

CANADA / JUDGMENT

United States v. Bandfield

2020 BCSC 1868

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1868 United States v. Bandfield

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Bandfield,

2020 BCSC 1868

Date: 20201204

Docket: OTR2019026

Registry: Vancouver

IN THE MATTER OF an application pursuant to s. 9.4 of the

Mutual Legal Assistance in Criminal Matters Act

AND IN THE MATTER OF The Attorney General of Canada, on behalf

of the United States of America and Robert Bandfield

Between:

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

Respondent

And

Delia Mulholland, Vision Crest Consulting Group Ltd.,

High Point Drive Whistler Holdings Ltd. and Fasken Martineau DuMoulin LLP

Applicants

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Respondent:

J. Gibb-Carsley

M. Zemojtel

Counsel for the Applicants:

R.A. Millar

Place and Date of Hearing:

Vancouver, B.C.

October 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2020

[1] The applicants seek an order for disclosure and production of a number of materials:

1. The disclosure and production of copies of all documents, letters, memorandum, email or any other method of electronic recording of communications and file contents (hereafter the "Documents") delivered by the representatives of the Government of the United States of America to the Government of Canada and its representatives relating in any way to the enforcement of New York Order as defined in paragraph 4 of the Affidavit of Laureto Padawan sworn July 5, 2019 and filed herein.
2. The disclosure and production of copies all Documents and files of the representatives of the Government of Canada, including those of Stephen Biebrier relating to the enforcement of the New York Order or the Minister's Approval of the Treaty Request as defined in paragraph 3 of the Affidavit of Laureto Padawan.
3. The disclosure and production of copies of all Documents and files of Constable Laureto Padawan relating to the enforcement of the New York Order and the Minister's Approval of the Treaty Request and without limiting the generality of the foregoing the information and content of the "Request" as set out in paragraph 5 of the Affidavit of Laureto Padawan.
4. Without limiting the generality of the foregoing, the disclosure and production of a copy of the email dated June 24, 2019 referred to in paragraph 8 of the Affidavit of Laureto Padawan.

[2] The context of the application is a forfeiture order made in the United States and registered in British Columbia for execution in this jurisdiction. The applicants allege an abuse of process and seek the remedy of a stay of proceedings. The materials sought are in support of the abuse of process application.

The Background Circumstances

- [3] The activities of Gregg Mulholland form the backdrop for this application. For a number of years he was engaged in stock promotion and related schemes in the United States and other jurisdictions. Those activities came to be investigated by authorities in the United States; the investigation culminated in criminal prosecution of a number of principals, including Mr. Mulholland. He was arrested in June 2015 in Arizona and has remained in custody since that date. Initially he was charged with a number of offences. Following plea negotiations, he entered a plea of guilty in New York to a charge of conspiracy to commit money laundering. The offence dates to which he admitted were between January 2009 and September 2014. The sums involved were very substantial, some \$250 million. He was sentenced on January 19, 2017 to a lengthy term of imprisonment. A comprehensive order for forfeiture of assets was also made.
- [4] The applicants in the matter at bar are Mr. Mulholland's wife, Delia Mulholland; two corporations of which she is evidently the principal officer, Vision Crest Consulting Group Ltd. and High Point Drive Whistler Holdings Ltd.; and the law firm Fasken Martineau DuMoulin LLP. As I understand, the law firm has represented Ms. Mulholland and the two corporations in certain litigation and has an interest in the relief sought in this application as a means of securing its fee for legal services. I further understand that the firm also holds the proceeds of the sale of one of the subject properties in trust.
- [5] The prosecution of Mr. Mulholland was based on his involvement in a conspiracy to manipulate share prices of publicly traded companies and laundering the proceeds through companies he controlled. Another individual, Robert Bandfield, was also engaged in these activities; he was named as a co-conspirator and co-defendant of Mr. Mulholland.
- [6] Mr. Bandfield also pleaded guilty to a charge of money laundering and, like Mr. Mulholland, consented to the entry of a forfeiture judgment. In his case, that was in the amount of \$12 million and his right, title and interest in a number of assets.
- [7] On March 24, 2017, a final order of forfeiture was made by a United States District Judge in the Eastern District of New York ("the US forfeiture order"). A list of the assets which were subject of the US forfeiture order was appended as Exhibit A to the order. Two of the assets included in that list are properties located in British Columbia and which are the subject of the present application:
- the real property and premises located at 3630 Mathers Avenue, West Vancouver, British Columbia V67 2L1, and all proceeds traceable thereto ("the Mathers property"); and
 - the real property and premises located at 2978 High Point Drive, Whistler, British Columbia V0N 1B2, together with any and all proceeds from the sale thereof ("the Whistler property").

- [8] On September 17, 2018, pursuant to the treaty between the Government of Canada and the Government of the United States of America and in accordance with the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) [Act] the United States government made a request to the Government of Canada to enforce the US forfeiture order in British Columbia.
- [9] On November 8, 2018, the Minister of Justice of Canada, through her authorized official, Stephen Bierbrier, counsel with the International Assistance Group ("IAG") of the Department of Justice, approved the request. On July 18, 2019, the Attorney General of Canada made an ex parte application in the Supreme Court of British Columbia, pursuant to s. 9.4(3) of the Act, to have the US forfeiture order entered as a domestic order in this jurisdiction.
- [10] Counsel for the Attorney General of Canada appeared before a justice of this Court at an ex parte in camera hearing. At that time, the following materials were provided to the Court:
1. The treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters;
 2. Section 9.4 of the Act;
 3. The affidavit of Constable Laureto Padawan, sworn July 5, 2019; and
 4. The US forfeiture order.
- [11] A forfeiture order enforceable in British Columbia, as sought, was granted on July 18, 2019 ("the BCSC forfeiture order").
- [12] The Attorney General of Canada served the BCSC forfeiture order upon parties appearing to have an interest in the properties. Those parties were Mr. Michael Schalke, Vancouver counsel for the US Securities and Exchange Commission ("SEC") and Mr. Robert Millar, counsel representing Ms. Mulholland and related corporate entities. In an accompanying letter, and by further correspondence, counsel for the Attorney General of Canada advised those parties of their right to challenge the BCSC forfeiture order prior to its execution. Counsel for the Attorney General has advised Mr. Millar that the applicants will not be held to the 30-day application time limit that the Act provides.
- [13] Counsel for the SEC was provided notice because that entity had previously initiated a lawsuit against Mr. Mulholland, Vision Crest Consulting Group Ltd. and 2978 High Point Drive Whistler Holdings Ltd. That action sought an order recognizing and enforcing a judgment that the SEC had obtained against Mr. Mulholland in the United States. The US judgment arose from a securities scheme that had been conducted by Mr. Mulholland.
- [14] My understanding is that lawsuit remains outstanding. In the course of the litigation, the SEC registered a certificate of pending litigation ("CPL") against the Mathers property and the Whistler property.

