

CANADA / JUDGMENT

United States v. PacNet Services Ltd.

2025 BCSC 244

COURT

Supreme Court of British Columbia

DECIDED

19 February 2025

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2025 BCSC 244 United States v. PacNet Services Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. PacNet Services Ltd.,

2025 BCSC 244

Date: 20250219

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 Edelmann

Reasons for Judgment

Counsel for the Applicant:

C.C. Benton

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Counsel for the Respondents:

I. Donaldson, K.C.

J. Oppal (October 23, 2024 only)

Place and Date of Hearing:

Vancouver, B.C.

October 23, 2024, January 20-21, 2025

Place and Date of Judgment:

Vancouver, B.C.

February 19, 2025

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Overview

- [1] The Attorney General of Canada seeks an order under the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) (the "Act") authorizing the sending of seized records to the United States in furtherance of a request for mutual legal assistance related to a criminal investigation into mass-mail fraud.
- [2] The respondent PacNet Services Ltd. ("PacNet") raises two issues in opposing the order.
- [3] First, PacNet alleges that contradictions in the evidence before the Court raise questions about whether the Minister of Justice granted the appropriate approval in the process leading to the seizure of the records. In furtherance of that allegation, PacNet seeks various forms of disclosure and seeks remedies, including the quashing of the underlying orders.

- [4] Second, PacNet submits that the search in question went beyond the scope of what was requested by the United States and it would not have been open to the Minister's delegate to approve such a search without a further request specific to the subject of the search.
- [5] I will begin with an overview of the procedural history before turning to the application for disclosure and, ultimately, the sending order.

Procedural History

- [6] In a request dated August 29, 2016, the United States sought the assistance of the Government of Canada to search and seize documents and records from PacNet and DeepCove's offices in Vancouver. 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 1995, Can. T.S. 1990 No. 19. The Minister of Justice approved this request on August 30, 2016.
- [7] According to the request, the United States authorities were conducting a criminal investigation into fraudulent mass-mailed solicitations believed to be financially exploiting vulnerable groups. The United States authorities allege that PacNet and DeepCove processed fraudulently induced payments in violation of United States laws and as such acted in a way to perpetuate mass-mailing of the fraudulent solicitations. The request alleges that a number of United States offences were committed through the direct mail schemes, including mail fraud, wire fraud, mailing lottery tickets, and conspiracy.
- [8] On September 21, 2016, the Attorney General of Canada applied ex parte for warrants to search and seize records from PacNet and DeepCove's co-located offices in Vancouver, pursuant to s. 11(2) of the Act. The same day, Associate Chief Justice Cullen issued the requested search warrants pursuant to s. 12(1) of the Act.
- [9] Competition Bureau officers executed the warrants at PacNet and DeepCove's corporate offices between September 21 and 25, 2016. During the execution of the warrants, officers found evidence that PacNet stored additional business records offsite at a Butler storage facility.
- [10] On October 7, 2016, the Attorney General applied for an evidence-gathering order pursuant to s. 18(1) of the Act requiring Butler to produce the business records PacNet stored at its facility. Justice Schultes issued the order sought the same day.
- [11] Between October 12 and 17, 2016, Butler produced 521 boxes of PacNet business records pursuant to the evidence gathering order. On October 21, 2016, Cullen A.C.J. issued a search warrant pursuant to s. 12(1) of the Act, authorizing the Competition Bureau to search the boxes produced by Butler. The documents at issue in the application before me (the "Butler Documents") were all obtained pursuant to these two orders.

- [12] In the intervening years, there were a number of hearings and applications related to the initial office searches. PacNet and DeepCove sought the disclosure of some ten categories of records, including the actual request made on behalf of the United States, in furtherance of challenges to the validity of the searches. In 2018, Winteringham J. (as she then was) ordered disclosure of the request but refused to order disclosure of the other nine categories of records (U.S.A. v. PacNet et al. (26 September 2018), Vancouver 160676 (B.C.S.C.)).
- [13] Following other preliminary hearings, (U.S.A. v. PacNet Services Ltd., 2019 BCSC 2076; U.S.A. v. PacNet Services Ltd., 2021 BCSC 649), Winteringham J. heard and dismissed PacNet and DeepCove's application to quash the warrants, finding that they were validly issued and were not overbroad as to violate s. 8 of the Charter, except for one category of mostly personal employee records she found could be severed. She issued a sending order with terms reflecting that exception (U.S.A. v. PacNet Services Ltd., 2023 BCSC 519; leave to appeal to BCCA refused: 2023 BCCA 445; leave to appeal to SCC refused: 2024 CanLII 64321 (SCC)).

