

CANADA / JUDGMENT

U.S.A. v. PacNet Services Ltd.

2023 BCSC 519

COURT

Supreme Court of British Columbia

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2023 BCSC 519 U.S.A. v. PacNet Services Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. PacNet Services Ltd.,

2023 BCSC 519

Date: 20230403

Docket: OTR160676

Registry: Vancouver

In The Matter of the Mutual Legal Assistance in Criminal Matters, R.S.C. 1985

c. 30, as amended

Between:

The Attorney General of Canada on Behalf of the United States of America

Applicant

And

PacNet Services Ltd. and DeepCove Laboratories Ltd.

Respondents

Before: The Honourable Justice Winteringham

Corrected Judgment: The counsel appearance table on the cover page of the judgment was corrected on April 17, 2023.

Reasons for Judgment (Sending Application)

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Place and Dates of Hearing:

Vancouver, B.C.

January 12 and 13, 2023

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April 3, 2023

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I. OVERVIEW

- [1] Authorities in the United States are investigating allegations of fraudulent mass-mailing schemes. They targeted two companies in British Columbia. In September 2016 and pursuant to a formal request from the United States government, Canadian authorities obtained and executed search warrants on the two BC companies, the respondents. At this

hearing, the Attorney General of Canada ("AGC"), on behalf of the requesting state, seeks an order that some of the items seized be forwarded to the United States under s. 15 of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) [Act].

- [2] The respondents do not disagree that some of the items be sent. However, the respondents take the position that the order sought is too broad, suggesting that some of the items sought should not be included in the sending order. They also request certain terms and conditions to ensure that the foreign state only uses the items for purposes specifically delineated in the search warrant.
- [3] This is the first of what is anticipated to be a series of applications for sending orders. Later, there will be separate applications for sending orders to deal with contents of electronic devices and documents where there has been an assertion of solicitor-client privilege.

II. PROCEDURAL HISTORY

- [4] On August 30, 2016, the Minister of Justice approved a request from the United States dated August 29, 2016, seeking to search two companies and to deliver the results of the search to the United States ("Request"). The Request was made pursuant to the 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. T.S. 1990 No. 19 [Treaty].
- [5] The U.S. authorities were conducting a criminal investigation into fraudulent mass-mailed solicitations believed to be financially exploiting vulnerable groups. The U.S. investigation targeted multiple individuals and businesses, including two businesses with offices in British Columbia, PacNet Services Ltd. ("PacNet") and DeepCove Laboratories Ltd. ("DeepCove"). PacNet is an international payment processing company with an office located on Howe Street, Vancouver. DeepCove is said to be an affiliate of PacNet that maintains a proprietary software and database system known as "RAVEN" that interfaces with PacNet's customers.
- [6] The U.S. authorities allege that PacNet and DeepCove processed fraudulently-induced payments in violation of U.S. laws and as such acted in a way to perpetrate the mass-mailing of fraudulent solicitations. According to the Request, a number of U.S. offences were committed through the direct-mail schemes, including mail fraud, wire fraud, mailing lottery tickets, and conspiracy.
- [7] In September 2016, the AGC made an ex parte application pursuant to s. 11(2) of the Act for warrants to search and seize records from the offices of PacNet and DeepCove. Nicola Pfeifer, a senior Competition Law Officer with the Competition Bureau of Canada ("CBC") filed affidavits in support of the application for search warrants ("Pfeifer Affidavits"). To further its investigation of the identified offences, the U.S. seeks evidence of:
 - a) the commission of the offences, specifically records relating to entities and individuals responsible for creating and mailing fraudulent solicitations;