- [15] Also during the course of that litigation, the Whistler property was listed for sale. In light of that development, and because foreclosure proceedings were apparently imminent, a justice of this Court ordered the removal of the CPL and directed that the net sale proceeds be placed in trust as security.
- [16] Given that state of affairs, it was evidently the view of the Attorney General of Canada that the SEC was entitled to notice.

The Positions of the Parties

- [17] It is in this factual matrix that the applicants bring this application. Their position is that the enforcement of the US forfeiture order should not be permitted, that the BCSC forfeiture order should be set aside, and that all proceedings pursuant to that order should be stayed as an abuse of process.

- [18] The particulars of the allegation of abuse of process, as I understand them, are as follows:

- The applicants say that the process to seize property in British Columbia is improper because the US forfeiture order purporting to be enforced was issued in respect of Robert Bandfield. The property which is subject of the seizure order belongs to the applicants and never belonged to the party named in the forfeiture order, Robert Bandfield, nor has Mr. Bandfield ever had any interest in the subject property. They assert as well that "Greg Mulholland has not claimed an interest in the Mathers property or the Whistler property. Greg Mulholland has never stated that he has an interest in the Mathers property, the Whistler property or the assets held on trust by or for the benefit of Vision Crest including the Whistler Proceeds."
- The Attorney General of Canada, acting on behalf of the United States of America, pursued a process before a justice of this Court that represented a fundamental breach of justice, seeking to impact the property rights of the applicants without notice to them, and using the court as a "rubber stamp". By proceeding without affording the property owners notice, the Court became involved in a breach of justice because an essential aspect of justice is "notice to affected parties".
- The applicants say that there should be a duty of notice imposed upon the Attorney General, recognizing that the Criminal Code, R.S.C. 1986, c. C-46 [Code], imposes notice requirements for domestic forfeiture proceedings. The applicants submit that they should have been provided notice of the process in accordance with s. 462 of the Code. The applicants say that requiring notice would not offend either the Act nor would it offend the related treaty between Canada and the United States.
- The applicants further contend that the process which resulted in the issuance of the BCSC forfeiture order was fundamentally improper in that counsel for the Attorney General of Canada failed in her duty of disclosure to the Court: in the face of an enquiry by the presiding justice as to whether there was anything that should be disclosed that would weigh against the granting of the order, and given the ex parte nature of the appearance, counsel did not disclose or raise for discussion the factual circumstances and history of the properties which were sought to be

forfeit or the right, interest and defences of the applicants, which would have militated against the making of the BCSC forfeiture order.

- [19] The Attorney General says that what took place in this matter was in full compliance with the procedure that the Act prescribes. That is, the Attorney General says that there was a lawful order made by a US court that included the subject properties. Although the style of cause of the US order named Robert Bandfield and did not name Gregg Mulholland, the order clearly extends to the subject properties, and the basis for the order was Mr. Mulholland's admitted guilt.
- [20] The Attorney General observes that, before the US forfeiture order was made final in that jurisdiction, any interested third parties had an opportunity to assert their claim. The applicants at bar did not do so, even though there is reason to believe the applicants had knowledge of the order being made. On the basis of submissions made in the sentencing proceeding in the US, Gregg Mulholland clearly purported to give up his self-declared interest, and his spouse, the respondent Delia Mulholland, was at least aware of that having occurred, and a reasonable inference is that she agreed to that taking place.
- [21] All that said, the Attorney General notes that the applicants still have a right to challenge the forfeiture in this jurisdiction. Presumably, they would do so on the basis that they are the actual beneficial owners of the subject properties, and that the forfeiture order ought not to be effective against them.
- [22] As regards the ex parte application that was made on July 18, 2019 to secure the BC Order, the Attorney General says that there was no failure to make disclosure of any relevant concern to the justice.

Applicable Legal Principles

- [23] In my view, a proper understanding of the legislative underpinning of the Mutual Legal Assistance Treaty ("MLAT") regime and the relevant legal principles is essential to an analysis of the issues that this application presents. I have taken the liberty of quite substantially adopting the description of the law as set out in the submissions of the Attorney General. To my mind, it is sound and comprehensive, and I do not understand the applicants to contest it:

A. Mutual Legal Assistance in Criminal Matters

29. The Act is a complete code that is to be given a broad and purposeful interpretation in order to ensure that Canada meets its international treaty obligations.¹⁹ [Footnote: Section 3 of the Act provides that in the event of an inconsistency between the Act and another Act of Parliament, the provisions of the Act will prevail to the extent of the inconsistency.] The Act provides various methods for Canada to cooperate with its treaty partners in the fight against transnational crime. One of the overarching objectives in both extradition and MLAT is to prevent international borders from being a means to criminals to escape justice or to

escape the consequences of criminal activities.