Disclosure and Ministerial Approval

- [14] The Minister of Justice is responsible for implementing and administering the Act and the relevant mutual legal assistance treaties (s.7, s.2). The first step in initiating the process for executing a search or gathering evidence under the Act is a request from a foreign state to the Minister for assistance. If the Minister approves the request, the Minister is required to provide the "competent authority" with any documents or information necessary to apply for the relevant order or warrant (s.17(1) and s.11(1)). The "competent authority" who applied for both the warrant and the evidence gathering order at issue before me is the Attorney General of Canada.
- [15] PacNet applies for disclosure of five broad categories of records in support of an argument that the Minister of Justice did not approve the search and seizure of the Butler Documents as required by ss. 11(1) or 17(1). PacNet says the issue is relevant to the validity of the warrant and evidence gathering order and resulting violations of s.8, as well as a factor to considered by this Court at the sending stage.
- [16] In the course of written and oral submissions, PacNet raised issues with both the delegation of the ministerial role and the timing of the purported approval. I will address each issue in turn.

Delegation

- [17] In response to the applications that are before me, the Attorney General filed a document attached to a paralegal's affidavit entitled "Confirmation of Ministerial Approval" dated 11 October 2024. In the document, Rosanna Carreon, identified as Senior Counsel with the International Assistance Group at the Department of Justice, confirms that she acted as a delegate of the Minister of Justice in extending approval for the search of the offsite storage at Butler. The document is a direct and formal representation on behalf of the Department

of Justice being put before the Court by the Attorney General of Canada that Ms. Carreon was the Minister's delegate for the purposes of the relevant approval. Counsel for PacNet has taken me to no provision of the Act that would prevent the Minister from delegating the tasks set out in ss.11(1) and 17(1). Nor has he presented any basis to put into question that there was such a delegation at the relevant time.

Timing of Approval

[18] To understand the second issue raised by PacNet, it is necessary to review the history of the warrants in some more detail.

[19] On September 21, 2016, when the initial warrant to search the offices of PacNet and Deepcove was sought, the materials before Cullen J. included affidavits of Nicola Pfeifer, a Senior Competition Law Officer with Competition Bureau Canada, sworn on September 19, 20 and 21, 2016. One of Ms. Pfeifer's affidavits attached a document entitled "Minister's Approval of Treaty Request" dated 30 August 2016 and signed by Ms. Carreon. In that document, Ms. Carreon approved the request on behalf of the Minister of Justice.

[20] On October 7, 2016, when the Attorney General applied for an evidence-gathering order before Schultes J., the application relied on the previous affidavits along with a Third Supplemental Affidavit of Nicola Pfeifer sworn October 6, 2016. That affidavit includes the following passage:

On September 27, 2016, CCB senior competition law officer Andrea McAuley informed me that during the search of PacNet and DeepCove, she located a folder labeled "storage" which contained delivery receipts, invoices, handwritten lists of numbers, and what appeared to be a list describing the contents of boxes...

[21] The affidavit does not refer to any further approval from the Minister under the Act.

[22] In the "Confirmation of Ministerial Approval" dated 11 October, 2024, Ms. Carreon sates the following:

... I extended approval on behalf of the Minister of Justice on September 23, 2016, for the purpose of searching other locations and for providing the results of this search to the United States in furtherance of their request for assistance. The basis for this approval was that there were reasonable and probable grounds to believe that evidence of the offences allegedly committed by PacNet Services Ltd. and DeepCove Labs Ltd. would be found in a newly identified location, specifically at Butler Boxes and Storage Inc. The executing authorities were notified of such on September 23, 2016.

[23] PacNet argues that there is a contradiction between these two documents, suggesting that Ms. Carreon could not have approved the search for the Butler Documents before Officer Pfeifer was aware of them, and furthermore Ms. Carreon could not have been in contact with the executing authorities if Officer Pfeiffer was not aware of it.

- [24] I do not find that the evidence before me raises the contradictions suggested by PacNet. The materials clearly identify someone other than Officer Pfeifer as taking the lead role in relation to the office searches. It would appear that Officer Pfeifer was tasked with drafting the affidavits to support obtaining the relevant court orders. I find there is little relevance to the point in time when she became aware of developments in the investigation.
- [25] During the hearing before me, counsel for the Attorney General explained that the term "executing authorities" as used by the International Assistance Group would refer to the Attorney General of Canada. Although the terminology could be clearer, it would be consistent with the requirement under ss.11(1) and 17(1) for the Minister to provide the necessary information to the "competent authority." It is clear on the face of the applications before Schultes J. and Cullen J. that the applicant was the Attorney General, confirming that the Attorney General was the relevant "competent authority." Counsel for the Attorney General confirmed that she was personally aware of communication between Ms. Carreon and counsel for the Attorney General at the relevant time. I do not understand counsel for PacNet to be challenging that assertion.