- b) the processing of fraudulently induced payments; and
 - c) the identities of parties who engaged in or aided and abetted the frauds committed by way of direct-mail solicitations.
- [8] On September 20, 2016, and pursuant to s. 12(1) of the Act, Associate Chief Justice Cullen (as he then was) authorized search warrants ("Search Warrants").
- [9] The Canadian authorities executed the Search Warrants at the PacNet and DeepCove premises over four days. Following the search, they learned that some of the items sought were held at a storage facility. To permit the search and seizure of documents located at the storage facility, this Court issued an evidence gathering order (to seize the documents from the storage facility and move the documents into the hands of the authorities) and subsequent search warrant.
- [10] As a result of the search, the CBC members seized paper documents that filled 82 boxes. PacNet later asserted solicitor-client privilege over some of the seized documents. Where a claim of privilege was made, the documents were placed into separate boxes.
- [11] Some of the privilege claims have been removed. As such, there are 80 boxes of non-privileged documents that were seized and which are the subject of the sending application under s. 15 of the Act. Some of these documents remain under seal at the offices of the CBC pending the resolution of the privilege claims.
- [12] The CBC also located and imaged 36 electronic devices during the execution of the search warrants. The data on the devices is the subject of claims of solicitor-client privilege and remains under seal and in the possession of the CBC until those claims are resolved.
- [13] Pursuant to an evidence-gathering order, documents were seized from Butler Box and Storage Inc. These documents will be the subject of a future sending application.
- [14] As required by s. 14 of the Act, Officer Pfeifer prepared a report, dated November 22, 2017 ("Report"). The Report was filed as an exhibit at the sending hearing.
- [15] In the Report, Officer Pfeifer described the process of executing the search warrants, including the identities of those participating and a description of the sort of material seized. Here, I address only the aspects of the Report describing the seizure of paper records. She wrote that she took custody of paper documents that filled 82 banker boxes. In an appendix to the Report, she numbered each box and provided a brief description of its contents. Later, the paper documents were scanned and secured onto 24 DVDs.
- [16] Regarding the paper documents, Officer Pfeifer states in the Report that she has reviewed the documents and has determined that they are within the scope of the search warrants. The AGC seeks a sending order with respect to the paper documents as well as the scanned documents on the DVDs where the solicitor-client privilege claims have been resolved ("Seized Material").

- [17] In an earlier ruling and pursuant to *R. v. Vukelich* (1996), 78 B.C.A.C. 113, 1996 CanLII 1005, I dismissed the AGC's application to summarily dismiss the challenge to the search warrants. In the same ruling, I dismissed an application for leave to cross-examine on the affidavits filed in support of the search warrant application: *U.S.A. v. PacNet Services Ltd.*, 2019 BCSC 2076. In an earlier ruling, I granted the applicants' disclosure application, in part: *U.S.A. v. PacNet Services Ltd.*, (26 September 2018), Vancouver OTR 160676 (B.C.S.C.).
- [18] In *U.S.A. v. PacNet Services Ltd.*, 2021 BCSC 649, I dismissed a challenge to the validity of the search warrants. I held that the affidavits filed in support of the search warrants established the requisite reasonable and probable grounds and were not overbroad so as to violate s. 8 of the Charter. However, I concluded that to the extent the warrants authorized the seizure of personal documents of named individuals, identified at para. 104(n) of the Pfeifer Affidavits, the grounds were insufficient to establish a nexus with the foreign offences. Thus, I severed the aspect of the warrant authorizing the seizure of personal documents.
- [19] Officer Pfeifer prepared an addendum to the Report on September 10, 2021 ("Addendum Report").
- [20] The Addendum Report was filed as an exhibit at the sending hearing.
- [21] In the Addendum Report, Officer Pfeifer addressed the seizure of personal documents identified at para. 104(n) of the Pfeifer Affidavits. In accordance with my 2021 ruling on the validity of the search warrants, Officer Pfeifer and another officer removed documents believed to be captured by the ruling. Officer Pfeifer described the documents removed in an appendix to the Addendum Report.
- [22] Also, in the Addendum Report, Officer Pfeifer attempted to correct an "inadvertent omission" in the Pfeifer Affidavits. In the Addendum Report, she ended with the following paragraph:
- The original mutual legal assistance request from the United States dated August 29, 2016, lists, among the U.S. offences under investigation, Laundering of Monetary Instruments contrary to 18 U.S.C. 1956 § 1956 and Aiding and Abetting, 18 U.S.C. 2 § 2. It has come to my attention that these offences were left out of the Supporting Affidavit and the Search Warrants. This was an inadvertent omission made during the process of drafting these materials and the information was not intentionally omitted from either the Supporting Affidavit or the Search Warrants.
- [23] PacNet and DeepCove take issue with this effort at correction and I will deal with that issue shortly.