30. The Act implements Canada's international obligations in the area of mutual legal assistance.²⁰ [Footnote: *Russian Federation v. Pokidyshev* (1999), 138 C.C.C. (3d) 321 (Ont. C.A.) at paras. 15-16; and *Belgium v. Suthanthiran*, 2017 ONCA 343 ("Suthanthiran") at para. 48, application for leave to appeal dismissed, [2017] S.C.C.A. No. 256).] The legislative objective of the Act is to "provide the widest measure of mutual legal assistance in criminal matters in a prompt and efficient manner."²¹ [Footnote: Ramsden at p. 304, para. 40; Suthanthiran at para. 46.]
31. When the Act was amended to add ss. 9.3 (restraint) and 9.4 (forfeiture) in 2001, the then Minister and Attorney General of Canada described the purpose of these amendments as follows: "Canada must be in a position to offer the necessary assistance to foreign countries whose courts have ordered confiscation of tainted property located in Canada."²² [Footnote: House of Commons Debates, vol. 137, no. 046 (23 April 2001) at p. 2955 (Hon. Anne McLellan).]
32. The Minister went on to say that the legislative intent in introducing the amendments was to "ensure that Canada is not singled out for its inability to provide the necessary assistance to help jurisdictions obtain the confiscated property."²³ [Footnote: House of Commons Debates, vol. 137, no. 046 (23 April 2001) at p. 2955 (Hon. Anne McLellan).]
33. The Minister then summarized the objectives of ss. 9.3 and 9.4 of the Act as follows:

The provisions would allow Canada to respond on the basis of a treaty to requests from a foreign jurisdiction for assistance in enforcing a confiscation order issued by a court in the jurisdiction in relation to proceeds of crime derived from the commission of a criminal offence for which the accused was convicted. In anticipation of a confiscation request, Canada would also be able to provide assistance in respect of a request to seize or restrain the targeted proceeds located in Canada.²⁴ [Footnote: House of Commons Debates, vol. 137, no. 046 (23 April 2001) at p. 2956 (Hon. Anne McLellan).]
34. The legislative objectives are reinforced by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which requires that the Act "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
35. As domestic legislation which has been enacted for the purpose of implementing Canada's international obligations, the Act should be interpreted purposively with a view to fulfilling these obligations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at p. 1371, para. 74. This principle has been explained as follows:

In interpreting legislation which has been enacted with a view towards implementing international obligations it is reasonable to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one would also strive to expound an interpretation which is consonant with the relevant international obligations. [Emphasis added.] (National Corn Growers at para. 1371, para. 74).

36. The reasoning has been applied to the interpretation of the Act. As Fish J.A., as he then was, stated for the Quebec Court of Appeal in *United States of America v. Ross* (1995), 100 C.C.C. (3d) 320 (Que. C.A.) at p. 324, paragraph 18, application for leave to appeal dismissed, (1996), 103 C.C.C. (3d) vi (S.C.C.), "At the same time, it permits Canada to fulfill its treaty obligations entered into to promote international cooperation in the investigation, prosecution and suppression of serious criminal offences."

B. Forfeiture Under the Act

37. Section 9.4 of the Act provides a scheme to enforce foreign forfeiture orders domestically. The relevant sections of 9.4 to this proceeding are as follows:

9.4(1) When a written request is presented to the Minister by a state or entity, other than the International Criminal Court referred to in section 9.1, for the enforcement of an order of forfeiture of property situated in Canada issued by a court of criminal jurisdiction of the state or entity, the Minister may authorize the Attorney General of Canada or an attorney general of a province to make arrangements for the enforcement of the order.

- (2) The Minister shall refuse the request if he or she
- (a) has reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of their race, sex, sexual orientation, religion, nationality, ethnic origin, language, colour, age, mental or physical disability or political opinion;
 - (b) is of the opinion that enforcement of the order would prejudice an ongoing proceeding or investigation;
 - (c) is of the opinion that enforcement of the order would impose an excessive burden on the resources of federal, provincial or territorial authorities;
 - (d) is of the opinion that enforcement of the order might prejudice Canada's security, national interest or sovereignty; or
 - (e) is of the opinion that refusal of the request is in the public interest.

- (3) On receipt of an authorization, the Attorney General of Canada or an attorney general of a province may file a copy of the order with the superior court of criminal jurisdiction of the province in which all or part of the property that is the subject of the order is believed to be located. On being filed, the order shall be entered as a judgment of that court and may be executed anywhere in Canada. [Emphasis Added]
- (4) An order that is filed under subsection (3) by an attorney general of a province is deemed to be filed by the Attorney General of Canada.
- (5) Before filing an order, the Attorney General of Canada or an attorney general of a province must be satisfied that
 - (a) the person has been convicted of an offence within the jurisdiction of the state or entity;
 - (b) the offence would be an indictable offence if it were committed in Canada; and
 - (c) the conviction and the order are not subject to further appeal.
- (6) From the date it is filed under subsection (3), subject to subsection (4),
 - (a) an order of forfeiture of proceeds of crime has the same effect as if it were an order under subsection 462.37(1) or 462.38(2) of the Criminal Code; and
 - (b) an order for the forfeiture of offence-related property has the same effect as if it were an order under subsection 490.1(1) or 490.2(2) of the Criminal Code, subsection 16(1) of 17(2) of the Controlled Drugs and Substances Act or subsection 94(1) or 95(2) of the Cannabis Act, as the case may be.
- (7) When an order is filed under subsection (3), a copy of the amendments made to the order may be filed in the same way as the order, and the amendments do not, for the purpose of this Act, have effect until they are registered.
- (8) When an order has been filed under subsection (3),
 - (a) an order of forfeiture of proceeds of crime shall not be executed before notice in accordance with subsection 462.41(2) of the Criminal Code has been given to any person who, in the opinion of the court, appears to have a valid interest in the property; and
 - (b) an order of forfeiture of offence-related property shall not be executed before
 - (i) notice in accordance with subsection 490.41(2) of the Criminal Code, subsection 19.1(2) of the Controlled Drugs and Substances Act or subsection 98(2) of the Cannabis Act has been given to any person who resides in a dwelling-house that is offence-related property and who is a member of the immediate family of the person charged with or convicted of the offence in relation to which property would be forfeited, and

(ii) notice in accordance with subsection 490.4(2) of the Criminal Code, subsection 19(2) of the Controlled Drugs and Substances Act or subsection 97(2) of the Cannabis Act has been given to any person who, in the opinion of the court, appears to have a valid interest in the property.

