

Law Note - The Business Cost of Third-Party Production Orders

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Amendments to the *Criminal Code* in 2004 introduced a new investigative tool for law enforcement agencies: a production order that would compel third parties to produce documents or data for use in criminal investigations. Two production orders required Telus to produce call-data records. Telus applied for exemptions from the orders on the grounds that the burden of compliance would be unreasonable without compensation due to the cost of retrieving the archived data.

The Supreme Court of Canada did not agree. For a unanimous Court, in *Tele-Mobile Co. v. Ontario*, Justice Abella wrote in part:

...In the absence of a specific provision permitting the recovery of costs in the production order scheme, therefore, and in light of the legislative history, the *ex parte* procedural mechanisms set out in the legislation, and the principle that compensation is not ordinarily recoverable in criminal matters (Foster, at para. 56), I agree with Vaillancourt J. that s. 487.012(4) and (5) cannot be interpreted so broadly as to permit a judge to order compensation for compliance with production orders.

I accept Telus' concern that because of the nature of its business, it will necessarily be the object of repeated production orders but, as an American court observed in connection with banks, another entity from whom requests for information are routinely sought, such requests are neither unanticipated nor aberrational....

The object of an unreasonable production order is not without remedy. It lies in an application for an exemption.... [But] in essence, the financial consequences must be so burdensome that it would be unreasonable in the circumstances to expect compliance. This, I readily acknowledge, is a somewhat tautological explanation, but I see no purpose in offering alternative definitions for a term so well known and understood as having a fact-specific compass. What is reasonable will be informed by a variety of factors, including the breadth of the order being sought, the size and economic viability of the object of the order, and the extent of the order's financial impact on the party from whom production is sought. Where the party is a repeated target of production orders, the cumulative impact of multiple orders may also be relevant.

This law note was prepared by Eugene Meehan, Q.C.

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