III. TERMS AND CONDITIONS OF SENDING ORDER

- [24] As stated previously, PacNet and DeepCove agree that so long as the Court is satisfied that the AGC has met the statutory criteria, a sending order may be appropriate in the circumstances and subject to any appeal of the earlier rulings. In response to the AGC's application for a sending order, PacNet raises two points.
- [25] First, PacNet and DeepCove oppose the addition of any further offences under investigation at this stage of the proceedings as proposed in the Addendum Report.
- [26] Second, PacNet insists any sending order include terms and conditions consistent with treaty obligations and in accordance with the Act.
- [27] To provide context to the scope of the Seized Material and the basis for including limiting terms to the sending order, PacNet provided some background to its operations.
- [28] PacNet described itself as a leading international payment processing business from its inception in 1994 until September 2016, when the search warrants were executed. In the years 2014, 2015 and 2016, PacNet had between 600 and 650 clients. Its core business included payment options for merchants around the globe. The payment options allowed customers to use direct debits, credit cards, electronic payments, and cheque processing services as well as multi-currency payout services such as refunds, rebates, and commission payments. PacNet submitted that it had approximately 120 employees internationally, with 75 employees located at its Vancouver office.
- [29] PacNet, supported by DeepCove, suggests the following terms and conditions:
- a) Seized Material not relevant to the issues raised by the Pfeifer Affidavits should be removed from the sending order (for example, documents pertaining to promotions undertaken by and on behalf of the Roman Catholic Church, including those administered by Downes Murray).
 - b) Seized Material must be used only in connection with criminal proceedings, including investigations, grand jury proceedings, trials and other court proceedings in the Eastern District of New York that relate to the offences listed in the Search Warrants issued on September 21, 2016 and in the Pfeifer Affidavit at para. 12.
 - c) Seized Material must not be transferred or transmitted or used in any way by any prosecutor or law enforcement agency in the U.S. outside of the Eastern District of New York for any investigation or prosecution of PacNet or DeepCove or their shareholders, officers or personnel.
 - d) Seized Material must not be shared or disseminated to any private person, party or litigant who is not involved in any of the above-mentioned criminal proceedings, either as investigator, party, attorney, administrative support staff, judge, juror, grand juror or prospective witness.

- e) All Seized Material must be returned to PacNet and DeepCove once it is no longer required for the purposes of the investigation or prosecution in the Requesting State.
 - f) The Seized Material must not be transmitted until after 15 days from the date of the sending order, or, if leave to appeal is sought by PacNet or Deep Cove, until the Court of Appeal has denied leave to appeal the sending order, or if leave has been granted, until the appeal has been heard and determined.
- [30] In short, PacNet and DeepCove submit that their operations, at least up until the time of the execution of the Search Warrants, were vast. They assert that many of the records seized have no connection to the investigation of offences specified in the Search Warrants. In addition to limiting the use of any materials sent, the respondents suggest the Court should engage in a relevance review of the documents particularized in the Addendum to the Report.
- [31] The AGC does not agree that the suggested terms are necessary or, indeed, consistent with the proper exercise of the Court's discretion. Nor should the Court engage in the sort of review suggested by the respondents.

IV. LEGAL FRAMEWORK

- [32] Criminal investigators from foreign states can seek evidence in Canada in furtherance of their criminal investigations by sending a request for assistance to the Minister of Justice. The Minister has the exclusive responsibility of reviewing the request to ensure compliance with the Treaty. The Minister is responsible for implementing and administering the Act and the relevant mutual legal assistance treaties.
- [33] The Act governs the foreign state's request for a search and seizure to be carried out in Canada. Section 11(1) sets out that if the Minister approves the request for assistance, they shall provide a "competent authority" (usually the AGC) with any documents or information necessary to apply for a search warrant or other judicial authorization. Once the Minister approves the request, the AGC will apply, ex parte, for the search warrant or other authorization before a judge: Act at s. 11(2).
- [34] Where a warrant is issued under s. 12 of the Act, the peace officer (which includes a member of the CBC) who executed the warrant must file a report (about its execution and a general description of the items seized) at least five days before the sending hearing: Act at s.14(1).
- [35] When items are seized pursuant to the execution of a s.12 authorization, the requesting state (here, through the AGC) must apply to the Court for an order that those items be forwarded. At the sending hearing under s. 15, first, the Court must be satisfied that the search warrant was executed in accordance with its terms and conditions before granting a sending order. Second, the Court must be satisfied that there is no reason why the order should not be made: *U.S.A. v. Wilson*, 2002 BCSC 124 at para. 33 [Wilson].

