

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *PacNet Services Ltd. v. United States of America*,
2025 BCCA 276

Date: 20250723
Docket: CA50505

Between:

PacNet Services Ltd.

Applicant/Appellant
(Respondent)

And

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

Respondent
(Applicant)

Before: The Honourable Justice Mayer
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated February 19, 2025 (*United States v. PacNet Services Ltd.*, 2025 BCSC 244, Vancouver Docket OTR160676).

Oral Reasons for Judgment

Counsel for the Appellant:

I. Donaldson, K.C.

Counsel for the Respondent:

C. Benton
B. Kozulin

Place and Date of Hearing:

Vancouver, British Columbia
July 23, 2025

Place and Date of Judgment:

Vancouver, British Columbia
July 23, 2025

Summary:

The applicant seeks leave to appeal a chambers judge’s disclosure decision and sending order made pursuant to the Mutual Legal Assistance in Criminal Matters Act, and a stay of the sending order. The applicant submits that the judge erred by finding that the requisite ministerial approval for a search of its offices was in place at the material time, and by misapprehending evidence pertaining to the applicant’s disclosure application.

Held: Application dismissed. Section 35 of the Act provides that an appeal of a judge’s decision is only available where a question of law is raised. The errors alleged by the applicant do not raise questions of law. As leave has been denied, the application for a stay of the sending order is rendered moot and is also dismissed.

MAYER J.A.:

Overview

[1] The appellant, PacNet Services Ltd. (“PacNet”) was an international payment processing service provider headquartered in Vancouver between 1994 and 2016. PacNet seeks leave to appeal a disclosure decision and a sending order made on February 19, 2025, pursuant to ss. 15 and 20 of the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.) [the “Act”].

[2] The orders were made in the context of an ongoing criminal investigation in the United States of America into fraudulent mass-mailed solicitations believed to be financially exploiting vulnerable groups. It was alleged that PacNet and DeepCove Laboratories Inc. (“DeepCove”), the corporation which held PacNet’s proprietary software, processed fraudulently induced payments.

[3] For the reasons that follow, I would dismiss the application for leave to appeal both the disclosure decision and the sending order. I would also dismiss the application for a stay, which is rendered moot by my decision to deny leave to appeal.

Background

[4] On August 30, 2016, the Canadian Minister of Justice approved a request from the United States of America, made one day earlier, to search the co-located

offices of PacNet and DeepCove in Vancouver and deliver the results to the United States (the “August 2016 Request”).

[5] The August 2016 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, which has been implemented domestically by the *Act*.

[6] After hearing an *ex parte* application made by the Attorney General for Canada (the “AGC”) on September 21, 2016, search warrants for the offices of PacNet and DeepCove were authorized by Associate Chief Justice Cullen, pursuant to s. 12 of the *Act*. In its application, the AGC relied upon affidavits of Nicola Pfeifer, a Senior Competition Law Officer with the Competition Bureau of Canada (the “Bureau”).

[7] The September 21, 2016, search warrants were executed over a four-day period. During the search, on September 22, 2016, Bureau officer Andrea McAuley located evidence that PacNet stored business records off-site at a private storage facility operated by Butler Box & Storage Inc (“Butler Box”).

[8] On October 7, 2016, the AGC made a second *ex parte* application, pursuant to s. 18 of the *Act*, to obtain materials stored by PacNet at the Butler Box facility, relying on a third supplemental affidavit sworn by Ms. Pfeifer. Justice Schultes granted this application. Ms. Pfeifer’s Third Supplemental Affidavit refers to the August 2016 Request, but did not explicitly refer to any further ministerial approval made pursuant to the *Act*. After being served with the October 7, 2016 order, Butler Box produced 521 boxes of PacNet records to the Bureau.

