UNIFORM LAW CONFERENCE OF CANADA

CRIMINAL LAW SECTION

ENFORCEMENT OF EXTRA-PROVINCIAL SEARCH WARRANTS

REPORT OF THE WORKING GROUP

Victoria, British Columbia
August 11-15, 2013

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Background

Some investigators enforcing provincial/territorial legislation have been unable to seize the evidence necessary to prosecute a regulatory offence because the evidence is located in another jurisdiction. Without the legal authority to exercise a provincial/territorial warrant outside the jurisdiction where it was issued, the regulatory investigation can be thwarted. In practice some jurisdictions have experienced this impediment to a regulatory prosecution in the occupational health and safety, environmental or illegal tobacco context. This situation most frequently occurs when a corporation under investigation for a provincial regulatory offence holds relevant documents in a corporate office outside the investigating jurisdiction.

A resolution was adopted at the 2011 meeting of the ULCC criminal section recommending that a working group be struck to consider options to enable the enforcement of extra-provincial search warrants in the context of provincial/territorial regulatory investigations.

Through a series of conference calls a survey was prepared for all ULCC criminal section representatives to see if they or their regulatory prosecution colleagues were experiencing these problems and whether they were interested in trying to address the issue. The responses to the 2012 survey indicated that Alberta and British Columbia thought this issue was serious enough to warrant a look at solutions. Newfoundland also indicated it might be an issue.

A progress report was presented by the working group to the Criminal Section at the ULCC Annual Meeting in August 2012 in Whitehorse, Yukon Territories. At the ULCC meeting Quebec, British Columbia, Alberta, and Saskatchewan indicated that they wanted to have members on the working group. A special request was made by the prosecutor's office in Nova Scotia to the prosecutor's offices in the other Atlantic Provinces. As a result of that effort, Prince Edward Island and Newfoundland representatives have also joined the working group.

Working Group

The membership of the group has grown to include: Nadine Smillie, Chair (Department of Justice, Nova Scotia), Karen Anthony (Department of Justice, Nova Scotia), Peter Craig (Public Prosecution Service, Nova Scotia), Cameron Gunn, (Office of the Attorney General, New Brunswick), Lisa Goulden (Department of Justice, PEI), Elaine Reid (Department of Justice, Newfoundland), Earl Fruchtman (Department of Justice, Ontario), Colleen McDuff (Department of Justice, Manitoba), Lane Wiegers (Ministry of Justice, Saskatchewan), and Monty Carstairs (Department of Justice, British Columbia). Quebec and Alberta have identified contact people to provide feedback on working group recommendations.

Activities

Following the results of the 2012 survey, the continued endorsement of the ULCC criminal section in 2012, and the growth in the membership of the working group, the members concluded that there was sufficient National interest in this project. The working group began to look for options with an ultimate goal of finding a practical solution to this problem. One potential solution is the development of coordinated reciprocal legislation among provinces and territories which would permit the execution of a search warrant issued in another jurisdiction.

The working group held conference calls on possible solutions to this issue. They considered exploring the possibility of developing a model for a uniform act. Members of the working group discussed the legislative frameworks for regulatory offences which exist within their jurisdictions. The working group discovered that each jurisdiction has its own regulatory enforcement scheme. The members also discussed what options might be available to address the practical problem faced by investigators when relevant evidence relating to a regulatory offence is located outside of the jurisdiction and therefore outside of their reach. The members identified two possible concerns that might arise if regulatory search warrants could be executed in other jurisdictions:

1. A receiving jurisdiction may not want to enforce certain laws from another jurisdiction.

2. Who would be the appropriate party to execute an extra-provincial search warrant; the enforcement officer from the initiating jurisdiction or some other party?