- [36] Under s. 15(1)(b) of the Act, the Court may also include terms and conditions in the sending order, including terms and conditions:
- (i) necessary to give effect to the request mentioned in that subsection,
 - (ii) with respect to the preservation and return to Canada of any record or thing seized, and
 - (iii) with respect to the protection of the interests of third parties.
- [37] The AGC has the burden of proving on a balance of probabilities that the requirements of s. 15 of the Act have been met: *Wilson* at para. 82.
- [38] If a sending order is issued by the Court, s. 16 of the Act precludes the sending of the evidence "until the Minister is satisfied that the state [] has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing."
- [39] In *United States of America v. Price*, 2007 ONCA 526 at para. 23 [Price], the Ontario Court of Appeal noted that there are similarities between the role of a sending hearing judge and that of a trial judge considering the admissibility into evidence of things seized pursuant to a warrant under s. 24(2) of the Charter. However, as set out in *Attorney General of Canada v. Levy*, 2020 ONSC 5847 at para. 78 [Levy], this similarity does not require the Court to strictly apply the analysis from *R. v. Grant*, 2009 SCC 32. Rather, the analogy serves to clarify that where the warrant was not executed according to its terms and conditions or where the warrant suffered from some defect, the sending hearing judge may nonetheless exercise their discretion to order transmittal of the evidence: *Price* at paras. 16-19, 34; *Canada (Attorney General) v. Suthanthiran*, 2017 BCSC 2297 at para. 33. The discretion must be exercised in a manner consistent with the purpose of the Act.
- [40] In *Price* at para. 24, the Ontario Court of Appeal explained the discretion applied by the sending hearing judge as follows:
- [24] The concern of a trial judge is with the use of the evidence at the trial. The validity of the warrant is a relevant factor, but there is no automatic exclusion of evidence obtained pursuant to an invalid search warrant; the issue falls to be resolved under the broad discretion of the trial judge. The role performed by a judge conducting a hearing under s. 24(2) of the Charter is not precisely congruent to the role of a judge under s. 15. The matter is still at [page 771] the investigative stage and the s. 15 judge is not in a position to assess the impugned evidence in terms of its importance or impact on the fairness of the trial. However, it remains that just as at trial, the central focus and concern on a s. 15 review is on the use of the evidence against the respondent by the requesting state, rather than the narrower issue of the validity of the warrant and whether or not improperly seized evidence ought to be returned to the respondent.
- [41] The Court ultimately upheld the sending order despite the fact that an overly broad warrant resulted in an over-seizure and even in circumstances where an equivalent domestic warrant would be quashed: *Price* at para. 2.

- [42] Similar comments were made in *Levy* where a s. 8 breach occurred when the police searched the browser history of a cellphone, which was not permitted by the terms of a search warrant. The s. 8 breach did not prevent the sending hearing judge from issuing a sending order in relation to the phone itself, but not the results of the browser history search.
- [43] Justice Maranger in *Attorney General of Canada v. Suthanthiran*, 2016 ONSC 2162, identified the following legal principles relevant to the sending hearing judge's exercise of discretion, at para 13:
- A recognition of the need to ensure Canada's international obligations are honoured and to foster cooperation between investigative authorities in different jurisdictions: *R. v. Budd* (2000), 150 C.C.C. (3d) 108 (Ont. C.A.) at para 28.
 - Unlike cases involving extradition, proceedings under the Act do not impose a dual criminality requirement: *Canada (Commissioner of Competition) v. Falconbridge Ltd.* (2003), 173 C.C.C. (3d) 466 (Ont. C.A.)
 - In deciding whether a sending order should issue, the sending hearing judge does not individually examine each of the seized documents: *Germany v. Ebke* (2001), 158 C.C.C. (3d) 253 (N.W.T.S.C.) at para 69.
 - The exercise of discretion must be in a manner that conforms with the overall purpose of the Act: *United States of America v. Price*, 2007 ONCA 526, 86 O.R. (3d) 762 at para. 18.
 - A generous view of relevance has to be given at this stage of the proceeding because it is still considered investigative.

[]

Terms and Conditions

- [44] Regarding the imposition of terms and conditions under s. 15(1)(b) of the Act, the Court's discretion is not "unbounded": *Belgium v. Suthanthiran*, 2017 ONCA 343 [Suthanthiran ONCA]. As set out in *Suthanthiran ONCA* at para. 60, the discretion of the sending hearing judge to impose conditions must be exercised in a way that:
- i. comports with the language and overall purpose of the Act;
 - ii. is consistent with the objectives and principles that underlie the Act in its broadest sense;
 - iii. is consonant with the purpose of a sending order; and,
 - iv. accords with the principles of statutory interpretation of criminal legislation.

