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# Case Comment: British Columbia (Attorney General) v. Brecknell

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In a day and age where a large portion of both innocent and criminal communications travel across the border and then reside on servers outside of the country, many Canadian police and prosecutors were understandably excited by the British Columbia Court of Appeal's decision in *Brecknell*.[1] This case concludes that a Canadian court can order an entity that is only "virtually present" to produce records pursuant to a *Criminal Code*[2] production order.

While it is a case that deals with a compelling issue faced by Canadian law enforcement in an environment where hundreds of such orders are issued naming US companies and are generally followed by them,[3] the decision is wrongly decided for a number of reasons. The British Columbia Court of Appeal erred in determining that a legal person who solely has a "virtual presence" in Canada is, in law, "present in Canada" for the purposes of the *Criminal Code*. In addition, the Court of Appeal misapplied the existing authorities on domestic and international law to determine that the *Criminal Code* has extraterritorial effect. Finally, an *ex parte* appeal that departed significantly from our adversarial system should be of questionable precedential value.

The procedural history of *Brecknell* is interesting and informative. The RCMP were looking for data from Craigslist, a US company. Craigslist advised the police that they would provide the requested data if the RCMP obtained a production order.[4] With this statement, Craigslist essentially said they would

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1 *British Columbia (Attorney General) v. Brecknell,* 2018 BCCA 5, 2018 CarswellBC 15 (B.C. C.A.) [*Brecknell*].

2 R.S.C. 1985, c. C-46.

3 For example, between January and June 2019 Twitter received 45 Canadian legal demands for user information: Twitter, "Transparency Report" (accessed 18 March 2020), online: https://transparency.twitter.com/en/countries/ca.html. During the same period, Google received 343 such demands: Google, "Transparency Report" (accessed 18 March 2020), online: https://transparencyreport.google.com/user-data/overview?hl=en&user_requests_report_period=series:requests,accounts;authority:CA;time:&lu=user_requests_report_period, and Facebook received 697: Facebook, "Transparency" (accessed 18 March 2020), online: https://transparency.facebook.com/government-data-requests/country/CA. These voluntary "transparency reports" do not break down whether the demand was via a production order, made in exigent circumstances or using some other form of process.

4 *Brecknell*, *supra* note 1 at para. 13.

voluntarily comply with a Canadian order, rendering much of the analysis in *Brecknell* superfluous *obiter*. The RCMP first applied to a provincial justice for a production order naming Craigslist. They were rejected and told to provide the court with evidence that the company has an office in British Columbia or some other authority to support their application against a US company. Instead of re-applying to the same judge, the RCMP made a new application to the provincial court arguing that Equustek *(B.C.C.A.)*[5] meant that the court had jurisdiction to grant the order. The Provincial Court refused the order, noting that *Equustek (B.C.C.A.)* was a civil case, and that jurisdiction in that case was granted by operation of a provincial statute.[6] The Crown then sought judicial review of the denial, unopposed and *ex parte*, to the Supreme Court of British Columbia. The Supreme Court dismissed the application and the Crown appealed again to the British Columbia Court of Appeal. By that time, the application for the production order had been refused three times by three different levels of court. Finally successful at the Court of Appeal, the Crown stopped appealing. Until the case hit the Court of Appeal and an *amicus* was appointed by the Court, all of the proceedings were *ex parte* and unopposed. Despite this case raising important jurisdictional and international law questions that the lower courts consistently answered against the Crown, there was nobody to seek leave from the Supreme Court of Canada to have the questions definitively answered. This raises some important procedural issues that are beyond the scope of this comment, but the Crown's ability to appeal and appeal unopposed until they get they answer they are looking for is inherently problematic.

## 1. CANADIAN LAW DOES NOT OPERATE EXTRATERRITORIALLY UNLESS PARLIAMENT SPECIFICALLY SAYS SO

In the *Brecknell* decision, the B.C. Court of Appeal acknowledges that it is settled law that Canadian statutes **do not have extraterritorial effect** unless Parliament specifically provides for it. Despite this, the Court of Appeal did not identify any signal from Parliament that it was intended to have effect outside of the country. From *Brecknell*:

> 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

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5 *Equustek Solutions Inc. v. Jack,* 2015 BCCA 265, 2015 CarswellBC 1590 (B.C. C.A.), affirmed *Google Inc. v. Equustek Solutions Inc.*, 2017 CarswellBC 1727, 2017 CarswellBC 1728 (S.C.C.) [*Equustek (B.C.C.A.)*].

