufficient to establish a real and substantial connection, thereby allowing the Court to assume in personam jurisdiction over it.
- [39] Thus, in Equustek, the Court of Appeal determined that the Supreme Court had territorial competence over Google by virtue of s. 3(e) of the CJPTA and also had in personam jurisdiction over Google given the considerable evidence that key parts of Google's business, including advertising contracts with B.C. residents and information gathering, are carried on in the province giving Google a real and substantial connection to the province: Equustek at paras. 52 to 54.
- [18] The judge then explained why Equustek was not dispositive of the issue before her:
- [41] While similar circumstances of advertising, payment for postings and information gathering exist for Craigslist as well, there are at least two distinguishing features to the circumstances of Craigslist. First, Google has Canadian offices and, as such, at least has a location where process can be served in the event of non-compliance with the injunction. Thus, the Court has the ability to ensure that where its order is not followed, remedial consequences can be imposed. Conversely, Craigslist has no corporate office within Canada where process for contempt proceedings can be served in the event of non-compliance with

an order and no way to monitor that the order is being followed.

- [42] Second, the remedy sought in *Equustek*, an injunction, was to prohibit Google from delivering search results pointing to the defendant's websites. The underlying action between the plaintiff and the defendant relates to the alleged violation of trade secrets and intellectual property rights while the defendant's operations were based in Vancouver, B.C. The Court of Appeal found that because the underlying civil suit was within the territorial competence of the Supreme Court, the Court had territorial competence over the injunction application: *Equustek* at paras. 40 and 41. In the case of *Craigslist*, however, what the AGBC seeks to do is obtain documents from a third party record holder where the custodian of the records is outside the country.
- [43] While it is true that production orders may well gather records from outside the country, the legislative history of the provision indicates there needs to be a custodial or record-keeping presence within our own borders. While *Craigslist* does business in B.C. and, by virtue of the decision in *Equustek*, has a real and substantial connection to the province through its business, in my view, that does not give the Court jurisdiction to issue an order for evidence gathering to be served and implemented in a foreign country. In my view, a Criminal Code production order cannot be issued from a Canadian court against *Craigslist*, an American company with only a virtual presence in B.C.
- [44] However, that does not mean that the AGBC and the RCMP are without remedy. Indeed, the appropriate remedy was identified by the learned Provincial Court judge when he issued his Reasons; subscription records, subscriber information, and the related items the RCMP seek through a Criminal Code production order can be obtained through the MLAT request process. Most treaty agreements with Canada provide for wide measures of cooperation including search and seizure and compelling the production of documentary or physical evidence.
- [45] I conclude, therefore, that the learned Provincial Court judge committed no jurisdictional error or error in law in dismissing the application for a Criminal Code production order that would be entirely extraterritorial in its effect.
- [19] In summary, the judge gave four reasons to support the conclusion that there was no jurisdiction to issue the order. First, *Craigslist* has no Canadian office for service of enforcement proceedings in the event the order is not complied with. Second, *Craigslist* as the custodian of the documents is located outside Canada. Third, jurisdiction requires a custodial or record-keeping presence within Canada. Fourth, there is no jurisdiction to issue an order for evidence gathering to be served and implemented in a foreign country.

Grounds of Appeal

- [20] The Attorney General alleges the judge erred:

1. in her statutory interpretation of s. 487.014 by reading a requirement into the section that the Internet company in respect of which a production order is sought must have a physical presence within Canada;
2. in her interpretation of the common law test for "in personam" jurisdiction in holding that a production order could not issue against an Internet company with only a virtual presence in British Columbia; and
3. in her statutory interpretation of s. 487.014 by reading in a requirement that sanctions for disobeying a production order must be demonstrably enforceable before it is issued.

Discussion

[21] Running through each of the decisions refusing to issue the production order is the concern that to do so would involve the court exercising extraterritorial jurisdiction not contemplated by a proper interpretation of s. 487.014(1). On this approach, there is nothing in the language of the section to support the view that Parliament intended, expressly or by necessary implication, to confer on the courts a jurisdiction to make an order requiring the gathering of evidence in a foreign country by a third party located outside the country. It is convenient to reproduce the section again:

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.