(9) Subsection 462.41(3) and section 462.42 of the Criminal Code apply, with any modifications that the circumstances require, to a person who claims an interest in proceeds of crime, and subsections 490.4(3) and 490.41(3) and section 490.5 of the Criminal Code, subsections 19(3) and 20(4) of the Controlled Drugs and Substances Act and subsections 97(3) and 99(4) of the Cannabis Act apply, with any modifications that the circumstances require, to a person who claims an interest in offence-related property.

38. Section 9.4 contains no notice provisions in advance of the filing of a foreign forfeiture order. In fact, the Act does not require a hearing. All that is required by s. 9.4(3) of the Act is the filing of the foreign forfeiture order if the Attorney General of Canada is satisfied that preconditions of s. 9.4(5) are satisfied. Upon filing the foreign forfeiture order, the Court shall enter that foreign order as a judgment of the Canadian court and it can be executed anywhere in Canada. Accordingly, there is no discretion for the Court to refuse to enter the foreign forfeiture order as a Canadian judgment upon it being filed by the Attorney General of Canada. There is no contemplation under the Act for a contested hearing on the merits at the issuance stage of the forfeiture order.

39. Section 9.4(6)(a) of the Act provides that upon filing, the foreign forfeiture order will have the effect of an order under s. 462.37 of the Criminal Code. As such, from the moment it is filed with the Canadian court, the foreign order has the same effect, and is equivalent to, a Canadian forfeiture order. This further indicates that s. 9.4 of the Act is not focused upon the tests of obtaining a forfeiture order under the Criminal Code. Instead the Act focuses upon the enforcement and execution of the foreign forfeiture order in Canada.

40. However, once filed, a party claiming an interest to assets that are subject to forfeiture has an opportunity to assert the interest. Section 9.4(9) of the Act provides that ss. 462.41(3) and 462.42 of the Criminal Code apply to a person who claims an interest in the assets that are the subject to forfeiture, with any modifications that the circumstances require.²⁵ [Footnote: Notice to a person who appears to have a valid interest in the property is required by s. 9.4(8) of the Act before the Canadian forfeiture order is "executed".] Given s. 9.4(6) of the Act provides that the foreign order has the same effect of an order under s. 462.37(1), the operative section relating to challenging the execution of the Canadian forfeiture order is s. 462.42, which provides, in part:

462.42(1) Any person who claims an interest in property that is forfeited to Her Majesty under subsection 462.37(1) or (2.01) or 462.38(2) may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4) unless the person is

(a) a person who is charged with, or was convicted of, a designated offence that resulted in the forfeiture; or

- (b) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property.
 - (4) Where, on the hearing of an application made under subsection (1), and the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any designated offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature of the extent of the interest.
41. In summary, the forfeiture provisions of the Act do not contemplate notice to interested parties or a contested application for issuing the foreign forfeiture order as a Canadian forfeiture order. In fact, given that s. 9.4(3) of the Act requires that upon filing of the foreign forfeiture order the Court shall enter the judgment as a judgment of that Court, there is no discretion for a judge to refuse entering the foreign forfeiture order upon filing. Notice to the party who may have a valid interest in the forfeited property is required only once the foreign order is filed as a Canada order and prior to its execution. The Act then provides an opportunity for an interested party to bring an application pursuant to s. 462.42 of the Criminal Code for a declaration by the Court that the interest of the applicant is not affected by the forfeiture, as well as a determination of the nature and extent of the interest. 26 [Footnote: Section 462.42(4) of the Criminal Code.]

C. Disclosure Rights and Obligations Under the Act

42. The Act does not provide a statutory right to disclosure. Although proceedings under the Act are criminal in nature, Stinchcombe disclosure principles do not apply. The s. 7 Charter right to make full answer and defence is not engaged because liberty is not at stake.²⁷ [Footnote: Canada (Attorney General) v. Curtis, 2005 BCSC 516 at paras. 24-25.]
43. The limited entitlement to disclosure in MLAT proceedings mirror those in the extradition context and establish that, in the normal course, disclosure is limited to the material relied upon in seeking the judicial authorization at issue.²⁸ [Footnote: Attorney General of Canada v. Suthanthiran, 2015 ONSC 3573 at para. 10. See also: United States of America v. Kwok, 2001 SCC 18 at paras. 97-101.]
44. Where an applicant seeks additional disclosure in connection with alleged state misconduct, the three part test set out by the Ontario Court of Appeal in R. v. Larosa, (2002), 166 C.C.C. (3rd) 449 must be satisfied:
- (a) the allegations must be capable of supporting the remedy sought;
 - (b) there must be an "air of reality" to the allegations; and

- (c) it must be likely that the documents sought and the testimony sought would be relevant to the allegations.²⁹ [Footnote: Larosa at para. 76; see also Curtis at para. 36, Suthanthiran (2015) at para. 10.]
45. An interested party is entitled to disclosure of the material filed in support of the order. As recognized by this Court in there is no obligation to disclose the MLAT request.³⁰ [Footnote: Canada (Attorney General) v. Curtis, 2005 BCSC 516 at paras. 24-25 and Suthanthiran.]
46. A request for mutual legal assistance made pursuant to the relevant treaty is a diplomatic communication from the central authority of the requesting state to the central authority of the requested state. The request may be relevant to the Minister's decision to approve the request, however that is separate and distinct from the question of whether the material placed before the authorizing judge was sufficient to satisfy the criteria imposed by s. 9.4 of the Act.