6 Specifically, the court referred to the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

> 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.[7]

Despite correctly reciting the Supreme Court's conclusion in *R. v. Hape*,[8] the Court did not identify any manner in which Parliament indicated its intention that production orders operate extraterritorially. In fact, Justice Harris acknowledged that there is nothing in the production order provisions of the *Code* indicating any parliamentary intention towards extraterritoriality. It is a fundamental principle of Canadian law that Parliament has to expressly provide for extraterritoriality in a statute,[9] but that is absent. This concern is even more acute in the search and seizure context. The Court in *Hape* observed:

> The theoretical and practical impediments to extraterritorial application of the *Charter* can thus be seen more clearly where the s. 8 guarantee against unreasonable search and seizure is in issue than where the issue relates, as in the cases discussed above, to the right to counsel. Searches and seizures, because of their coerciveness and intrusiveness, are by nature vastly different from police interrogations. **The power to invade the private sphere of persons and property, and seize personal items and information, is paradigmatic of state sovereignty. These actions can be authorized only by the territorial state.** From a theoretical standpoint, the *Charter* cannot be applied, because its application would necessarily entail an exercise of the enforcement jurisdiction that lies at the heart of territoriality. **As a result of the principles of sovereign equality, non-intervention and comity, Canadian law and standards cannot apply to searches and seizures conducted in another state's territory.**[10]

Parliament does, from time to time, pass laws that have extraterritorial effect: Parliament amended the *Canadian Security Intelligence Service Act* with Bill C-44 in 2015 to extend CSIS's jurisdiction to investigate and collect information outside of Canada.[11] Similarly, Parliament added provisions to the *Income Tax Act* dealing with foreign-based information and a limited piercing of the corporate veil to obtain foreign-based information, as was seen and applied in *eBay Canada Ltd. v. Minister of National Revenue*.[12] Parliament has even gone so far as to amend the *Criminal Code* to make sure that if a Canadian on the international space station murders another person, that is deemed to take place

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7 *Brecknell*, *supra* note 1 at para. 23.

8 *R. v. Hape*, 2007 SCC 26, 2007 CarswellOnt 3563 (S.C.C.) [*Hape*].

9 *Ibid* at para. 53.

10 *Ibid* at para. 87 (emphasis added).

11 Bill C-44, *An Act to amend the Canadian Security Intelligence Service Act and other Acts*, 2d Sess., 45th Parl, 2015, passed as S.C. 2018, c. 9.

12 *eBay Canada Ltd. v. Minister of National Revenue*, 2008 FCA 348, 2008 CarswellNat 3980 (F.C.A.) [*eBay Canada*].

in Canada so the accused can be brought before a Canadian court.[13] Presumably crimes by Canadian astronauts are rare, but Parliament turned its mind to the possibility. It is hard to imagine that Parliament was not aware of the possibility of relevant evidence being held outside of Canada by a non-Canadian company. Even if Parliament thought of this, it must be stated expressly to give effect to this impulse.

The only mention of territoriality included by Parliament with respect to production orders is at s. 487.019(2) in the *Criminal Code*, which only speaks to provinces within Canada:

> 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.

The only mention of territoriality is confined to Canada, which leads to the conclusion that Parliament did **not** grant world-wide effect.[14]

The *Brecknell* Court clearly finds the law's emphasis on territorial location of things (including data) to be impractical in this digital age when data can move easily across borders and can exist in multiple places at the same time, where the nature of the information is of much greater importance than its location.[15] The Court later emphasises that legitimate investigations can be thwarted by the movement of data, either malevolently at the behest of criminals or innocently as part of the operations of service providers.[16] As a policy proposition this is fine,

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[13] See *Criminal Code*, *supra* note 2 at s. 7(2.3): 7(2.3) Despite anything in this Act or any other Act, a Canadian crew member who, during a space flight, commits an act or omission outside Canada that if committed in Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission is committed(a) on, or in relation to, a flight element of the Space Station; or(b) on any means of transportation to or from the Space Station.