[22] It is evident that the section is silent on any potential extraterritorial reach of orders made pursuant to it. Having said that, Mr. Klein, appearing as *amicus curiae* to advance arguments in support of the judgment below, acknowledged that the section is effective to compel production of documents located outside Canada, provided the person who is in possession or control of them is within Canada. The chambers judge appears to have taken the same view in para. 43 of her reasons.

[23] The need to interpret the section in light of restrictions placed on extraterritorial effects is uncontroversial. The fundamental principles were canvassed in *R. v. Hape*, 2007 SCC 26. There, Justice LeBel identified a number of settled but important principles. First, customary international law, which has been adopted domestically, limits the actions a state may legitimately take outside its borders. Customary international law is based on respect for the sovereignty and equality of foreign states. Sovereign equality commands non-intervention and respect for the territorial sovereignty of foreign states. Nonetheless, Parliament may legislate "extraterritorially" in violation of those principles provided it does so expressly: see paras. 35-46.

- [24] Second, international comity serves as an interpretive principle, suggesting laws should not be interpreted in a way that would infringe on the sovereignty of another state: see paras. 47-52. Thirdly, LeBel J. reconfirmed the principle of statutory interpretation by which legislation is presumed to conform to international law, although effect must be given to a contrary intention: see paras. 53-56.
- [25] Justice LeBel went on to articulate different kinds of jurisdiction relevant in considering extraterritoriality. For example, he distinguished between prescriptive jurisdiction, enforcement jurisdiction and adjudicative jurisdiction. Arguably, in the case at bar, the issue is one of enforcement jurisdiction, namely "the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld": at para. 58. Sometimes included within enforcement jurisdiction is what is referred to as investigative jurisdiction. In the case at bar, nothing turns on the jurisdictional label attached to the production order in issue. What matters is whether in substance it has an extraterritorial effect. And there is no doubt that issues relating to the extraterritorial application of criminal law attract heightened scrutiny. Criminal law is inherently territorial, something recognized in the Criminal Code itself, and nation states jealously guard the integrity of their sovereignty in relation to criminal law matters.
- [26] The core issues on this appeal are whether, on the facts of the case, the production order should properly be viewed as having an extraterritorial effect or as being impermissibly extraterritorial in its effect. To put the matter one way, even though Canada has jurisdiction over the alleged crime and, arguably, the Court has in personam jurisdiction over Craigslist, does the Court have jurisdiction to order Craigslist, headquartered in California, to gather evidence that can be seen to be located outside the country? Alternatively, the issue may be properly characterized as whether it is an extraterritorial exercise of jurisdiction to issue a production order compelling a person in Canada to produce documents in Canada that are in that person's possession or control if they are stored outside the country and must be accessed in a foreign country. In large measure the answer to the issue before the Court turns on properly characterizing where the order takes effect and whether it is properly regarded as directed against a person in Canada for the purpose of the section.
- [27] Before turning to analyze the wording of the section, it is important to recognize that the section is embedded in a statutory scheme. The section itself compels the production of documents on pain of penalty (s. 487.0198), but provision is made for applications to be made by a person subject to an order to revoke or vary the order (s. 487.0193(1)). This latter section contemplates the opportunity to raise issues before the order must be complied with that relate to the obligation to produce the documents. Hence, for example, if a person is subject to other legal obligations that prevent compliance, such as private law obligations to the individual whose records are to be produced or legal obligations in the jurisdiction where the documents are stored, then there is an opportunity to canvass those issues before compliance. None of those potential questions are in issue on the record before us. And nothing in this judgment purports to deal with them. The sole issue is whether there is

jurisdiction to make the order in the first instance.

