



Beware the “Unknown Unknowns”: Navigating Criminal Cases with Cross- Border Aspects

Professor Rob Currie
Schulich School of Law
Dalhousie University

robert.currie@dal.ca

Always start with statistics...

- Yearly profits for transnational crime
 - Human trafficking: US\$150 billion
 - Cybercrime: US\$1.5 trillion
 - Wildlife crime: US\$8-10 billion
 - Narcotics trafficking: US\$426-652 billion

Canada is not immune

- A hub for global money laundering (*Cullen Commission Final Report (2022)*)
- Just in August 2022, Australia had largest ever seizure of fentanyl (smuggled from Canada) and CAN\$140 million in cocaine and meth (smuggled from Canada, in a Bentley)

BEWARE...



There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know.

— *Donald Rumsfeld* —

AZ QUOTES

The Evidence that Help is Needed

CENSORED



Coming in 2025

Robert J. Currie, Heather Ferg & David Quayat,
*A Practitioner's Guide to Cross-Border Criminal Law
& Procedure* (LexisNexis)

The International Law Piece

- Public international law: regulates the interaction of countries [i.e., states] and sometimes the interaction of individuals with states (e.g., int'l human rights law)
- As soon as a case has a cross-border element, it notionally has international law issues in it
- International law is part of Canadian law, so you can apply it

The International Law Piece (cont'd)

- Questions to ask yourself (at every stage):
 - Does the international law angle matter here?
 - If yes, then where is it showing up?
 - Is it an issue only the executive deals with?
 - If it affects the issues to be determined in the case, then what is the relevant Canadian law and what legal tools do I/the parties need to deal with it?
 - ~~Has Rob Currie published anything about it?~~



INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW

THIRD EDITION

Robert J Currie
Dr Joseph Rikhof

ESSENTIALS OF CANADIAN LAW

A. Jurisdiction

- Axiomatic: you can only try the case if your court has jurisdiction over it
- Cross-border = international law = territory becomes important
- International law of jurisdiction governs when states can take jurisdiction over individual cases
- Rules are different depending on where events took place & what states have a bona fide interest in the case

Jurisdiction

- Biggest distinction: territorial vs extraterritorial jurisdiction
- Territorial: the offence took place entirely within Canada
- Extraterritorial: the offence took place entirely outside Canada
- Int'l law rules are different, and so are Canadian approaches

Extraterritorial Jurisdiction

- *Code*, s. 6(2): Subject to this Act or any other Act of Parliament, no person shall be convicted...of an offence committed outside Canada.

Extraterritorial Jurisdiction

- Code, s. 6(2): Subject to this Act or any other Act of Parliament, no person shall be convicted...of an offence committed outside Canada.
- Parliament (federal) has the capacity to create offences that cover conduct outside Canada – and does
- Rules of stat interpretation: provisions presumed not to be extraterritorial, so language must be explicit/necessary implication

Extraterritorial Jurisdiction

- Different statutory approaches
- I) Built into provision
- E.g., Piracy, s. 79(2): “Everyone who commits piracy while in or out of Canada is guilty of an indictable offence...”
- *Crimes Against Humanity & War Crimes Act*, ss. 6-8: “Every person who, outside Canada...”

Extraterritorial Jurisdiction

- 2) Attached to an existing offence, via a jurisdiction clause
- E.g., hostage-taking, s. 279.1(1)
 - jurisdiction outside Canada if victim is Canadian national, per s. 7(3.1)(e)
- Many of these found in s. 7 of *Code*, e.g., terrorism, offshore platforms, child sexual abuse, attacks on UN personnel
- s. 477.1, various special maritime jurisdictions

Extraterritorial Jurisdiction

- 3) Conspiracy
- 465(3): anyone who conspires in Canada to commit any offence outside Canada (if also an offence in that state)
- 465(4): anyone who conspires outside Canada to commit any offence in Canada

Extraterritorial Jurisdiction

- Take-away: despite gut instinct of common law-trained lawyers, this is not controversial
- Does not breach *Charter* (*R. v. Klassen*, 2008 BCSC 1762)
- Often agreed-upon (*R. v. Ribic*, 2008 ONCA 790)
- Sometimes not even noticed (*R. v. Ader*, 2017 ONSC 7052)