[14] Canada could have followed the lead of the United Kingdom when it enacted the *Data Retention and Investigatory Powers Act 2014* (U.K.), c. 27, which amended the *Regulation of Investigatory Powers Act 2000* (U.K.), c. 23, to **expressly** provide for investigatory court orders with extraterritorial effect. Here is what was added to the warrant provisions of that Act:(2A) A copy of a warrant may be served under subsection (2) on a person outside the United Kingdom (and may relate to conduct outside the United Kingdom).Our *Criminal Code* does not contain any language that is akin to the language added to the *Regulation of Investigatory Powers Act 2000* (UK) related to search and seizure powers.Similarly, the United States Congress amended *the Stored Communications Act*, 18 U.S.C. § 2701-2712 (2012) [*S.C.A.*], via the *CLOUD Act*, being Division V of the *Consolidated Appropriations Act, 2018*, Pub. L. No. 115-141, to include the following provision: §2713 A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, **regardless of whether such communication, record, or other information is located within or outside of the United States**. [emphasis added]

[15] *Brecknell*, *supra* note 1 at para. 46.

[16] *Ibid* at para. 57.

but international law of jurisdiction is inherently territorial in nature. The law related to the exercise of criminal jurisdiction is even more territorial. States do treat data as being territorially located and are resistant to intrusions upon their territorial sovereignty by way of evidence-gathering by other states. One may, at one point, have a situation where data is both "here and there,"[17] but in this case the data was entirely "there" and not "here." If we are to interpret statutes so as to avoid breaches of international law (which we must do), close attention needs to be paid to the international law on point.

The court in *Brecknell* relied on *eBay Canada*, in which the Federal Court of Appeal took a similar policy-based approach but failed to deal with the international law on point in any depth (presumably because it was not raised). It is important that the provision of the *Income Tax Act* at issue in the *eBay Canada* case specifically provides for demands that can be served on non-residents of Canada provided they are carrying on business in Canada: ". . . Minister may . . . require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document."[18]

As required by the canons of statutory interpretation, Parliament had expressly granted the Minister of National Revenue the power to make demands on non-residents that have extraterritorial effect. That is not the case with the production order powers under the *Criminal Code*. It is also notable that the organizations subject to the order in the *eBay Canada* case, namely eBay Canada Limited and eBay CS Vancouver Inc., were physically present in Canada and actually had custody or control of the data. In fact, they used the data in Canada in the course of their business in Canada.

It appears that the Court in *Brecknell* dodged the question by creating the proposition that the production order was not really extraterritorial because Craigslist was effectively "present in Canada" by being virtually present in the province. "Virtual presence" is an invention of the Court of Appeal. The Supreme Court of Canada in *Van Breda* raised the caution flag about this sort of assertion:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. **The notion of carrying on business requires some form**

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[17] See Society of Composers, Authors Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, 2004 CarswellNat 1919 (S.C.C.) at paras. 58-59, and quoted in *eBay Canada*, *supra* note 12 at para. 17.

[18] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) at s. 231.6(2), cited in *eBay Canada*, *supra* note 12 at para 28.

> **of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction.** But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.[19]

This was recently followed by the Ontario Court of Appeal in *Sgromo v. Scott*, also in the civil context:

> [8] Mr. Sgromo made the same submission before the motion judge in both the Bestway and Polygroup actions. In each case the motion judge rejected his submission. In the Polygroup action the motion judge wrote at paras. 33-34:
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> > In *Van Breda*, at para. 87, the Supreme Court of Canada stated that caution must be exercised in considering whether an entity is carrying on business in the jurisdiction, to avoid what would amount to assuming universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. "The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office or regularly visiting the territory of the particular jurisdiction."
>
> **Although retailers in Ontario may carry Polygroup products, and although Polygroup therefore did business with Ontario retailers, this does not mean that Polygroup carried on business in Ontario. For Polygroup to carry on business in Ontario, it would require a finding that Polygroup had some form of actual presence in the Province.**
>
> [9] And in the Bestway action the same motion judge wrote at paras. 67-68:
>
> > Mr. Sgromo submits that the Bestway companies are carrying on business in Ontario because their products are sold at retailers in Ontario. In *Van Breda*, at para. 87, the Supreme Court of Canada stated that caution must be exercised in considering whether an entity is carrying on business in the jurisdiction, to avoid what would amount to assuming universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. "The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office or regularly visiting the territory of the particular jurisdiction."