- [28] Determining whether the section has an impermissible extraterritorial effect is an exercise in statutory interpretation. A number of issues arise. They include: (a) In what sense must a "person" be within the jurisdiction for the section to apply? Must that person be in the jurisdiction physically or in a record keeping or custodial capacity? (b) Does the section contemplate that personal jurisdiction is sufficient for an order to be effective? (c) Where does a production order take effect? Is it effective in relation to a person, and operates domestically if the person is in the jurisdiction regardless of the location of the documents? (d) Does a production order take effect where the documents are produced and disclosed or where they are located and stored?
- [29] The first step in the analysis is to recognize that a production order is directed to a person and requires that person to produce documents in their possession or control. Pursuant to s. 487.0192(1), the documents must be produced to an officer, presumably within the jurisdiction, though (3) of that section allows the production to be made electronically.
- [30] The section is silent on issues to do with extraterritoriality, and it is silent on any question dealing with the location of the documents. Section 487.019(2) may offer some assistance by stipulating that, unlike search warrants, the order has effect throughout Canada without requiring endorsement if executed in another jurisdiction. The section reads:

487.019(2) The 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.

It appears to me that this section is addressing a difference between search warrants and production orders. It does not directly deal with extraterritorial issues.

- [31] Arguably, some assistance can also be gleaned from comments made in Parliament when the Bill introducing production orders was presented. While not directly admissible to interpret the section, the comments are indicative of the mischief the amendments were intended to address. Amongst other comments, the parliamentary secretary to the Minister of Justice, Mr. Macklin, explained that:

Law enforcement agencies and crown prosecutors have been asking for a new investigative tool for some time and with the proliferation of the Internet and the widespread adoption of new communications technologies, the timing is right for this form of investigative tool.

The production orders will solve a number of nagging issues for investigators including extraterritorial searches and timing issues. Under these new orders, persons who have possession or control of documents, data or information will have to produce that information whether it resides in Canada or abroad. Thus, as long as they have possession or control over the relevant information, they will be required to produce it no matter where it is located. This solves the problem that has in part been created by inexpensive overseas data warehousing.

[Emphasis added.]

- [32] Parliament's Legislative Summary for the Bill also referred to the fact that production orders allowed for the acquisition of information held outside Canada where it is under the control of a custodian in Canada. Although the Bill died on the Order Paper, it was reintroduced and passed in the next session of Parliament and was accompanied by the same Legislative Summary as before.
- [33] The chambers judge interpreted s. 487.014(1) in a similar way. One reason she concluded that there was no jurisdiction to issue the production order was because she concluded that Craigslist was not a custodian or record keeper in Canada. On the other hand, she appeared to accept that had Craigslist been a "custodian" in Canada, it may well have been required to produce the information even though it was located outside Canada.
- [34] At a minimum, it is clear that a production order is effective against a person because it commands that person to obtain and produce documents. Applying appropriate presumptions of statutory interpretation, it is evident that a production order may issue only against a person in Canada. The question is, therefore, whether Craigslist is to be treated as a person in Canada for the purpose of the section.
- [35] The Criminal Code does not define a "person". Clearly a person encompasses both a natural person and a legal person such as a corporation. Corporations often can be located in specific geographical territories by reference to such matters as place of incorporation, registration to conduct business (including the provision of a place for service), the location of head offices, or other places of business. Corporate persons can exist simultaneously in multiple jurisdictions. They can be simultaneously both here and there, to borrow a phrase. Historically and typically, corporations generally needed to be physically present in a particular territory, by way of business premises or employees, if they were to conduct business in that territory. In the Internet age that is no longer the case. Corporate persons can conduct business in multiple jurisdictions without the need for a physical presence in the jurisdiction. That is the situation with Craigslist.
- [36] The nature of its business allows Craigslist to conduct business in British Columbia without establishing any physical presence. Nonetheless, it seems to me that Craigslist is present in British Columbia, in a very real sense, by virtue of the way in which it conducts its business. It supplies services to British Columbians focusing on specific locations, putting buyers and sellers in those locations together. It derives revenue from British Columbians. As the chambers judge recognized, it is virtually present in British Columbia, even if it is not physically present.
- [37] Accordingly, the question is whether its virtual presence in British Columbia is sufficient to provide a jurisdictional foundation for the issuance of a production order without having impermissible extraterritorial consequences. There is no question that there is a real and substantial connection between Craigslist and British Columbia arising from Craigslist's virtual presence in British Columbia to conduct business. That real and substantial

connection is sufficient to provide personal jurisdiction over Craigslist. The question is whether that is a sufficient jurisdictional basis to issue the order. The chambers judge concluded that it was not because, among other reasons, Craigslist did not have a custodial or record-keeping presence in the province. That presence, she concluded, existed outside the country.