Extraterritorial Jurisdiction

- However, some procedural/evidentiary implications
- Because of international law requirements, ET jurisdiction is often limited by to whom it applies, e.g.:
 - Accused is Canadian citizen
 - Victim is Canadian citizen
 - Offence took place in particular location, e.g. offshore platform, on Canadian-registered ship/plane, on Int'l Space Station (yes, really)
- Fairly simple, but Crown nonetheless obliged to prove these “procedural facts” in order for court to have jurisdiction

Extraterritorial Jurisdiction

- More procedural implications
- Consent of Attorney General of Canada (or of province where proceedings commenced) usually required for prosecutions, especially of foreign nationals (s. 7(7), s. 477.2)
- Federal paramountcy, see s. 2.3

Extraterritorial Jurisdiction

- This is a procedural requirement: Crown must file notice of AG consent within 8 days of commencement of proceedings
- Prosecutions do founder on this:
 - *Davidson v. B.C.(A.G.)*, 2006 BCCA 447
 - *Zhang v.A.G. (Can.)*, 2007 FCA 201
 - *R. v.Vella*, 2009 ONCJ 30
 - *Minot v.A.G. (Can.)*, 2011 NLCA 7
 - *R. v. Patel*, 2016 ONCJ 172
- Often comes up re foreign nationals who commit offences on planes landing in Canada

“Extended” Territorial Jurisdiction

- Recall distinction between territorial & extraterritorial jurisdiction:
 - Territorial: the offence took place entirely within Canada
 - Extraterritorial: the offence took place entirely outside Canada
- What about cases that fall “in between?”

“Extended” Territorial Jurisdiction

- “Extended territorial jurisdiction”: cases that can be legally construed to have taken place in Canada, because they are sufficiently connected to Canadian territory
- Also called “*Libman* jurisdiction,” after *Libman v. The Queen*, [1985] 2 SCR 178
 - Fraudulent sale of mining company shares
 - Calls made from Toronto, to US residents
 - Money sent to Panama & Costa Rica
 - Libman would collect, return to Canada with \$

Libman v. The Queen

- Libman prosecuted for fraud, over which there is no ET jurisdiction
- Note: offence was not complete in either Canada or US
- La Forest J: some crimes happen “both here and there”
- For jurisdictional purposes, we can say it happened in Canada if:
 - “real and substantial link [connection]” between offence and Canada
 - Canada prosecuting would not offend international comity

“Real & Substantial Connection”

- Not necessary that particular elements in Canada
- Focus is on the relevant facts that took place in/connected to Canada, in context of offence:
 - Some or all elements took place here
 - Offence was prepared or formulated here, executed outside
 - Offence was initiated here, effects felt outside
 - Harm or injury from offence took place/felt here
 - Proceeds of offence brought here

“International Comity”

- Whether relevant international considerations point towards or away from Canada prosecuting
- Undeveloped; such evidence mostly in the hands of the Crown
- Potential applications:
 - Foreign state has pending extradition request
 - Foreign state is protesting Canada’s prosecution vs foreign state is cooperating with Canada
 - Foreign state has improper purpose for wanting to prosecute

Libman test: applications

- *R. v. Villela*, 2006 CanLII 25621 (cross-border narcotics smuggling)
- *R. v. Bahr*, 2006 ABPC 360 (accused set up hate propaganda site from AB, though US servers & audience)
- *R. v. Karaalp*, 2010 ONCJ 545 (accused took daughter to US, then decided to stay)
- *R. v. Karigar*, 2017 ONCA 576 (transnational bribery operation b/t Canada, US & India)
- *R. v. Barra*, 2021 ONCA 568 (same case, accused were foreign nationals who never entered Canada)

Libman test: applications

- Accused can be extradited here to face prosecution for cross-border offence
- E.g., Amanda Todd suicide case: Dutch national extradited & convicted of extortion, child luring, criminal harassment, etc., all done via computer from the Netherlands (August 2022)

Libman test: procedural notes

- Applies to criminal statutes outside code (*CDSA*, *Competition Act*, *Corruption of Foreign Public Officials Act*)
- Applies to sentencing based on uncharged acts: *R. v. Larche*, [2006] 2 SCR 762
- Crown bears the burden of proof; not clear whether BARD or BoP

B. Admissibility of Evidence Gathered Outside Canada

- Occurring more frequently, in several scenarios:
 - Foreign police obtain evidence and just send it to Canadian police
 - Canadian police in cooperative investigation with foreign police in foreign state, obtain evidence and bring it back
 - Evidence sent from foreign state via Mutual Legal Assistance Treaty (MLAT)
- Will deal with each