Discussion

- [24] For the reasons that follow, I conclude that the application does not meet the applicable test and accordingly it must be dismissed.
- [25] I propose to begin with an examination of the merits of the applicants' allegations of abuse of process. After doing so, I will then assess the application in the context of the Larosa test for disclosure.
- [26] In my view, it will be helpful at the outset to consider the notion of abuse of process.
- [27] Abuse of process is a doctrine known to both the criminal and civil law. At its core, the doctrine seeks to prevent misuse of the court's procedure in a way that would bring the administration of justice into disrepute. Claims can arise in a variety of circumstances and encompass a range of conduct. However, consideration of the present application requires some measure of clarity as to what will constitute an abuse of process and what will not.
- [28] I will proceed on the basis that an abuse of process as alleged by the applicants, such as to entitle them to the remedy of a stay of proceedings, will entail conduct by the state or a state actor that is a misuse of a lawful process and results in proceedings that are vexatious or oppressive to affected parties. Such conduct will be of sufficient moment to threaten the integrity of the administration of justice and offend the community's sense of fair play. Generally, the conduct will have an element of bad faith or, at least, will be lacking in good faith.
- [29] It becomes readily apparent that the assertion by the applicants that there is a fundamental injustice in their failure to receive notice and disclosure and their inability to challenge the US forfeiture order at the point it was filed with this Court is misconceived.

- [30] Firstly, it is important to understand that the process of filing the US forfeiture order with the British Columbia Supreme Court (s. 9.4(3) of the Act - see para. 38 in the quote on p. 11 of these reasons) is just that: a filing. In fact, the court has no adjudicative function at that stage.
- [31] The actual order, the US forfeiture order, had already been made. I note that the process in the US provides for affected third parties to advance a claim before the order is made final. In the instant case, none of the applicants did that. The available evidence provides a basis to believe the applicants were aware of the process in the US, but elected not to assert their interests. In oral submissions on this application, counsel for the applicants essentially conceded that they were aware of the proceedings.
- [32] However, that is not the end of the matter.
- [33] In accordance with the structure of the MLAT regime, the right of affected third parties, such as the applicants, to receive notice and to raise their objections is provided after the Canadian court has made its order but before execution is taken.
- [34] That is what has occurred in the instant case. As noted above, the applicants were provided noticed shortly after the BCSC forfeiture order was made. Although the Act provides a 30-day time limit to make an objection known, the Attorney General advised the applicants that would not be enforced. The applicants have the right under that provision to bring their objection. That avenue remains open so there is seemingly no prejudice to them.
- [35] The applicants make reference to the notion of notice generally and also to certain forfeiture provisions in the Code that require notice to affected parties prior to the application for forfeiture being made.
- [36] As is apparent, the procedure for MLAT forfeiture proceedings is different because the order for forfeiture is made outside the jurisdiction, in this case, in the United States. Nevertheless, the rights of affected third parties to notice and to raise their objections are duly afforded prior to execution.
- [37] On this proper understanding of the MLAT model, the applicants' somewhat provocative contention that the Court in British Columbia is being used as a mere "rubber stamp" loses its force.
- [38] In their submissions, the applicants place considerable emphasis on the proposition that the Code sets out a number of requirements for notice to interested or affected parties where the court is called upon to make a forfeiture order.
- [39] There is no doubt that the Code scheme in forfeiture matters includes requirements for notice to interested or affected third parties prior to the making of forfeiture orders; as well, the Code allows for applications for relief from forfeiture after the making of orders. I also recognize that the Act includes reference to Code sections relating to forfeiture provisions, some of them referencing notice requirements.

- [40] However, it is my conclusion that those considerations do not constitute a proper basis to import any further notice obligations into the filing of a foreign forfeiture order, duly made and vetted by the Minister of Justice and presented for filing with the superior court of criminal jurisdiction in the province where the property is believed to be located. I base that conclusion on the fact that the scheme of the Act includes no such requirement and, most particularly, because it makes proper and adequate provision for any affected or interested party to have their claim considered before the forfeiture order is executed. While the sequence of the proceedings is different, the protection of the rights of third parties is nevertheless ensured. Accordingly, I reject the allegation that the process represents a breach of natural justice.
- [41] The applicants make much of the fact that the order is in the name of Robert Bandfield. Indeed, on its face, that appears to be curious.
- [42] However, the affidavit of Cst. Padawan, which was provided to the court at the time the filing was made, provides an explanation for that.
- i. On or about May 9, 2016, Mr. Mullholland pleaded guilty to the U.S. District Court for the Eastern District of New York to conspiring to fraudulently manipulate the share price of numerous United States publicly traded corporations and launder more than \$250 million in proceeds. As part of his plea agreement, Mr. Mullholland agreed to forfeit a number of assets including two real properties located in British Columbia. The two properties in British Columbia are as follows:
 - i. The real property and premises located at 3630 Mathers Avenue, West Vancouver, British Columbia (the "West Vancouver Property"); and
 - ii. The real property and premises located at 2978 High Point Drive, Whistler, British Columbia (the "Whistler Property").
 - m. On or about May 23, 2016, Mr. Bandfield pleaded guilty to violation of Title 18, United States Code, Section 1956(h) Laundering of Monetary Instruments. As part of his plea agreement, Mr. Bandfield agreed to forfeit a number of assets, including those held in a Saxo Bank Account in the name of Titan (the "Saxo Bank Assets").¹ [Footnote: As described in paragraph 8 of this Affidavit, the final US forfeiture order reflecting the third party claim against Mr. Bandfield's assets also encompasses Mr. Mulholland's forfeited assets, listed in Exhibit A. As such, the final US forfeiture order is effective against Mr. Mulholland's forfeited assets in British Columbia, Canada.]
 - n. On or about July 12, 2016, Karla Melgaard and Kathy Melgaard (together, the "Third-party Claimants"), filed a third-party petition asserting interest in the Saxo Bank Assets. On March 22, 2017, the Third-Party Claimants entered into a Stipulation of Settlement with the government of the United States, in full and final satisfaction of their third-party claim. No other third party filed any petition or claim with the U.S. Court and the time to do so expired on July 21, 2016.