Related Developments

In the Fall of 2012, the Nova Scotia Legislature passed an Act to amend the *Summary Proceedings Act*. A brief introduction to those amendments is attached as Schedule "A" and a copy of Chapter 46 of the Acts of 2012 is attached as Schedule "B". These amendments authorize the recognition of a search warrant originating from a designated jurisdiction. Designated jurisdictions can be prescribed by regulation. In practice a jurisdiction could become a designated jurisdiction if it entered into an agreement with Nova Scotia to reciprocate the recognition of a Nova Scotia initiated search warrant. The end result is the reciprocal recognition of both jurisdictions' search warrants. The designated province could make a request to the Attorney General for Nova Scotia to bring an *ex parte* application on its behalf to a Nova Scotia justice. Once a search warrant has been issued following the process set out in the reciprocating agreement between the jurisdictions and using the personnel agreed to, the search warrant can be executed in Nova Scotia. The agreement between the jurisdictions would cover more of the details on how an extra-provincial search warrant could be obtained and executed. Questions such as what types of matters would be considered by the receiving Attorney General for an

extra-provincial search warrant; who could execute the warrant; and which parties could assist in the execution; could also be covered in the agreement. If personnel might move between the jurisdictions, the agreement could ensure that there is appropriate oversight and accountability in place for those individuals. If items are seized pursuant to a search warrant there is a requirement to report to a justice in Nova Scotia.

Analysis of Options

After Nova Scotia amended the *Summary Proceedings Act*, the members of the working group discussed whether the types of concerns identified by the group where addressed by this model. No other provincial or territorial jurisdiction in Canada currently recognizes the ability to reciprocally recognize extra-provincial search warrants.

Federally there are a couple of possible models. The *Criminal Code of Canada* in Section 487.03 authorizes the backing of a search warrant initiated in one jurisdiction by a justice in the receiving jurisdiction so that it can be executed in the receiving jurisdiction. Investigations under the Criminal Code are done by police officers as members of police agencies which have national agreements in place for the oversight of officers and mutual co-operation. All investigations conducted under a backed search warrant would be in relation to offences under the Criminal Code. Those aspects would differ from search warrants for provincial regulatory offences potentially conducted by various regulatory enforcement officers. The Federal government also has the *Mutual Legal Assistance in Criminal Matters Act (Canada).*Under that Act the Federal government can recognize a search warrant for a criminal matter initiated outside of the country. Again these investigations would be conducted by police officers and would be related to criminal offences. Unlike the Criminal Code extra-provincial recognition of search warrants, search warrants under the *Mutual Legal Assistance Act* may not involve offences which are mirrored in both jurisdictions and there may not be existing oversight and co-operation agreements in place for the officers who may be involved in the investigation from more than one jurisdiction.

The Nova Scotia model more closely resembles the model in the *Mutual Legal Assistance in Criminal Matters Act* as it requires an application to the Attorney General of the receiving jurisdiction who then steps in to act on behalf of the initiating jurisdiction to obtain a search warrant issued within the receiving jurisdiction. It was agreed that determining if the Nova Scotia initiative could be a model made more sense than the group trying to create another model from scratch. The working group concluded that it looked as though the discretion which the Attorney General had to refuse an application gave the receiving jurisdiction some control over what laws were enforced within their jurisdiction, and the requirement to be a designated jurisdiction in order to be recognized for an extra-jurisdictional warrant gave an opportunity for the jurisdictions to enter into a reciprocating agreement which would address how a search

warrant from outside the jurisdiction would be handled and who could execute it. The agreement could also address a mechanism required for oversight and accountability for the actions of an enforcement officer executing a search warrant within the territory of the other jurisdiction.

Analysis of the Nova Scotia Initiative

All of the members of the working group were asked to consider individually whether the Nova Scotia initiative could be a model for other jurisdictions by looking at their own jurisdiction. The questions asked were:

1. How, or if, the Nova Scotia *Summary Proceedings Act* amendments could be incorporated into the provincial offences legislative scheme for your jurisdiction? and

2. Identify any additional changes (to the Nova Scotia initiative) you think are necessary?

Responses were requested to be provided in writing prior to an April 9, 2013 teleconference. Several responses were provided in advance and further verbal responses were provided during the scheduled teleconference.