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[19] *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 2012 CarswellOnt 4268 (S.C.C.) at para. 87 (emphasis added).

> **There is no evidence that the Bestway companies had such an actual presence in Ontario, even if their products were sold in the province by third party retailers, as alleged by Mr. Sgromo.**
>
> [10] We agree with each of these passages. We add that in *Van Breda*, at para. 87, LeBel J. emphasized that even active advertising in Ontario would not be enough to establish that a defendant was carrying on business here.[20] [emphasis added]

Questions related to jurisdiction under international criminal law are much stricter than under private international law.[21] But even under the flexible civil rules, a "virtual presence" is insufficient to ground jurisdiction.

## 2. ENFORCEMENT DOES ACTUALLY MATTER

The *Brecknell* court also makes the mistake of setting aside and underplaying the inability to enforce any resulting order against Craigslist:

> [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:
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> [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.
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> . . .
>
> [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.
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> [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.

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[20] *Sgromo v. Scott*, 2018 ONCA 5, 2018 CarswellOnt 143 (Ont. C.A.) at paras. 8-10 (emphasis added).

[21] Compare, for example, *Equustek* to *Hape*.

> [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.[22]

*Equustek* was a civil injunction application where jurisdiction was specifically granted by the Court Jurisdiction and Proceedings Transfer Act,[23] not an order under the *Criminal Code*. When the case came before the Supreme Court of Canada,[24] Justice Abella repeatedly referred to *Mareva* injunctions and *Norwich* orders which have extraterritorial effects (both of which are civil tools), but never once referred to criminal investigation tools.[25] Criminal and civil law are completely different beasts, as far as any extension beyond borders is concerned.

In a case where Craigslist agreed to comply with a production order (presumably with an understanding from the police about the nature of the data being sought), it is very easy to disregard enforcement of the order. Enforcement in such a case becomes entirely academic and one can conclude that Craigslist essentially acceded to the court's jurisdiction.

It is a mistake to conflate and confuse private international law with public international law, particularly as it pertains to the international law of criminal jurisdiction. In the criminal law context, a court cannot simply say it has jurisdiction over the activity (or even the person) so that is sufficient to issue an order extending outside of the territory of Canada. The issuance of the order is, in and of itself, an exercise of enforcement jurisdiction. Projecting that outside Canada — absent clear authority from Parliament — is contrary to international law and Canadian domestic law.[26] The Supreme Court of Canada was clear in *Hape* that enforcement jurisdiction is essential for the extraterritorial application of Canadian law unless the legislature provides otherwise: ". . . Canadian law cannot be enforced in another state's territory without that state's consent."[27]

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22 *Equustek (B.C.C.A.)*, *supra* note 5 at paras. 51 — 52.

23 *Supra* note 6.

24 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, 2017 CarswellBC 1727 (S.C.C.) [*Equustek (S.C.C.)*].

25 It should be noted that the Attorney General of Ontario, in its intervention in *Equustek (S.C.C.)*, invited the Supreme Court to consider and even rule upon whether criminal investigation tools can extend outside of Canada, but the Court declined to comment on this: *ibid* (Factum), online: < https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36602/FM075_Intervener_Attorney-General-of-Ontario.pdf > .

26 See Robert J. Currie, "Cross-Border Evidence Gathering in Transnational Criminal Investigation: Is the *Microsoft Ireland* Case the 'Next Frontier'?" (2017) 54 Can YB Int'l L 63, online: < https://doi.org/10.1017/cyl.2017.7 > .

27 *Hape*, *supra* note 8 at para. 85.