- o. On March 24, 2017 the U.S. order reflecting the Third-party Claimant's claim was entered in the District Court for the Eastern District of New York and became a final order of that court in relation to all right, title, and interest in all property listed in Exhibits A and B. The time to appeal the order expired on April 7, 2017 at which point the order became final and non-appealable.
- [43] The matter of the format of the US forfeiture order was specifically addressed at para. 8 of the affidavit of Cst. Padawan:
- 8. On June 24, 2019, I read an email from Stephen Bierbrier, Counsel, Department of Justice in Ottawa, dated December 21, 2018 and learned as follows:
 - a. That there is no United States order of forfeiture which only lists Mr. Mulholland as the defendant. The United States prosecutor handled the forfeiture in this matter to identify all of the assets at issue for all of the defendants and put them together in one document/schedule.
 - b. When the plea agreements were negotiated, the prosecutors sought to have the defendants forfeit their respective interests in all of the assets, even though it is not necessarily the case that all of the defendants had a claim/ownership interest in all of the assets.
 - c. This was done to avoid the situation where a co-defendant might try and make a claim as to any of the assets as part of the ancillary forfeiture proceedings following the plea/preliminary order of forfeiture.
 - d. As it was the same slate of assets for all the defendants, it would have been redundant to obtain final orders of forfeiture for each of the defendants because the defendants' interests in the property have already been forfeited/terminated, as had anyone else's interests, since the time for filing claims as to the property had run, by the time the New York Order was issued.
- [44] Essentially, the explanation is that one forfeiture order was drawn in respect of both of the co-conspirators, Mr. Mulholland and Mr. Bandfield. All of the property subject to forfeiture was listed on one common schedule.
- [45] Accordingly, then, when these circumstances are understood, this is not a matter of forfeiture being sought on the basis that some unrelated stranger, Mr. Bandfield, is the owner of the subject properties. Rather, as I shall explain, the forfeiture order is based on Mr. Mulholland having represented that he is the owner of the properties and having offered them up for forfeiture as part of his plea arrangement.

[46] With regard to the basis for the order including the British Columbia properties and the applicants' contention that Mr. Mulholland has never claimed an interest in the subject properties, I note that a number of documents from the plea and sentencing proceedings in the US have been filed on this application. There are three such documents that are relevant: a sentencing memorandum, a plea agreement and a consent to entry of final judgment,

[47] The sentencing memorandum prepared on Mr. Mulholland's behalf, presented to the US court and signed by his counsel, contains the following:

In addition to the personal impact of this case and Mr. Mulholland's unwavering acceptance of responsibility for his conduct, we ask the court to note that Mr. Mulholland has exhibited this acceptance in other ways as well. The government in this case properly sought forfeiture. Mr. Mulholland, prior to entering his plea agreed to submit to a proffer in which he detailed, in excruciating detail, the offence, his role in it, the roles of others and he set forth his every asset, some of which were not known to the government. He did so knowing that while he was always willing to cooperate, the government was not amenable to his cooperation. He came clean in every respect despite this. After detailing his assets, he agreed to complete forfeiture and explained how these assets could be attached. One of the assets was the house in Canada in which his wife and children reside. The house and one other property have been the subject of litigation with the SEC in Canada. Mr. Mulholland has done his utmost to secure an agreement in which the litigation would be terminated and the house forfeited with his wife being able to retain enough funds to relocate to far more modest accommodations. There is also an SEC matter in the United States. This matter was stayed pending the outcome of this criminal case. Mr. Mulholland has agreed to settle this matter as well with a complete and lifetime bar from the securities field. While we recognize that this outcome was inevitable, Mr. Mulholland chose not to litigate this matter. As for the forfeiture of the properties in Canada, his wife has been advised that she could tie the matter up in litigation for years. They have chosen not to do so. Mr. Mulholland is determined to leave all remnants of this conduct far behind him. He wants nothing more than to start a new and legally. While this will cause his family significant financial hardship in the years to come, it is Mr. and Ms. Mulholland's hope that they can persevere until his return.

[48] A plea agreement was filed with the US court. Mr. Mulholland signed that document and acknowledged that he had read the entire agreement and discussed it with his attorney. He acknowledged that he understood all of its terms and entered into it knowingly and voluntarily. Included in that agreement is the following:

6. The defendant acknowledges that property is subject to forfeiture as a result of his violations of 18 U.S.C. § 1956(h) as alleged in the superseding indictment. Pursuant to 18 U.S.C. § 982(a) (1), the defendant consents to the forfeiture of all right, title and interest in the property listed in Exhibit A (the "Forfeited Assets"), as property, real or personal, involved in a violation of 18 U.S.C. § 1956(h), or any property traceable to such property, and/or as substitute assets pursuant to 21 U.S.C. § 853(p). The defendant consents to the entry of a

Preliminary Order of Forfeiture pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure forfeiting the Forfeited Assets. The defendant further consents to have the Preliminary Order of Forfeiture made final at any time before sentencing pursuant to Rule 32.2(b)(4)(A) of the Federal Rules of Criminal Procedure.