Rules of Evidence

- Central point: Canadian rules of evidence apply (incl in *MLACMA*, see below)
- May need additional attention on voir dire to foreign facts, e.g., confessions
 - Accused perception of “person in authority”
 - Foreign police called as witnesses?
 - If no video, how to weigh?
- When weighing accused evidence, always bear in mind that Crown can more easily obtain evidence from foreign state – accused usually cannot

Charter Exclusion: Foreign Authorities

- *Charter* does not apply directly to the actions of foreign police officers, acting completely within their territory
- This would offend sovereignty of foreign state (*R. v. Harrer* (SCC 1995); *R. v. Terry* (SCC 1996); *R. v. Hape* (SCC 2007))
- Also does not apply to interception of phone calls between person in Canada and person abroad, if done by foreign authority (e.g., *R. v. Della Penna*, 2012 BCCA 3)

Charter Exclusion: Canadian Authorities

- *Charter* also does not apply directly to the actions of Canadian police officers, acting completely within foreign state's territory
- This, too, would offend sovereignty of foreign state, for some reason... (*Hape*)
- Extremely controversial, may be reconsidered by SCC in *McGregor*

Charter Exclusion: Canadian Authorities

- Subject to two exceptions:
- If foreign state gives consent for application of *Charter*
 - Could happen under MLAT
 - Otherwise see *R. v. Tan*, 2014 BCCA 9 for test
- “Human rights exception:” if activity in foreign state implicates Canada’s int’l human rights obligations, then *Charter* can be applied
 - So far only applies to Omar Khadr (*Canada v. Khadr*, 2008 SCC 28)
 - Note: if remedy sought, Crown must disclose “fruits of investigation” (*R. v. RT*, 2018 ABPC 2)

Charter Fair Trial Exclusion

- While *Charter* doesn't apply directly, court can exclude evidence under ss. 7/11(d), if trial would be made unfair by its admission (*Harrer, Terry, Hape*)
- Applies equally to evidence gathered by Canadian and non-Canadian police; issue is trial fairness

Charter Fair Trial Exclusion

- How to evaluate? Best methodology yet from *R. v. Guilbride*, 2003 BCPC 44 (joint Canada-Greece investigation in Greece)
 - Conscriptive/non-conscriptive
 - Method of collection affect reliability?
 - Participation of Cdn police, good/bad faith
 - Oppressive/abusive
 - Probative value
 - Big one: was foreign law breached? Unlocks a second set of criteria

Charter Fair Trial Exclusion

- Case law is not massive, but some guidance
- *R. v. Mathur*, 2010 ONCA 311
- *R. v. Proulx*, 2005 BCSC 184 (“Mr. Big” stmt, would be illegal in UK but ok re Cdn standards)
- *R. v. Rogers*, 2011 ONSC 5011
- *R. v. Giles*, 2015 BCSC 1744 (cooperative drug investigation in Panama, applies *Guilbride*)

Evidence Received via MLAT

- MLATs: treaties where Canada agrees to gather evidence to send to foreign states, in exchange for similar help
- Not used for all evidence! *MLACMA* expressly preserves “other arrangements”
- Usually used when compulsory powers required, e.g., search and seizure or compelling witness testimony

Evidence Received via MLAT, cont'd

- Special provisions in *MLACMA* to ease authentication & admissibility of records and things received from foreign authorities
- S. 36: record/copy and affidavit/certificate/statement made with it, sent in response to request, not inadmissible b/c of hearsay or opinion
- S. 37: same with “things”
- S. 38: affidavit etc. doesn't require proof of official status of person sending (plus notice req)
- S. 44: outside court, records are privileged

Evidence Received via MLAT, cont'd

- BUT: a hearsay headache in *R. v. Rajatnaram*, 2019 BCCA 209
 - Crown sought to adduce records re accused (hearsay), supported by Thai police affidavit (also hearsay)
 - Crown argued that s. 36 precluded trial judge from screening hearsay for necessity/reliability per *Khelawon*
 - TJ: this interpretation correct...but N/R screening required for fair trial
 - S. 36 struck down under s. 7/11(d)
- Agreement in Ont CJ: *R. v. Raja*, 2020 ONCJ 250