Overall there was general support for the use of the approach in the Nova Scotia initiative. Several jurisdictions have almost no general provincial offence legislation. They rely on a general adoption of the summary offence provisions of the *Criminal Code of Canada*, and some ticketing procedures. That approach usually is combined with specific investigative powers included in some of the enabling legislation for provincial offences, such as within the *Environment Act*. Therefore, in some jurisdiction in order for a model similar to the Nova Scotia initiative to be adopted there would need to first be a general legislative scheme for investigative powers for Provincial offences created first.

Some jurisdictions identified that because of differences in their provincial offences legislation some drafting would be required to achieve a similar result. It was thought that those matters were more appropriately left to the individual jurisdictions to work out. There were no absolute impediments identified by any jurisdiction. The working group members endorsed the Nova Scotia initiative as the recommended approach.

Recommendation and Next Steps

The working group recommends the Criminal Section of the ULCC endorse the creation of a joint working group to create a model for the enforcement of extra-provincial search warrants. The working group submits the Nova Scotia initiative provides a sound basis for this work.

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It was accepted by the working group that any model recommended would require some level of legislative or regulatory change to enable the recommended model to be implemented. The working group concluded the involvement of ULCC's civil section would be essential to that objective.

Request

The working group requests that the ULCC pass a resolution to:

1. receive this working group report;

2. endorse the working group's recommendation to discuss with the ULCC civil section the continuation of this work through the creation of a joint working group that would use the Nova Scotia initiative as a reference point for future work.

Schedule "A"

Nova Scotia Initiative on Extra-Provincial Search Warrants

Chapter 46 of the Acts of 2012, entitled *Interprovincial Investigative Authority Act* (amended), which amends the *Summary Proceedings Act*, Chapter 450 of the Revised Statutes, 1989. On December 6, 2012 these amendments came into effect. The intent is that where a "designated province" requires a search warrant within Nova Scotia an application can be made to the Attorney General for a search warrant to be issued under the *Summary Proceedings Act* which can then be executed within the Province of Nova Scotia. Before another province can be a "designated province" there must first be a reciprocal agreement between that jurisdiction and the Province of Nova Scotia. The reciprocal agreement would set out the details on how extra-provincial search warrants could be issued and executed and would require that both jurisdictions have provisions in their legislation over provincial offences to enable the recognition of the other jurisdiction for the issuance and execution of their search warrants.

Details on the proposed model

Nova Scotia's *Summary Proceedings Act* has a dual search warrant process. A general warrant under s. 2B(1) is available for any provincial offence under investigation. It allows for a basic search of a place and seizure of items. An investigative warrant under s. 2B(1A) is only available for enactments designated under the regulations. It allows for a search to include the creation of records of computer files, testing and the use of other investigative techniques or procedures.

A "designated province" would be designated in the regulations made under the *Summary Proceedings Act*. Those enactments for which investigation techniques might be required for a search warrant from a "designated Province" would also need to be designated in the regulations in order for an investigative warrant to be available. Most matters requiring extra-provincial execution of a search warrant are likely to require an investigative warrant in Nova Scotia.

Schedule "B"

***Interprovincial Investigative Authority Act* (amended),**

Chapter 46 of the Acts of 2012

An Act to Amend Chapter 450 of the Revised Statutes, 1989, the Summary Proceedings Act, Respecting Interprovincial Investigative Authority

Be it enacted by the Governor and Assembly as follows:

1 This Act may be cited as the Interprovincial Investigative Authority Act.

2 Chapter 450 of the Revised Statutes, 1989, the Summary Proceedings Act, is amended by adding immediately after Section 2G the following Sections:

2H (1) In this Section and Section 2J,

(a) "designated enactment" means an enactment of a designated province, which enactment is designated by the regulations;

(b) "designated province" means a province of Canada designated by the regulations.

(2) Where the Attorney General receives a request from a designated province to have a search or a seizure carried out in the Province in respect of an offence against an enactment of the designated province, the Attorney General may apply ex parte to a justice for a warrant.