- [38] It is by no means clear to me what it means to say that a person has a custodial or record-keeping presence in the jurisdiction, particularly in a digital age where information can be instantly transmitted by a click of a mouse. Certainly, a custodial presence is not synonymous with a physical presence. A company may have offices or employees in the jurisdiction whose function is entirely unrelated to record keeping or exercising custody over documents. Moreover, the function of record keeping and exercising custodial authority are not necessarily the same thing and may be functions exercised in different locations. The authority to require the retrieval of documents may reside in one location, the act of retrieving them may be possible in various locations, and the documents may be stored yet somewhere else. Finally, the location of documents may bear little or no relation to the business activity that generates them. As Mr. Macklin observed, cheap warehousing of data may lead to storage outside the country. It is not obvious that Parliament intended jurisdiction in relation to the employment of this investigative tool to depend on such contingent, haphazard, happenstance resulting from the variable internal structures of businesses. Having said this, I recognize that in this case it is part of the reality that Craigslist has offices in California to which an order for documents needs to be transmitted and from which it can be implemented. The question is whether this fact is decisive to deprive a British Columbian court from issuing a production order in the first place.
- [39] I think not. I take a somewhat different view of the scope of the section from that of the judge. In the first instance, the section, properly interpreted, stipulates only that the person subject to the order must be a person in the jurisdiction. In my view, Craigslist is such a person. Second, the person must be a person who has possession or control of a document. The section says nothing expressly about where that possession or control exists. Indeed, it may not even be sensible to pose the question in terms of the location of control. A person either does or does not have possession of a document. The question is one of control, not where the control is exercised. In this case, Craigslist has possession or control of the relevant records and the provision requires nothing further. In other words, there is nothing in the section that requires the person in the jurisdiction to be a custodian of the documents in the jurisdiction. In my view, it is sufficient that the person is present within the jurisdiction. I do not think that there is anything extraterritorial in such an interpretation. To conclude that Craigslist is a person within the jurisdiction who has possession or control of documents does not give the section an impermissibly extraterritorial interpretation.
- [40] In the second place, in the Internet era it is formalistic and artificial to draw a distinction between physical and virtual presence. Corporate persons, as I have noted, can exist in more than one place at the same time. With respect, I do not think anything turns on

whether the corporate person in the jurisdiction has a physical or only a virtual presence. To draw on and rely on such a distinction would defeat the purpose of the legislation and ignore the realities of modern day electronic commerce. Moreover, the current facts illustrate the doubtful relevance of the distinction. Craigslist's virtual presence is closely connected to the circumstances of the alleged offence, because at least some elements of the alleged offence were facilitated by relying on the services Craigslist provides virtually. In terms of the alleged offence, any physical presence Craigslist may have in the jurisdiction is beside the point. A corporate entity's physical presence may have nothing to do with the circumstances of an offence. In my view, it would be curious if the presence of a retail outlet which is totally unrelated to the acquisition of information sought by a production order would ground a jurisdiction that did not otherwise exist.

- [41] There remain, however, a number of other arguments that may be advanced to support the proposition that the issuance of the production order in this context has impermissible extraterritorial effects.
- [42] The first is that the absence of a physical presence or a registered records office eliminates the possibility of serving the order within the jurisdiction. In my view, service and the extraterritorial effect of the order are different questions. It may well be that an order which is properly viewed as intraterritorial in its effect has to be served *ex juris*. Service has to do with the provision of notice, not with the effect of the order. In short, I do not think the fact that the order needs to be served outside the jurisdiction demonstrates that such an order is extraterritorial in its effect. One has to analyze the effect of the order directly to reach that conclusion, rather than the mode of service.
- [43] The next issue arises as a result of the similarity between a production order and a search warrant. It is evident that a Canadian court could not issue a warrant authorizing government officials to enter and search Craigslist's offices in California and seize property located there. Typically, but not always, a search warrant involves authorizing a named person, a state agent, to enter a specified place to search for and seize specified property. Prior judicial authorization is required to protect a target's reasonable expectation of privacy. The focus of the search involves acting in a specified place and hence an overseas search necessarily would involve violating the sovereignty of another country because it involves the extraterritorial exercise of enforcement jurisdiction.
- [44] Should a production order be regarded as just a form of search warrant so that their extraterritorial characteristics are similar? Since *R. v. Spencer*, 2014 SCC 43, it has been clear that the release of user information such as Craigslist's posting records requires prior judicial authorization because it is a form of search leading to the disclosure of information in which a person may have a reasonable expectation of privacy. The argument assimilating production orders and search warrants is that a production order of the type sought here is in the nature of a search executed outside the country in which a foreign private entity is, in substance, conscripted as a state agent to execute the search. The search occurs where the records are located because that is where the private information is found. It is conducted