[Citations omitted.]

- [45] The Treaty contains provisions limiting the use of material shared. Article IX of the Treaty provides:

1. The Central Authority of the Requested State may require, after consultation with the Central Authority of the Requesting State, that information or evidence furnished be kept confidential or be disclosed or used only subject to terms and conditions it may specify.
 2. The Requesting State shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested State.
 3. Information or evidence made public in the Requesting State in accordance with paragraph 2 may be used for any purpose.
- [46] In *Suthanthiran ONCA* at para. 62, the Court noted that the Treaty and the Act must be interpreted and understood in a fair and liberal manner so as to "favour Canada's fulfillment of its international obligations and Parliament's accomplishment of its legislative objectives." The Court identified two particularly significant objectives of the Act. First, the Act fulfills Canada's international obligations to cooperate in the investigation of international crime and provide legal assistance to other states. Second, by offering to help other states, Canada ensures reciprocity with the investigation of crimes (para. 61). Ultimately, the Court upheld the sending hearing judge's refusal to impose conditions intended to safe-guard confidential corporate information from third parties.
- [47] On this point, the Court in *Suthanthiran ONCA* made three points:
- a) the discretion granted to the sending hearing judge does not allow for the imposition of terms and conditions that interfere with the conduct of an investigation or proceedings in the foreign state (para. 93);
 - b) the Court must not assume that the Minister will not fulfill their role or that the foreign state will not adhere to its treaty obligations (para. 93); and
 - c) terms and conditions that are appropriate to include "would do more than merely repeat the protections already afforded to the parties by the Treaty" (para. 96).
- [48] As stated earlier, *PacNet* and *DeepCove* took the position that if the Court granted the sending order, it should not be granted in the form sought. Rather, they submitted that appropriate safeguards were necessary in this case. In support of their position, in addition to the authorities mentioned above, they relied on decisions supporting the terms and conditions they sought to include.
- [49] I turn to those authorities now.

- [50] In *Re Stuckey*, 2000 BCSC 171, Justice Owen-Flood granted a sending order and included terms very similar to those sought by PacNet. At paras. 11-13, Owen-Flood J. "adapted a form of the reciprocity principle from extradition law to ground a condition that would avoid the potential problems of foreign states making requests for assistance based on reciprocated offences, only to use the material sent for the investigation and prosecution of additional offences for which reciprocity does not exist": *Suthanthiran ONCA* at para. 67.
- [51] In *Canada (Attorney General) v. Pacific Network Services*, 2003 BCSC 171, Justice Burnyeat considered the Court's jurisdiction to impose terms and conditions in the context of evidence gathering orders under s. 20 of the Act. The relevant sections for evidence gathering orders are very similar to the steps set out for sending orders. Justice Burnyeat stated at paras. 17-19:
- [17] Canada submits that the terms and conditions which will be binding on the United States of America can only be imposed by the Minister of Justice. I am satisfied that this is other than in accordance with the Act. First, s. 20(2) of the Act establishes that it is the judge who sets the terms or conditions. There is no statement that the Minister sets the terms or conditions. Rather, the Minister must satisfy herself or himself that the requesting state or entity has agreed to comply with the terms or conditions before the record or thing that has been ordered under s. 20 can be sent to the requesting state. Accordingly, I reject the submission by Canada that the terms and conditions imposed in the Order of Owen-Flood, J. and the Order that will be made on this application can only be made by the Minister.
- [18] I also reject the submissions of Canada that it would be inappropriate to restrict the use of what is forwarded so that it could be used only in relation to the offences listed in the request, the individuals listed in the request, and on the basis that the materials forwarded will be returned to Canada in due course.
- [19] I am satisfied that it is always appropriate to impose a term that the items forwarded only be used in connection with criminal proceedings, including, investigation, grand jury proceedings, trials or other Court proceedings relating to the individuals or entities named in the original request. For similar reasons, the items forwarded should not be used in other criminal proceedings or other Court proceedings relating to offences other than the offences listed in the original request..
- [52] PacNet and DeepCove note that Justice Shabbits, in *R. v. Sharples*, 2006 BCSC 1768, similarly endorsed terms and conditions restricting the use to be made of seized material. However, Shabbits J. rejected that he was bound to include the same terms as *Re Stucky* and *Pacific Services Network*. Justice Shabbits noted that the caselaw had developed since those decisions and distinguished both cases as they dealt with evidence gathering orders that were subject to different considerations. He also held that the terms and conditions imposed must take into account the facts of the particular sending order (para. 12).