(3) A justice to whom an application is made under subsection (2) and who is satisfied by information upon oath in the form prescribed in the regulations that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against an enactment of a designated province has been or is suspected to have been committed; or

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against an enactment of a designated province,

may at any time issue a search warrant under the justice's hand authorizing a peace officer

(c) to search the building, receptacle or place for any such thing and to seize it; and

(d) to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice in accordance with subsection (1) of Section 2I.

(4) A justice may issue an investigative warrant authorizing a peace officer to, subject to this Section, use any investigative technique or procedure or do any thing described in the warrant that would, where not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the justice is satisfied by information under oath that there are reasonable grounds to believe that an offence against a designated enactment has been, is being or will be committed and that information or other evidence concerning the offence will be obtained through the use of the technique or procedure or the doing of the thing;

(b) the justice is satisfied that it is in the best interest of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of the Legislature that would provide for a warrant or order authorizing the technique or procedure to be used or thing to be done.

(5) A justice who issues a warrant under subsection (3) or (4) may order any person to accompany and assist a peace officer in the execution of the warrant, if the Attorney General so requests.

(6) For the purpose of subsections (1B) to (11) and (13) of Section 2B and Sections 2C, 2D and 2G,

(a) a search warrant issued under subsection (3) is deemed to be a warrant issued under subsection (1) of Section 2B; and

(b) an investigative warrant issued under subsection (4) is deemed to be an investigative warrant issued under subsection (1A) of Section 2B.

(7) Where a written report is filed under subsection (11) of Section 2B, the clerk of the court with whom the written report is filed shall, as soon as reasonably possible, cause the report, together with the information on oath and the warrant to which it pertains, to be brought before a justice to be dealt with under Section 2J.

2I (1) Where a person has seized anything under a warrant issued under Section 2H or seized anything under Section 2D while executing a warrant issued under Section 2H, that person shall, as soon as practicable,

(a) where that person is satisfied that

(i) there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) the continued detention of the thing seized is not required for the purposes of any investigation, inquiry, trial or other proceeding,

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice that the thing has been returned; or

(b) where that person is not satisfied as described in subclauses (i) and (ii) of clause (a),

(i) bring the thing seized before the justice referred to in clause (a), or

(ii) report to the justice that that person has seized the thing and is detaining it or causing it to be detained,

to be dealt with by the justice in accordance with Section 2J.

(2) A report to a justice pursuant to subsection (1) shall be in the form prescribed in the regulations, varied to suit the case.

2J (1) Where, pursuant to clause (b) of subsection (1) of Section 2I, anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice

(a) shall hear any representations of the Attorney General, the person from whom the thing was seized in the execution of the warrant and any person who claims to have an interest in the thing that was seized; and

(b) may require that the thing seized in execution of the warrant be brought before the justice.

(2) At the hearing required under subsection (1), the justice shall

(a) where the justice is not satisfied that the warrant was executed according to its terms and conditions or where the justice is satisfied that an order should not be made under clause (b), order that a thing seized in the execution of the warrant be returned to

(i) the person from whom it was seized, if possession of it by that person is lawful, or

(ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or

(b) in any other case, order that the thing seized in the execution of the warrant be sent to the designated province referred to in subsection (2) of Section 2H and include in the order any terms and conditions that the justice considers necessary or advisable, including terms and conditions

(i) necessary to give effect to the request referred to in subsection (2) of Section 2H,

(ii) with respect to the preservation and return to the Province of any thing seized, and

(iii) with respect to the protection of the interests of third parties.

3 Subsection 19(1) of Chapter 450 is repealed and the following subsection substituted:

(1) The Governor in Council may make regulations

(a) designating enactments of a designated province of Canada for the purpose of clause (a) of subsection (1) of Section 2H;

(b) designating provinces of Canada for the purpose of clause (b) of subsection (1) of Section 2H;

(c) respecting requests by a designated province to have a search or a seizure carried out in the Province in respect of an offence against an enactment of the designated province;

(d) respecting the application for and execution of warrants under Section 2H;

(e) respecting the detention and return of things seized in the execution of a warrant under Section 2H;

(f) respecting the sending of things seized in the execution of a warrant under Section 2H to a designated province;

(g) defining any word or expression used but not defined in this Act.