Justice Noël applied these well-established principles in *X (Re)* to deny CSIS a warrant with extraterritorial effects, and observed:

> [139] Lastly, in *Hape*, LeBel J set out the different types of jurisdiction applicable to the question of extraterritoriality of laws. Particularly important to the case at hand, is the concept of enforcement jurisdiction, which is described as the State's power to use coercive means to uphold and give effect to its domestic laws. Under the umbrella of enforcement jurisdiction, is found the investigative jurisdiction, which refers to the power of law enforcement to investigate matters as to give effect and uphold a state's domestic law (*Hape* at para 58). **In customary international law states may not exercise their enforcement jurisdiction in any form on the territory of another state unless based on an international custom or convention. If a state does not obtain consent for exercising its powers on a foreign states territory, such an act would constitute a violation of territorial sovereignty and international law.** Therefore, any extraterritorial application of a domestic law in a foreign country, without permission or without ground in international law, can be seen as a violation of territorial sovereignty. As stated by LeBel J in *Hape*:
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> 65 The Permanent Court of International Justice stated in the *Lotus* case, at pp. 18—19, that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". See also *Cook*, at para. 131. According to the decision in the *Lotus* case, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of individual states. While extraterritorial jurisdiction [. . .] exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. **According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously** (see the opinion of the International Court of Justice in the *Case concerning Military and Paramilitary Activities In and Against Nicaragua*, at p. 108). Consequently, it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law. See Brownlie, at p. 306; *Oppenheim's International Law*, at p. 463. This principle of consent is central to assertions of extraterritorial enforcement jurisdiction.[28]

Of further assistance is the Supreme Court of Canada decision in *R. v. Cook*, referred to by Justice Noël. In that case, it was clearly stated that one state cannot exercise its enforcement jurisdiction on the territory of another state.:

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[28] *X (Re)*, 2018 FC 738, 2018 CarswellNat 4748 (F.C.) at para. 139, affirmed 2018 CarswellNat 6763, 2018 CarswellNat 8970 (F.C.A.) (emphasis added).

> 26 . . . In essence, the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state. The Permanent Court of International Justice in The Case of the S.S. "Lotus" (1927), P.C.I.J., Ser. A, No. 10, at pp. 18-19, articulated this principle as follows:
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> > **Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.** In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
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> . . .
>
> . . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.
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> 27 From the general principle stated in The S.S. "Lotus" that the basis of a State's jurisdictional competence is territorial, it follows that an attempt to apply domestic law beyond Canada's borders results in "extraterritoriality", defined by James R. Fox, in the *Dictionary of International and Comparative Law* (2nd ed. 1997), at p. 106, as the "operation of laws upon persons or rights existing beyond the territorial limits of the state enacting such laws". The respondent argues that, in accordance with the prohibition under international law against the extraterritorial application of domestic laws, the *Charter* cannot apply at all beyond Canada's territorial boundaries. In our view, although territory is clearly a critical element in determining the scope of a state's jurisdiction, territory alone is not determinative of jurisdictional competence under international law. There are some circumstances where the application of Canadian law to an undertaking by Canadian law enforcement authorities on foreign territory can be grounded on other jurisdictional principles, and will not result in an objectionable interference with the exercise of foreign jurisdiction.[29]

A production order is an extension of enforcement jurisdiction. Absent the provision that it is an offence not to comply, it is merely a request. To paraphrase the *SS Lotus* decision quoted in *Cook*, a production order is an exercise of power. To adopt the definition of "extraterritoriality" used in *Cook*, a production order

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[29] *R. v. Cook*, 1998 CarswellBC 2001, [1998] 2 S.C.R. 597 (S.C.C.). The majority concluded that the *Charter* applies to the actions of Canadian detectives in interviewing the accused in the United States and the application of the *Charter* in such cases does not interfere with the sovereign authority of the U.S.

is an operation of Canadian laws upon persons or rights existing beyond the territorial limits of Canada. The offense for failing to comply is the *sine qua non* of the order and cannot be detached from the order itself. There is no principled manner in which the *Criminal Code* can be read to permit a Canadian court to issue an order with such extraterritorial effects.

To the author's knowledge, the only other time this question has led to a reported decision is that written by Judge Gorman of the Newfoundland and Labrador Provincial Court. Judge Gorman refused to issue a production order naming Facebook, concluding that he lacked jurisdiction to do so and that *Brecknell* was wrongly-decided.[30]

## 3. THE IMPACT OUTSIDE OF CANADA NEEDS TO BE CONSIDERED

One important issue that did not arise before any level of court in *Brecknell*, but will likely come up if *Brecknell* is applied in the future is the fact that American companies are often prohibited by the domestic law from complying with foreign court orders.