7. The defendant agrees not to file a claim, or assist another person or entity to file a claim contesting the forfeiture of the Forfeited Assets in any administrative or judicial proceeding. Further, if any third party files a claim to any of the Forfeited Assets, the defendant shall assist the government in defending such claim. The defendant agrees to fully assist the United States in forfeiting the Forfeited Assets, by, among other things, executing any and all documents necessary to effectuate the immediate forfeiture of all right, title and interest in the Forfeited Assets to the United State.
8. The failure of the defendant to forfeit any monies and/or properties as required under this agreement, including the failure of the defendant to execute any document to accomplish same on timely notice to do so, may constitute a material breach of this agreement. Upon such a breach, the defendant will not be entitled to withdraw the plea, but the Office may bring additional criminal charges against the defendant. The defendant consents to the forfeiture of any other property of his, up to the value of Forfeited Assets not forfeited, pursuant to 21 U.S.C. § 853(p), the Federal Debt Collection Procedures Act, or any other applicable law.
9. The defendant has disclosed to the government all assets in which he holds an interest in a sworn financial statement entitled "United States Department of Justice Financial Statement" dated May 9, 2016 (hereinafter, the "Financial Statement"). The defendant agrees that a failure to disclose assets on the Financial Statement may constitute a material breach of this agreement. Further, the defendant consents to the forfeiture to the United States of all assets in which he has an interest, but failed to disclose on the Financial Statement, if any, as assets that constitute or are derived from the proceeds of his offense. Should undisclosed assets which the defendant owns or in which the defendant has an interest be discovered, the defendant knowingly and voluntarily waives the right to any required notice concerning the forfeiture of said assets.
10. The defendant knowingly and voluntarily waives his right to any required notice concerning the forfeiture of the monies and/or properties forfeited hereunder, including notice set forth in an indictment or information. In addition, the defendant knowingly and voluntarily waives his right, if any, to a jury trial on the forfeiture of the monies and/or properties forfeited hereunder, and waives all constitutional, legal and equitable defenses to the forfeiture of said assets, including, but not limited to, any defenses based on principles of double jeopardy, the Ex Post Facto clause of the Constitution, any applicable statute of limitations, venue, or any defense under the Eighth Amendment, including a claim of excessive fines.

11. The defendant agrees that the forfeiture of the Forfeited Assets is not to be considered payment of a fine, penalty, restitution loss amount, or payment of any income taxes that may be due, and shall survive bankruptcy. The defendant acknowledges that the Office, at its sole discretion, may seek to forfeit the Forfeited Assets through commencement of an administrative or civil judicial proceeding.
- [49] It is to be noted that Exhibit A to the plea agreement is the same list of properties to be forfeited which is appended to the BCSC forfeiture order granted on July 18, 2019.
- [50] Finally, I note that there is a copy of the consent to entry of final judgment dated December 22, 2016, signed by Mr. Mulholland. By that document, he consents to entry of final judgment, including orders for disgorgement in the amount of \$24,659,355.57, of which payment obligation shall be deemed satisfied by the entry of an order of restitution and forfeiture against him, contingent upon the accuracy and completeness of his representations made in that case concerning his assets.
- [51] The net effect of these documents satisfies me that when the US court made its forfeiture order, it was acting on the basis of representations by Mr. Mulholland that he had a proprietary interest in the subject properties and that he was agreeing to relinquish his interest in them as part of a forfeiture order. Whether he was misrepresenting his interest is not anything that I am able to say. However, on the face of these materials, I am unable to conclude that the US government was acting other than in good faith in its belief that the properties were properly liable to be forfeited. Accordingly, I find no merit to any submission of the applicants that the making of the forfeiture order was an abuse of process.
- [52] I wish to address the applicants' allegation that the lawyer who appeared before a justice of this Court on the filing application acted in breach of her professional and ethical obligations when, in the face of an inquiry by the presiding justice as to whether there was anything that should be disclosed that would weigh against the granting of the order, she did not disclose or raise for discussion the factual circumstances and history of the properties which were sought to be forfeit or the right, interest and defences of the applicants, which would have militated against the making of the BCSC forfeiture order.
- [53] Although determination of that issue is not, strictly speaking, a matter for this Court, my obligation to assess the disclosure application necessarily involves applying the Larosa criteria. Included in that is assessing whether or not there is an air of a reality to the allegations.
- [54] In my respectful view, when the situation is properly understood, there is no air of reality to the contention advanced by the applicants.

- [55] There can be no argument that the obligations of counsel on an ex parte hearing are onerous. The applicants make extensive reference to the reason for judgment of Associate Chief Justice Holmes of this Court in *British Columbia (Director of Civil Forfeiture) v. Owners and All Others Interested in the Real Property*, 2019 BCSC 1537, and particularly her remarks at paras. 33-37 and para. 73.
- [56] The fundamental importance of counsel making full, frank and fair disclosure of all material facts - facts that might be expected to influence the granting or rejection of the application in question - is a given and beyond dispute.
- [57] As I have observed, the process of filing the US order with the court in this province is an administrative act: a filing. The Act provides that, upon filing of the foreign forfeiture order, the court shall enter that foreign order as a judgment of the Canadian court. There is, in reality, no adjudicative function for the court to perform. Indeed, one might reasonably question why the Attorney General's representative would not simply attend at the registry to make the filing.
- [58] Accordingly, when the presiding justice inquired of counsel whether there was anything to be disclosed that would weigh against the making of the order, it seems to me that counsel's response ("No, My Lady, I don't believe there is.") was factually accurate. The respondent's suggestion that counsel was somehow obliged to tell the Court the factual circumstances and that there were third parties who might have an interest to claim is quite simply misconceived when considered in the structural framework of the MLAT scheme. Counsel's duty was to disclose to the Court anything material to the application at hand. In this case, I am not persuaded that counsel failed in that regard.
- [59] It seems to me that, at most, counsel might have considered advising the justice that there are parties who are likely to advance claims against the subject properties and oppose the execution of the forfeiture order, but that those parties will be advised of the making of the order in BC and will have an opportunity to make their claims in a proceeding prior to any execution of the order, in accordance with the process that the Act provides.
- [60] However, none of that was material to the filing of the US forfeiture order in the British Columbia court and I do not accept that there was any obligation on counsel to do so.
- [61] As a final observation, I consider it useful to examine the scope of the disclosure sought by the applicants. They seek broad access to the communications between the Government of the United States and the Government of Canada including at the ministerial level. That is, they seek communications central to the international treaty relationship.
- [62] In my view, two comments are apposite:

1. The authorities referenced earlier suggest that disclosure of such a class of material will not be routinely granted. Applications such as that which is before this Court will be carefully scrutinized, with the recognition that there is no obligation to disclose the MLAT request nor, I would say, the materials related to the consideration of the requisition at the ministerial level.
2. The allegations of the applicants, even given the benefit of generous doubt, do not, in my estimation, provide a basis for the relevance of the broad scope of disclosure sought. The application might fairly be described as a strikingly ambitious exploratory expedition: a fishing trip, plain and simple.