Disclosure

- [26] Counsel agree that disclosure applications in the mutual legal assistance treaty context are governed by the three-part test set out by the Ontario Court of Appeal in *R. v. Larosa*, 2002 CanLII 45027; 166 CCC (3d) 449 (ON CA) at para. 76 (see *U.S.A. v. PacNet et al.* (26 September 2018), Vancouver 160676 (B.C.S.C.)). Before the court can order the production of documents, an applicant seeking disclosure must satisfy the court that:
- a. the allegations are capable of supporting the remedy sought;
 - b. there is an air of reality to the allegations; and
 - c. it is likely that the documents sought and the testimony sought would be relevant to the allegations.
- [27] The air of reality requirement requires that the applicant establish "some realistic possibility that the allegations can be substantiated if the orders requested are made" (*Larosa* at para. 77). As noted by Holmes J. in *In the Matter of an Application Pursuant to s. 17(2) of the Mutual Legal Assistance in Criminal Matters Act and Rafal Kurek*, 2005 BCSC 516 at para. 37: "It is not enough to hope, or to suspect, that something of relevance will accrue in furtherance of the allegations if disclosure is allowed."
- [28] I do not find that PacNet has established an air of reality to the assertion that there was no Ministerial approval at the relevant time. I do not find there to be an air of reality to the suggestion Ms. Carreon was not a delegate of the Minister of Justice at the relevant time. I also do not find that there are contradictions on the face of the evidence about the timing of the approval. To the contrary, I find the materials before me are consistent with the assertion by Ms. Carreon that she granted approval on behalf of the Minister for a further

search on September 23, 2016. The application for disclosure is dismissed.

Sending Order

- [29] As the applicant at the sending hearing, the Attorney General of Canada bears the onus of proving on a balance of probabilities that the requirements of s. 15 of the Act have been met (U.S.A. v. Wilson, 2002 BCSC 124 at para. 82). A judge hearing a sending application under s. 15 of the Act is to consider two matters: (1) whether the warrant was executed according to its terms and conditions; and (2) that there is no reason why the order should not be made (U.S.A. v. Wilson, 2010 BCCA 85 at para. 40).
- [30] I am satisfied on the materials before me that the warrant was executed according to its terms and the relevant reports under the Act were filed. The respondents do not suggest otherwise.

Scope of Request

- [31] In addition to the issues I have already addressed earlier in these reasons, counsel for PacNet submits that I should decline to make the sending order because the search of the Butler Documents was beyond the scope of what was requested by the United States. He submits that the Minister had no jurisdiction under the Act to approve investigative measures beyond those that were specifically requested.
- [32] The Attorney General submits that it is not the role of this Court to sit in judicial review of a decision of the Minister of Justice to approve a request under the Act, and further argues that I should not consider the issue at all. While I agree with the Attorney General that I am not sitting in judicial review of the Minister's decision, it is less clear to me as a matter of law whether there may not be circumstances when the investigative measures approved by the Minister are so far removed from the nature of a request is that it might weigh against making a sending order. However, given my conclusion on the facts of this case, it is not an issue I need to decide and I will therefore leave it to be addressed in a case where it might arise.
- [33] The Act does not require the request to be produced at a sending hearing as a matter of course. In this case, the request from the United States that was approved by the Minister is only before me as a result of the disclosure order of Winteringham J. The United States was requesting assistance in searching for various business documents in the offices of PacNet and DeepCove. Ms. Carreon became aware that some of those documents were likely stored offsite rather than in the specified location and approved a further search on behalf of the Minister. Even if I were to accept the submission of PacNet that the search of the Butler Documents was not specifically requested by the United States, it was not so far removed from the nature and scope of the request to bring the validity of Minister's approval into question. I do not find that the alleged discrepancy between the request and the approval weighs against the making of a sending order in the circumstances.

[34] For the reasons set out above, I am satisfied there is no reason the sending order should not be made on appropriate terms and conditions.

Terms and Conditions

[35] 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 [s. 11(1)],
- (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.

[36] The parties before me largely agree on the terms and conditions that should be imposed in making a sending order, excluding the same material as in the order of Winteringham J. The main area of disagreement is that PacNet and Deepcove would seek to have an additional condition that if excluded material is found in the seized material by the requesting state that it be immediately returned. The Attorney General opposes the addition of such terms as the onus being placed on the authorities in the requesting state is unclear. It may require them to interpret not only the Canadian order, but also Canadian application of legal concepts like solicitor-client privilege. I agree. I do not find the additional terms are necessary in the circumstances. If it became evident there were materials that were inadvertently sent contrary to the order, it is to be expected that the situation would be remedied without the need to specify the mechanism for doing so in the order itself.

[37] I therefore order that the Report of Adam Crowley dated September 27, 2024 and the seized materials (both the original paper copies and electronic copies) described in Appendix 3 to that report be sent to individuals or agencies of the Government of the United States of America designated by the Canadian Minister of Justice, excluding:

all records subject to a claim of solicitor-client privilege by PacNet and/or DeepCove; and all records falling solely within paragraph 14 (the personal records) of the Search Warrant re Butler Boxes issued by Associate Chief Justice Cullen on October 21, 2016.

(the "Seized Materials")

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

That the Government of the United States of America return the Seized Materials 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 or, if PacNet and DeepCove seek leave to appeal this order to the Court of Appeal pursuant to s. 35 of the MLACMA, until the Court of Appeal has refused leave to appeal this order or, if leave is granted, until the Court of Appeal has rendered its decision.

"Edelmann J."

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Prepared on 27 October 2026 · Esheria