American tech companies, from whom Canadian law enforcement often attempt to obtain evidence, are US residents. It is axiomatic that a United States resident is required to comply with United States law. Of particular interest in this context, but never mentioned in the *Brecknell* decision, is the *Stored Communications Act*,[31] which regulates the circumstances under which an "electronic communications service provider" can disclose information related to its account-holders.[32]

In general terms, the *S.C.A.* distinguishes between two categories of information: "content" information and "non-content" information. Content information would be the contents of a communication, such as an email, a text message, or an instant message. Non-content information would be information such as basic subscriber information, a customer's name, backup email address, and some metadata that does not reveal the substance of a communication.

If a U.S. resident were to provide the **content** of communications to Canadian police pursuant to a criminal code production order, it would be in violation of US law.[33]

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[30] In the Matter of an application to obtain a Production Order pursuant to section 487.014 of the *Criminal Code of Canada, Re,* 2018 CarswellNfld 19 (N.L. Prov. Ct.).

[31] *S.C.A., supra* note 14.

[32] For a more learned overview of the *S.C.A.* see: Kerr, Orin S., "A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending it" (2004) 72 George Washington L. Rev. 1208.

[33] Specifically, 18 U.S.C. §2702, where none of the exceptions contemplate non-U.S. court orders except those within the ambit of a CLOUD Act executive agreement: (a) Prohibitions.—Except as provided in subsection (b) or (c)—(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity **the contents of a communication** while in electronic storage by that

The impact of the *S.C.A.* on U.S. providers was never brought up in *Brecknell*. As Craigslist had said they would provide the data if the police provided a production order, it presumably did not prohibit the disclosure of the data being sought by the RCMP.[34] There was no consideration of the impact of the order on the other side of the border.

### *3.1 A Canadian production order naming a non-Canadian company offends comity*

A Canadian production order directed at a non-Canadian company offends comity and sovereignty. The United States has absolute sovereignty over what takes place within its territory and what searches can be carried out on its territory. No law of Canada can change that and while Parliament can pass laws that offend international law, it is clear from the language of the *Criminal Code* that the Parliament of Canada has not attempted to do so.

Despite this apparent impasse, there exists a pathway through which Canadian investigators can obtain information from the United States, which was negotiated between the two countries, and is used on a regular basis: the Mutual Legal Assistance Treaty between the United States and Canada.[35]

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service; and (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity **the contents of any communication** which is carried or maintained on that service—(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service; (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and (3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

[34] It appears that the information sought under the *Brecknell* production order was information respecting the identity of the person who posted certain advertisements on the Craigslist service, so the *Stored Communications Act* prohibitions respecting content would not have come into play. From *Brecknell*, *supra* note 1 at para. 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; andf. the record of the posting.

It is unclear what (f) refers to. If it is non-content information, it would not be subject to the content limitations in the *SCA*. This is in contrast to this instant case, where the *S.C.A.* specifically prohibits the disclosure of the content information, even if a Canadian court orders its disclosure.

[35] *Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, 18 March 1985, Can TS 1990 No 19.

Canada would be offended if a foreign government were to order a Canadian company to hand over data in violation of Canadian privacy law. It would be equally offended if the order was made simply for the convenience of the foreign law enforcement when it could work with the Canadian government to obtain what it seeks.

The Supreme Court of Canada has clearly stated that one country can only extend its criminal investigations into another's territory on invitation. Mutual legal assistance is such an invitation — a common, negotiated exception — to the absolute sovereignty of nations. In *Zingre*, Justice Dickson wrote:

> As that great jurist, Chief Justice Marshall, observed in *Schooner Exchange* . . . the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.
>
> It is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed . . . or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.[36]

This is not unique to the United States. Canada also has "blocking statutes." An analogue may be the Foreign Extraterritorial Measures Act that permits the blocking of non-Canadian orders for the production of information.[37] Similarly, the Personal Information International Disclosure Protection Act prohibits a public body in Nova Scotia or a service provider of such a public body from disclosing "personal information" in response to a "foreign demand for disclosure."[38] Canadian sovereignty would be offended if a foreign tribunal were to penalize a Canadian entity for following these laws.