by a party who has no physical presence in Canada and who cannot act in or from Canada to retrieve the documents. Indeed, the presence of the person in Canada does not avoid the extraterritorial effect of the production order, since it is implemented where the documents are located. Necessarily the order engages enforcement jurisdiction. As such it involves enforcement outside Canada in a manner that invades the territorial sovereignty of another country, contrary to customary rules of international law which form part of the law of Canada. In the absence of a clear indication that Parliament intended the section to apply extraterritorially, which is not the case here, the section authorizing the issuance of production orders cannot be interpreted to confer jurisdiction to issue one on the facts of this case. The principles underlying this argument have been helpfully articulated by Robert Currie in "Cross-Border Evidence Gathering in Transnational Criminal Investigation: Is the Microsoft Ireland Case the 'Next Frontier'?" (2016) 54 Can YB Int'l Law 63.

- [45] I recognize the force of this argument. Indeed, an argument much like this was accepted by the United States Court of Appeals for the Second Circuit in *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016). In that case Microsoft, although a person actually present in the United States, was not required to produce emails that were stored on a server in Ireland. I note that the Supreme Court of the United States has agreed to hear an appeal from this case.
- [46] There is, however, another way of looking at the issue, which in my view accords with Parliament's legislative intent to modernize police powers to investigate Canadian crime that is increasingly occurring through the Internet or about which evidence exists in an international electronic world. On this view of the matter, the order goes against a person present in the jurisdiction and in effect commands that person to do certain things, namely to retrieve documents. It does not directly involve entry into a place by state agents who are authorized to search and seize property. The location of the documents is irrelevant to the essence of the order. What matters in terms of the invasion of privacy is the disclosure or production of the documents rather than access to them where they are stored. The impact on the privacy interest is not specific to a place and the existence of that interest has no direct relevance to whether the order has an extraterritorial reach. Indeed, the Supreme Court of Canada in *R. v. Marakah*, 2017 SCC 59, may be seen as having deemphasized the importance of physical place or geographic location in relation to searches with the majority placing emphasis on what is searched. In that case the search was treated as being of a text conversation, not necessarily the phone on which it was memorialized. Similarly, the private information produced through the production order is information generated in relation to postings that happen to be in British Columbia, although memorialized elsewhere. The territorial dimension of place in both contexts may be seen as being significantly attenuated.
- [47] If the production order is viewed through this lens, it may be seen as more akin to a subpoena requiring a person within the jurisdiction to make disclosure of documents in a certain place. It is I think because the legislative draftsman viewed the matter in this way

that Mr. Macklin was able to inform Parliament and the Legislative Summary recorded, that the section would be effective, in the Internet age, to deal with the problem of records being stored outside the country. On this view of the matter, Parliament did not need to turn its mind to whether the order was having an extraterritorial effect, precisely because the order's effect was on the person rather than on the documents, wherever they were located. Any extraterritorial aspect to the order is secondary to an order taking effect domestically.