- [53] While assessing whether certain terms and conditions should be included in a sending order, Shabbits J. recognized that the task of dealing with international treaty obligations is for the political authorities. He stated it this way, at para. 16:
- [16] The purpose of proposed term and condition #5 is to require the requesting state to comply with para. 2, Article IX of the Treaty. But, as noted in Reumayr, I must assume that the requesting state will abide by the terms of the Treaty, and, as noted in McVey, it is for the Minister to supervise adherence to the Treaty. The task of dealing with international treaty obligations is for the political authorities....
- [54] On this point, Justice Watt in Suthanthiran ONCA at para. 74, writing for the Court, rejected the BC approach stating that "the principle of reciprocity as found in the extradition context has no place in the analysis under [the Act]". Justice Watt's rejection of the approach was summarized succinctly at paras. 75-79:
- [75] Two provisions govern disclosure and use of materials sent to the Requesting Treaty Partner.
- [76] First, the Treaty.
- [77] Article 17 of the Treaty prohibits Belgium from disclosing or using information or evidence furnished for purposes other than those stated in the Request without the prior consent of the Minister as the central authority of the Requested State.
- [78] Second, the Act.
- [79] Section 16 of [the Act] prohibits implementation of a sending order under s. 15 until the Minister is satisfied that the Requesting State has agreed to comply with any terms imposed in respect of the sending abroad of the record or thing.
- [55] Watt J.A.'s approach recognizes that it is inappropriate for a judge at a sending hearing to impose terms and conditions that replicate the terms of the applicable treaty. Such an order could improperly intrude with the Minister's role and would conflict with the presumption of comity and good faith between states. At para. 93, Watt J.A. wrote:
- [T]he discretion to impose terms and conditions under s. 15(1)(b) of [the Act] is circumscribed by the division of responsibility between the Minister and the judiciary; the provisions of the Treaty; and the objectives of the mutual legal assistance scheme. This discretion does not extend to imposing terms and conditions that interfere with the conduct of an investigation or proceedings in the Requesting State. Nor does it assume that the Minister of Justice will not fulfill her role under [the Act] or the Treaty, or that the Requesting State will not adhere to its Treaty objections about use and disclosure of sent material.
- [56] In sum, I agree with Shabbits J.'s writing in Sharples. When the Court exercises its discretion to include terms and conditions in a sending order under s. 15(1)(b) of the Act, it must be responsive to the facts of the case and the considerations set out above regarding the purposes of the Act. I do not agree that certain terms must be included in every order made under s. 15. I agree with Watt J.A.'s remarks that regard must be had to the division of

responsibility between the Minister and the judiciary, the Treaty, and the objectives of the mutual legal assistance scheme.

V. ANALYSIS

- [57] I will first address whether a sending order should be issued. If yes, then I will consider whether it should include the terms and conditions sought by the respondents.
- [58] The Report and Addendum Report were presented at the sending hearing to establish that the Search Warrants were executed according to their terms and conditions. The Report and Addendum Report set out that the search was conducted by the CBC between September 21-25, 2016, during the hours authorized by the Search Warrants. Security officers hired by the CBC secured the site during the hours when the search was suspended.
- [59] In the Addendum Report, Officer Pfeifer included samples of the materials seized by the CBC. In accordance with the Search Warrants, copies of the search warrants were provided to Rosanne Day, a representative of PacNet.
- [60] The CBC informed Ms. Day and counsel for PacNet that the terms of the Search Warrants included protections for solicitor-client privilege and allowed them to review documents for safeguard claims of solicitor-client privilege. Identified documents were sealed and separated from the balance of the Seized Material.
- [61] The Report noted that throughout the execution of the Search Warrants, employees were permitted to perform their usual business duties at the premises.
- [62] Based on my review of the Report, Addendum Report, and submissions of counsel, I am satisfied that the AGC has proven on a balance of probabilities that the Search Warrants were executed according to their terms and conditions. I find that the evidence seized by the CBC fell within the parameters of the Search Warrants, in terms of subject matter and timeframe.
- [63] I turn to consider the second s. 15 factor. That is, whether there are reasons why the order should not be made. To that end, I consider the discretion of the sending hearing judge to consider all relevant factors bearing on the application for a sending order and that the discretion must be exercised in a manner consistent with the purposes of the Act.
- [64] I have considered the factors relevant to informing the decision to grant a sending order. In this case, I agree with the AGC's submission that these factors weigh strongly in favour of the issuance of a sending order, including Canada's interest in meeting its international obligations under the Treaty and the purposes of the Act. The volume of material seized must be considered in the context of the timeframe set out in the Search Warrants, and a generous view of relevance has to be given at this stage of the proceeding because it is still considered investigative. As noted in Price at para. 24, I am not to be concerned with either the ultimate evidentiary value of the requested material to the foreign jurisdiction or with the conduct of any proceedings in the foreign jurisdiction.