Evidence Received via MLAT, cont'd

- Final point: don't forget, evidence gathered by foreign officials and sent via MLAT still subject to "fair trial" exclusion under ss. 7/11(d) of the *Charter*



A Few Snapshots

Snapshot 1: Cross-examination on criminal record for credibility purposes: s. 12 CEA

- Can witness be crossed on foreign convictions, or only Canadian ones?
- ANSWER: Foreign convictions okay, if foreign offence is also an offence in Canada & foreign trial system recognizably fair (*R. v. Stratton*, ONCA 1978; *R. v. Perera*, BCCA 1991)
- NB: if witness denies, foreign record must be proven. See s. 12(a) & (b), but: if obtained by MLAT, hearsay problem?
- What about for purposes of s. 666 of *Code*? No case law, but in principle it would be the same

Snapshot 2: *Jordan* applications where extradition involved

- Trial delay motions: what is effect of delays stemming from need for accused to be extradited? Some points:
 - Ordinary extradition process often treated as “discrete event” for *Jordan* purposes, does not count as delay
 - Crown delay that is unnecessary/unexplained/not “duly diligent”: counts as delay (e.g., *R. v. MacIntosh*, 2011 NSCA, aff’d 2013 SCC 23; *R. v. Arsenault*, 2013 ONSC 5675; *R. v. Gill*, 2014 BCPC 208)

Snapshot 2: *Jordan* applications where extradition involved, cont'd

- If accused has knowingly fled and is trying to avoid capture, attributed to defence (e.g., *R. c. Terk*, 2011 QCCA 390; *R. v. White* (ONCA 1997))
- BUT, some cases where accused fled but Crown given “free pass” on obligation of diligence (e.g., *R. v. REM*, 2007 BCCA 154; *R. v. Burke*, 2018 ONCA 594 (12.5 years))

Snapshot 3: Cross-Border Production Orders

- No such thing as a cross-border search warrant. Why?
 - Under int'l law, states cannot enforce their laws outside their territories, i.e., “extraterritorial enforcement jurisdiction is prohibited” (*Hape*)
 - Warrant that purports to authorize search outside Canada is void *ab initio*
- Scenario: police in Canada seek production order for Company X, which is located in Canada, to disclose data. However, data is stored outside Canada. Can production order issue?

Snapshot 3: Cross-Border Production Orders, cont'd

- BCCA says yes: *BC (AG) v. Brecknell*, 2018 BCCA 5
<http://canlii.ca/t/hplpj>
 - An application for a production order against Craigslist, which was not invited to make submissions
 - Initial application to a JP was denied for lack of jurisdiction over Craigslist
 - Re-applied to Provincial Court – **denied**
 - Appealed to the Superior Court – **denied**
 - Appealed to the Court of Appeal – **allowed**

Snapshot 3: Cross-Border Production Orders, cont'd

- BCCA: it's okay to issue the production order. Why?
 - Craigslist is “virtually” on Canadian territory
 - No indication Parliament used extraterritoriality
 - We recognize there is an international law thingie...
 - But this is about jurisdiction over data, and data is very un-territorial these days, ‘because the Internet’
 - MLAT requests are haaaaaaarrrd.....
 - Therefore territory is not important.

Snapshot 3: Cross-Border Production Orders, cont'd

- Currie's list of problems with *Brecknell*:
 - Cites presumptions of conformity/territoriality...and forgets to apply them
 - Best evidence is that this does breach int'l law...but whatevs
 - Digital data may be a-territorial, but the law is very territorial
 - This view of jurisdiction may be impractical, but you don't fail to apply the law b/c of impracticality
 - US view: this breaches the MLAT!

Snapshot 3: Cross-Border Production Orders, cont'd

- Currie's list of problems with *Brecknell*:



Snapshot 3: Cross-Border Production Orders, cont'd

- *Brecknell* is dominant position; followed by several lower courts, and by ABCA (*R. v. Love*, 2022 ABCA 269)
- **Contra:** *In the Matter of an application to obtain a Production Order pursuant to section 487.014 of the Criminal Code of Canada, 2018*, 2018 CanLII 2369 (NL PC, per Gorman J.), <http://canlii.ca/t/hq0kl>
- Territorial problem will be solved by Canada-US treaty to gain access to US *CLOUD Act* → Cdn police will be able to give order to US data custodians directly
- BUT, could open lots of s. 8 problems as US given reciprocal access to data in Canada

Conclusion

- Questions?
- robert.currie@dal.ca