Disclosure

[63] With those observations made, I turned to the Larosa test.

[64] In assessing the application for disclosure, I find the following excerpt from *United States v. Meng*, 2019 BCSC 2137, as to how the Larosa criteria are to be applied, to be instructive:

[38] The test to be met for disclosure to support an abuse of process claim is set out in the Ontario Court of Appeal's decision in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.) at para. 76. The test was adopted by the BC Court of Appeal in *United States v. Costanzo*, 2009 BCCA 120 at para. 28.

[39] By the Larosa test, three criteria must be met:

- (a) the allegations [here, of abuse of process] must be capable of supporting the remedy sought;
- (b) there must be an air of reality to the allegations; and
- (c) it must be likely that the documents sought and the testimony sought would be relevant to the allegations.

[40] The Larosa test thus serves to eliminate frivolous applications, destined to fail, before substantial resources are applied by the parties and the court to a hearing of the application on its merits, and the committal phase of the extradition process inevitably delayed. The test also requires an applicant to demonstrate that their claim reaches a "threshold of plausibility" based on reasonable facts and inferences from the evidentiary record already before the court, before they will be entitled to disclosure over and above the usual, fairly limited level.

[41] In *United States of America v. Wong*, 2017 BCCA 109, Fitch J.A. discussed these features of the Larosa test, and related them to how the test is applied. In particular, an application for disclosure in the context of an abuse of process claim must be founded on evidence, not speculation or unsupported assertions about such an abuse (at paras. 25-26):

[25] The test in *Larosa* and the purpose it serves was addressed by Molloy J. in *United States of America v. Tollman*, [2006] O.J. No. 5588 at para. 21 (Ont. S.C.):

The function of the "air of reality" test is two-fold. First, it provides a mechanism to weed out frivolous applications before incurring the expense and delay of a lengthy evidentiary hearing. Second, it imposes a threshold of plausibility before the applicant will be entitled to relief such as production of documents, particulars, or the compelling of viva voce testimony [citations omitted]. The level of plausibility required to survive the air of reality test is somewhat amorphous. Typically, when cases are dismissed as having no air of reality, the allegations can fairly be characterized as ludicrous or preposterous. However, in my opinion, the actual test is, and must be, higher than that. Obviously, at this point, the applicant cannot be expected to reach the standard of proof on a balance of probabilities, as that is the ultimate standard to be applied at the abuse of process hearing itself. However, it is not enough for the applicant to demonstrate that his allegations are not ridiculous; he must be able to show some reasonable prospect of success on the application.

- [26] The "air of reality" criterion will not be satisfied by "wishful thinking" or the mere assertion that the disclosure sought will assist in determining the issue the applicant seeks to raise: Larosa at para. 74. Further, the "air of reality" test will not be satisfied on the basis of vague and unsubstantiated suggestions, or conjecture and speculation: [citations omitted]. The required "air of reality" to the abuse of process claim must be demonstrated on the basis of the evidentiary foundation before the extradition judge and the facts and inferences that evidence reasonably supports; in other words, the test must be satisfied independent of speculative assertions as to what the sought-after disclosure might reveal.
- [42] It is important to stress that while the application of the Larosa test thus requires some consideration of the evidence in support of the abuse of process application, the court does not determine whether the abuse of process application will ultimately succeed. The applicant is not required at this stage to prove an abuse of process, even on a balance of probabilities. The question at this stage is whether the abuse of process claim has an air of reality, measured according to the three-part test.
- [65] The first criterion to consider is whether the allegations are capable of supporting the remedy sought.
- [66] If the applicants prove on a balance of probabilities that the enforcement of the forfeiture order against the two British Columbia properties would constitute an abuse of process of the court, they will seek the remedy of a stay of proceedings.
- [67] I note that the remedy of a stay of proceedings is quite drastic and only very infrequently granted. I also consider it relevant that, as explained earlier, there is an available avenue for the applicants to pursue the remedy they seek, that is, to exempt the subject property from forfeiture. In the circumstances, to pursue a claim for the somewhat extraordinary remedy of a finding of an abuse of process and a stay seems unnecessarily complicated in the circumstances.

- [68] All that said, the question I must ask is, if the applicants were successful in proving an abuse of process, would a stay of proceedings be available? The answer to that I conclude is in the affirmative, and so the first branch of the test is satisfied.
- [69] The second branch requires that the applicants satisfy the Court that there is an air of reality to the allegations - that is some realistic possibility that the allegations can be substantiated if the disclosure orders requested are made.
- [70] With great respect, I am unable to conclude this branch of the test has been met. All of the evidence suggests that the US authorities acted in good faith as did the Canadian government and that their actions were in compliance with the relevant laws. I find no reasonable basis, in the evidence and on the applicable law, to conclude that there was improper conduct, whether in the obtaining of the US forfeiture order; the absence of notice to the applicants at the time of the filing of the order in BC; or any failure on the part of counsel to make full disclosure to the Court of the material facts. None of these allegations of abuse of process have an air of reality to them.
- [71] As the third branch of the test, I must consider whether it is likely that the disclosure sought would be relevant to the allegations. I have stated my view that the scope of disclosure sought is breathtakingly broad. More relevantly, on a fair assessment of the facts as disclosed by the available evidence and according to the applicable law, I do not accept that the disclosure sought would be relevant as Larosa requires.
- [72] Also with respect to the disclosure sought, I offer one final observation. Qualitatively, the scope of the disclosure sought by the applicants is also problematic. They seek broad access to the communications between the Government of the United States and the Government of Canada including at the ministerial level. That is, they seek communications central to the international treaty relationship. As a general proposition, such diplomatic communications are subject to a special status of privilege. For the reasons I have provided above, the application must, on its merits, fail, and so there is no need for this Court to address the privilege issue. However, because the application appears to quite squarely seek to reach into that domain, I consider it worthy of mention in passing.

Conclusion

- [73] The application stands dismissed.

"Williams J."

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