- [48] I take some comfort in approaching the matter in this way, since there appears to be a well-established line of appellate authority in the United States that recognizes the intraterritorial validity of subpoenas directed to persons in the United States over whom there is personal jurisdiction to disclose documents in the United States even where they must be obtained from overseas. In this respect, see for example: *Marc Rich & Co. v. United States*, 707 F.2d 663, at 668-670 (2d Cir. 1983), cert. denied, 463 U.S. 1215 (1983); *United States v. Bank of Nova Scotia*, 740 F.2d 817, at 820-821, 826-829 (11th Cir. 1984); *In re Sealed Case*, 832 F.2d 1268, at 1270, 1283-1284 (D.C. Cir. 1987); *Securities and Exchange Commission v. Minas de Artemisa, S. A.*, 150 F.2d 215, at 216-218 (9th Cir. 1945); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, at 412 (3d Cir. 2004). Moreover, this view of the matter was taken by certain of the dissenting justices on the petition for a rehearing of the Microsoft Ireland case itself.
- [49] I take additional comfort from the fact that if a substantial body of United States authority does not treat a subpoena issued to a person in the United States to disclose documents in the United States although retrieved from another country as an extraterritorial exercise of jurisdiction, then the suggestion that the interpretation of the section I offer is inconsistent with principles of international comity tends to lose force. If the authority to which I have referred does represent settled judicial opinion, it seems unlikely that a court in the United States would regard this order directed to Craigslist as a violation of sovereignty.
- [50] I turn now to two further issues. The first has to do with difficulties of enforcement. The second with the relevance of the Mutual Legal Assistance Treaty process ("MLAT").
- [51] While I recognize that there may be difficulties in enforcing a production order in circumstances such as this, I do not think those difficulties deprive the court of jurisdiction to issue the order. In my view, the comments of Justice Groberman in *Equustek* are apt:
- [85] Once it is accepted that a court has in personam jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to it making an order.

* * *

- [97] Apart from the issue of comity, Google also argues that the order that was made is unenforceable. It takes umbrage with the trial judge's suggestion (made at paras. 96 and 97 of her judgment) that Google might be prevented from using the courts of British Columbia as a penalty for non-compliance with the order.

- [98] I tend to agree with Google that barring it from access to the courts of the Province would be a draconian step, and not one that needs to be contemplated at this juncture. Given that Google does business in the Province, however, British Columbia courts are entitled to expect that it will abide by their orders. It is also likely that, in the event of non-compliance, there will be consequences that can be visited on the company.
- [99] Google's arguments do not persuade me that there is either a jurisdictional or practical bar to the granting of an injunction of the sort pronounced by the chambers judge
- [52] In my view, problems of enforceability may often need to be considered when courts make discretionary decisions, since that issue is relevant to the exercise of its discretion. Those difficulties do not, however, deprive the court of jurisdiction to make the order.
- [53] Finally, I do not accept that proposition that the existence of alternative investigative tools available through the MLAT demonstrates that the court lacks jurisdiction to make a production order. Certainly, there are many aspects of investigation into criminal activity that have international elements and frequently investigation may be possible only through international cooperation if territorial sovereignty is to be respected. The MLAT thus reflects the views of sovereign states about the legitimate scope of criminal investigation with extraterritorial elements. It may also be that MLAT would, on these facts, provide an alternative means of gathering evidence. But even that conclusion is by no means certain if a production order is treated as a search where the documents are located, because the record does not disclose where the information is stored. On the Court of Appeals' approach to the Microsoft Ireland issue, it may be that the California court would not have jurisdiction to make the order if Craigslist stored the information outside the United States.
- [54] The more important point, however, is that the existence of the MLAT does not answer the question of whether the court has the jurisdiction to issue the production order, even if its terms give some indication of what states might regard as extraterritorial investigation. Since I have concluded that there is jurisdiction to issue the production order because doing so is not an impermissible extraterritorial exercise of enforcement jurisdiction, I need say no more about the MLAT.
- [55] The issue before this Court has not been authoritatively settled in Canada, it would appear. The closest applicable authority is *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348. In that case, information identifying Canadian eBay sellers was stored as electronic records on servers in the United States owned by eBay Inc. ("eBay U.S."), but was compiled and maintained by a Swiss corporation that was a wholly owned subsidiary of eBay U.S. An application was made under s. 231.2 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), for production of the customer information. The issue before the court was whether the information was "foreign-based" because it was "available or located outside Canada" and should, therefore, fall under s. 231.6, despite the fact that the appellants, Canadian corporations, had been authorized to access it in Canada for use in their business, but did not download it to their computers.