- [65] Steps were taken by the CBC to ensue compliance with my 2021 ruling that personal documents be excluded from the sending order. The Report provides a description of the steps taken by the CBC to identify and exclude personal documents. The Search Warrants were otherwise found by this Court to be lawful.
- [66] Based on the circumstances as presented, I accept the submission that all of the factors informing the discretion of the Court weigh strongly in favour of granting a sending order in this case.
- [67] I next consider whether the sending order should include the terms and conditions sought by PacNet and DeepCove.

A. Scope of the Materials

- [68] To limit the scope of the material to be sent on the basis of relevance, PacNet and DeepCove seek the following terms and conditions in the sending order:

The [CBC] remove from the physical boxes and the hard drives documents pertaining to the promotions undertaken by and on behalf of the Roman Catholic Church, in particular, Downes Murray International, Archdiocese of Durban, Nazareth House, Catholic Welfare and Development, and Hope Africa, before the records are transmitted

- [69] Considering the U.S. matter remains in the investigative stage, this Court is to adhere to a generous view of relevance of seized documents. I have already discussed that my review of the relevance of the documents should be limited. As noted in *United States of America v. Black*, [2007] O.J. No. 1304, (sub nom. Conrad Black (Re)) 2007 CanLII 11137 (O.N.S.C.) at para. 28, it would be impossible to determine the relevance of every single document seized as such a determination would require the sending judge to have an intimate familiarity with the foreign matter.
- [70] I agree that the promotions relating to the various charities fall under the category of search described in the Search Warrants as "information and materials related to direct mail solicitations." In my view, exercising my discretion in the manner suggested by the respondents could result in an improper interference with the conduct of the investigation underway in the foreign state. Again, the material seized was in accordance with the terms of the Search Warrant found to be valid.

B. Limiting Use of the Materials to Criminal Prosecution in New York

- [71] As a safeguard to protect the transmission of records from a Canadian company to a foreign state, PacNet and DeepCove sought the following terms and conditions:

The records will not be transferred or transmitted or used in any way by any prosecutor or law enforcement agency in the United States outside of the Eastern District of New York for any investigation or prosecution of PacNet or DeepCove or any of its or their affiliates or subsidiaries or any of its or their shareholders, officers or personnell; nor shall it be shared with or

disseminated to any private person, party or litigant who is not involved in any of the above mentioned criminal proceedings, either as investigator, party, attorney, administrative support staff, judge, juror, grand juror or prospective witness.

That should the relevant authorities in the United States of America wish to use the said records in connection with criminal proceedings, including investigations, grand jury proceedings, trials or other Court proceedings, in the United States that relate to parties other than the parties listed in the Request dated August 29, 2016, it will be necessary for a further request to be made by the United States of America to Canada.

[72] I have determined that the proposed terms and conditions are not to be included in the sending order for two reasons.

[73] First, the terms and conditions sought limiting the use to be made of the material are duplicative of the Treaty. The Treaty expressly imposes limits on the use to be made of materials sent. Thus, these terms are unnecessary and redundant. In exercising its discretion to impose terms, the Court must assume that the Minister will fulfill their role under the Act and the Treaty; that is, to ensure other nations comply with their political commitments to Canada. Similarly, the Court is not to assume that the requesting state will not adhere to its Treaty obligations about use and disclosure of sent material.

[74] Second, the jurisprudence makes clear that the exercise of discretion does not extend to imposing terms and conditions that interfere with the conduct of an investigation or proceeding in the Requesting State. Assuming adherence to the Treaty and the Act, as I must, the respondents suggest limitations that may very well improperly intrude on an investigation or proceeding in the requesting state.