### *3.2 Canadian courts consistently will not order anyone to violate another country's laws*

It is well settled in Canadian law that a court will not order anyone to violate another country's laws. This is the unambiguous conclusion made by the Ontario Court of Appeal in Frischke, where an Ontario court was asked to require a Panamanian employee of a Royal Bank affiliate to provide documents in violation of that country's laws. The Ontario Court of Appeal said that this is simply not done:

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[36] *R. v. Zingre,* 1981 CarswellMan 142, [1981] 2 S.C.R. 392 (S.C.C.) at paras. 17-18, at 400 [S.C.R.].

[37] R.S.C. 1985, c. F-29.

[38] S.N.S. 2006, c. 3.

> An Ontario Court would not order a person here to break our laws, we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that state. We respect those laws. The principle is well recognized.[39]

Even exigency cannot justify such an order:

> . . . Certainly, urgency alone cannot create its own rules, in the face of established principles. We cannot speculate as to how the matter would be regarded in Panama. We note that there is a Court in that jurisdiction that has the power to authorize the production of the information requested, and perhaps an application should be made to that tribunal rather than circumvent its authority.[40]

This principle was more recently canvassed in *TD Bank, N.A. v. Lloyd's Underwriters*. In that case, the court wrote that comity is of particular importance with the United States:

> . . . Comity is a value that runs deep on both sides of our border and is the product of a very long, peaceful and cooperative history and common legal culture. The US is by no means the only jurisdiction to whom we ordinarily extend comity, but it can perhaps be considered to occupy a pre-eminent ranking in the list.[41]

## 4. MECHANISMS EXIST THAT WILL PERMIT ACCESS TO DATA CONSISTENT WITH CANADIAN, UNITED STATES AND INTERNATIONAL LAW

One country can only extend its policing powers into another state with the permission of that state. This is clear, as noted by the Supreme Court of Canada in *Hape*:

> ... However, in light of the foregoing discussion of the jurisdictional principles of customary international law, the prohibition on interference with the sovereignty and domestic affairs of other states, and this Court's jurisprudence, Canadian law can be enforced in another country **only with the consent of the host state**.[42]

Both Canada and the United States, through the *Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, have agreed to a mechanism that permits Canadian police to obtain data from U.S. companies in a manner that it consistent with Canadian and international law. This is a reciprocal arrangement based on mutuality and consent, which is a hallmark of international law.

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39 *Frischke v. Royal Bank*, 1977 CarswellOnt 281, 17 O.R. (2d) 388 (Ont. C.A.) at para. 26.

40 *Ibid* at para. 27.

41 *TD Bank, N.A. v. Lloyd's Underwriters*, 2016 ONSC 4188, 2016 CarswellOnt 10373 (Ont. S.C.J.) at para. 17, additional reasons 2017 CarswellOnt 5657 (Ont. S.C.J.).

42 *Hape*, *supra* note 8 at para. 68 (emphasis added).

Through official channels, and subject to approval of both the Canadian and American governments, Canadian legal demands can be converted to a U.S. court order, which satisfies the *S.C.A.* Until a *CLOUD Act* agreement is in place between the two countries for mutual recognition of such orders, the MLAT is the sole means by which the governments of both Canada and the United States have chosen to address cross-border evidence gathering.[43]

## 5. CONCLUSION

Despite the compelling policy arguments that Canadian courts should be able to issue orders that require service providers to disclose records related to offences involving Canadians that arise in Canada, the reality of both domestic and international law prevent Canadian courts from issuing such orders. Canada's parliament has unquestioned authority to create laws that violate international law and offend comity, but it has not done so. Furthermore, the notion of a "virtual presence" was a fabrication of the court that is contrary to existing principles of international law, both private and public.

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[43] The *CLOUD Act*, among other things, creates a regime in which the U.S. government can enter into executive agreements with other states with the effect that certain U.S. orders will be recognized in those other states and certain orders for the production of evidence will not encounter the same U.S. legal barriers under the *S.C.A.*