- [56] The facts and the section at issue in the eBay case are different from this case, but the Court had little apparent difficulty in concluding that information stored on servers outside Canada was not foreign-based information since it was readily available to the appellants within Canada who were authorized to access it. Some of what the Court said is however relevant to the issues before us. Hence:
- [17] In reaching this conclusion, Justice Hughes observed that, since electronically stored information relating to PowerSellers was readily, lawfully, and instantaneously available in a variety of places to eBay entities, including to the appellants in Canada, the location of the servers on which it was stored was irrelevant (2007 FC 930 (CanLII), at para. 23). He relied on judicial descriptions of telecommunications from a foreign State to Canada, and vice versa, as being "both here and there" (see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (CanLII), [2004] 2 S.C.R. 427, at para. 59 (SOCAN))

* * *

- [40] Counsel for the appellants says that, as a matter of law, information in electronic form stored on a server is "located" where the server is situated and, until downloaded or printed, is not located anywhere else. He argues that the fact that information is "available" in another country to those who have access to the server through their computers is not sufficient to make it "located" in that other country for the purpose of section 231.6.
- [42] I agree that neither SOCAN nor *Libman v. The Queen*, [1985] 2 S.C.R. 178, another telecommunications case, is directly analogous to the question in issue here. More important, however, SOCAN instructs courts to interpret legislation in light of contemporary technology and, if necessary, to "transpose" its terms to take into account the changed technological environment in which it is to be applied.
- [48] This is because, with the click of a mouse, the appellants make the information appear on the screens on their desks in Toronto and Vancouver, or anywhere else in Canada. It is as easily accessible as documents in their filing cabinets in their Canadian offices. Hence, it makes no sense in my view to insist that information stored on servers outside Canada is as a matter of law located outside Canada for the purpose of section 231.6 because it has not been downloaded. Who, after all, goes to the site of servers in order to read the information stored on them?
- [49] Nor is the extraterritorial application of the Act a significant issue on the present facts. For example, the agreements with eBay Canada expressly provide that they may disclose confidential "eBay System Information" (which the appellants say includes information about PowerSellers) which "is required to be disclosed by order of any court": appeal book, Vol. II, at pages 295-296. Nor does the requirement oblige a person outside Canada to do anything.

- [57] I accept that legislation must be interpreted in light of contemporary technology and take into account the changed technological environment to which it must be applied. That imperative applies in the context of criminal investigation in the digital world and colours the analysis of whether a particular investigative technique has impermissible extraterritorial effects. The reality is that criminal activity involving such matters as human trafficking, child pornography, money laundering, commercial fraud and international terrorism conducted by means of electronic communication can be insulated from investigation if a production order is viewed as being implemented where the data is stored and its issuance is, therefore, impermissibly extraterritorial. Such a result is an open invitation to criminals to hide their activity targeting this jurisdiction by ensuring that information about their communications is stored in another. The MLAT may offer little by way of viable alternative investigative techniques for several reasons. Many countries are not parties to a treaty with Canada. Depending on local law, even if a country is a party, the information may be inaccessible if it is stored outside that country in a non-participating jurisdiction. It also seems reasonably clear that the MLAT provides a slow and uncertain mechanism of investigation in an era when information moves instantaneously and may be stored only for a short time.
- [58] Additionally, I do not think that a principled and effective system of legitimate investigation based on international norms should be contingent on business decisions taken by service providers in their own private interest. It is notorious that service providers move customer information around the world frequently, no doubt for entirely legitimate commercial reasons, and it seems frequently break up data storing it in a variety of different places. The result may be the effective, if unintended, frustration of investigation into serious criminal conduct.
- [59] I do not think that Parliament, when it turned its mind to the ability of production orders to reach foreign stored information, intended a result that would frustrate legitimate investigation, particularly where that investigation requires prior judicial authorization to protect privacy interests.

Disposition

- [60] In the result, I would allow the appeal and remit the application for a production order to the British Columbia Provincial Court for reconsideration in accordance with these reasons.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Hunter"

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