C. Limiting Use of the Materials to Offences in Search Warrants

[75] DeepCove and PacNet objected to any additional offences being included in the Search Warrants. Specifically, the respondents contend that documents relating to "money laundering", an offence not particularized in the Search Warrants, should be excluded from the sending order. To that end, they ask that the following terms be included in the sending order:

That subject to clause 4 of this order, the items shall be used only in connection with criminal proceedings, including investigations, grand jury proceedings, trials and other court proceedings in the Eastern District of New York, that relate to the five offences listed in the Search Warrants, namely, [attempt and conspiracy; importing or transporting lottery tickets; mailing lottery tickets or related matter; mail fraud; and, wire fraud]

[clause 4] That should the relevant authorities in the United States of America wish to use the said records in connection with criminal proceedings, including investigations, grand jury proceedings, trials and other court proceedings in the United States, that relate to offences other than the said five offences listed in the Search Warrants, an application to amend this order so as to permit such use must be brought to this Court.

[76] PacNet and DeepCove object to including money laundering as a particularized offence in the Search Warrants. They characterize this inadvertent omission as a "proposed ex post facto amendment of the Search Warrant" that is inconsistent with the constitutional requirements of Canadian law. The respondents submit that the time to amend the Search Warrants was before they issued, not now, some six years later. In accordance with *R. v. Booth*, 2019 ONCA 970, the respondents object to an attempt by the AGC to amplify the Search Warrants, submitting that amplification is to be used to correct minor, technical errors and not, as proposed here, after the execution of the warrants and documents seized.

[77] I have reviewed the Search Warrants and the Pfeifer Affidavits in assessing the respondents' submission on this point. Here, I agree that this situation is akin to the circumstances before Justice O'Driscoll in *Mutual Legal Assistance in Criminal Matters Act (Re)*, [1996] O.J. No. 371 [Gladwin], aff'd in *Euro-Can-Am Trading Inc. v. Ontario (Attorney General)* 1996, 89 O.A.C. 148, 1997 CanLII 1288. In Gladwin, the search warrants issued under the Act referred only to section numbers of the United States Code in describing the offences. Justice O'Driscoll stated:

[51] In my view, this Act should receive an expansive rather than a restrictive interpretation, so that Canada can fulfill its international treaty obligations. In my view, the expansive view articulated by La Forest J. for the Extradition Act in *Schmidt v. The Queen* should be applied to this Act.

[52] Again, in my view, the fact that the warrant did not say "mail fraud and wire fraud", in addition to giving the section numbers of the U.S. Code for those offences, is not sufficient reason to refrain from making an order under 15(1)(b) of the Act.

[78] Those words are apt here.

[79] The respondents were provided with the nature of the foreign investigation from the time of the execution of the Search Warrants. They have been in possession of the Minister's Approval of Treaty Request since shortly after the execution of the Search Warrants, and the MLAT request itself since 2018 when I ordered its disclosure.

[80] I am not satisfied that the conditions proposed are consistent with the objectives of the Act and the terms of the Treaty; that is, to provide the widest measure of mutual legal assistance in criminal matters.

VI. CONCLUSION AND SENDING ORDER

[81] In sum, having concluded that the search warrants were executed according to their terms and conditions, and having found no reason not to order the transmission, I grant the sending order as proposed by the AGC. The sending order is hereby granted in the form set out in Exhibit 5 and is to include the following terms:

THIS COURT ORDERS that the s. 14 Report, the Addendum and the seized materials (both the original paper copies and DVD copies made by the Competition Bureau of Canada) described in Appendix 1 to the Addendum be sent to individuals or agencies of the Government of the United States of America designated by the Canadian Minister of Justice, excluding:

- (1) All records subject to a claim of solicitor-client privilege by PacNet and/or DeepCove; and
- (2) All records falling within paragraph 104(n) of the Pfeifer Affidavit (the personal records) as identified by the Competition Bureau of Canada pursuant to the process described in the Addendum;

("Seized Material").

THIS COURT FURTHER ORDERS that the sending of the Seized Material to the Government of the United States of America is subject to the following terms and conditions:

- (1) That the Government of the United States of America return the Seized Material to the Competition Bureau of Canada within 90 days of the final conclusion of any criminal proceedings (including appeals) and shall thereafter be returned to PacNet and DeepCove or their designate;
- (2) That 15 days has passed from the date that this order is issued by the Court.

"Winteringham J."

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