[9] On October 21, 2016, the AGC made a third *ex parte* application for a warrant authorizing the Bureau to search the boxes obtained from Butler Box, which was granted by Associate Chief Justice Cullen pursuant to s. 12(1). The AGC relied upon Ms. Pfeifer’s Fourth Supplemental Affidavit and her preceding affidavits.

[10] Between 2018 and 2023, PacNet and DeepCove brought a series of applications related to the lawfulness of the warrants authorizing a search of their offices—which were heard and dealt with by Justice Winteringham (as she then was). In 2018, Justice Winteringham had ordered disclosure of the August 2016 Request. In 2019, she dismissed PacNet and DeepCove’s application to quash warrants.

[11] Ultimately, on April 3, 2023, Justice Winteringham granted the AGC’s application for a sending order, brought pursuant to s. 15 of the *Act*, authorizing transmittal of records seized pursuant to the September 21, 2016 warrants to the United States. On November 30, 2023, Justice Harris of this Court refused PacNet and DeepCove’s application for leave to appeal the orders which culminated in Justice Winteringham’s April 2023 order. On July 11, 2024, the Supreme Court of Canada dismissed an application for leave to appeal Justice Harris’ decision.

[12] On October 3, 2024, PacNet and DeepCove filed a further application seeking to set aside October 2016 orders authorizing the gathering of and subsequent search of PacNet’s boxes stored at the Butler Box facility. In the application, they opposed the sending of any of the materials obtained from the boxes stored at the Butler Box facility to the United States.

[13] In a document dated October 11, 2024, Rosanna Carreon, a lawyer with the Department of Justice, stated that she extended approval on behalf of the Minister of Justice on September 23, 2016, to search Butler Box & Storage (the “Confirmation”). The Confirmation further stated that the “executing authority” was informed of this extension on September 23, 2016. PacNet and DeepCove say that they learned of the Confirmation after they applied for disclosure of documents relevant to determining whether ministerial approval was obtained.

[14] On October 23, 2024, Justice Edelmann (as he then was) heard a portion of the AGC’s application brought pursuant to ss. 12 and 15 of the *Act* seeking an order authorizing the transmittal of the records seized from the Butler Box facility to the United States. Also, on October 23, 2024, PacNet filed a further application for

disclosure concerning Ms. Carreon’s authority to act on behalf of the Minister, communication between AGC counsel and the Minister or delegate in relation to the warrants which had been issued, communication between the Bureau and AGC counsel, approval of the search for and seizure of PacNet’s boxes from the Butler Box facility and government policies concerning an “extension” of Ministerial approval under the *Act*.

[15] On January 20 and 21, 2025, Justice Edelman heard PacNet’s disclosure application and the continuation of the AGC’s October 23, 2024 application. In its written and oral submissions, PacNet raised two main issues: whether the Minister had properly approved the search and seizure of their boxes from the Butler Box facility and whether the seizure of those boxes was beyond the scope of the initial request made by the United States. During this hearing, counsel for PacNet confirmed that they were not suggesting that the Confirmation was a false document, Ms. Carreon’s statements in that document were not honest or the Minister could not delegate authority to Ms. Carreon. They stated that they accepted Ms. Carreon was a delegate of the Minister.

[16] On February 19, 2025, Justice Edelman dismissed PacNet’s application for disclosure and granted the AGC’s application for a sending order authorizing the transmittal of the materials seized from the Butler Box facility to the United States (the “Edelman Decision”).

[17] In this application, PacNet seeks leave to appeal Justice Edelman’s dismissal of the disclosure application and granting of the sending order, and seeks a stay of the sending order pending the determination of the appeal or further order of this Court.

Grounds of Appeal

[18] PacNet describes the proposed grounds of appeal as follows:

- I. The hearing judge erred in law in imposing an evidentiary burden on the applicant to impugn the purported Ministerial approval. The applicant discharged its burden, if there was one, because Officer Pfeifer’s sworn evidence was inconsistent with the ‘approval’

document created years after the fact, and there is no statutory authority for an ‘extension’; and

- II. The hearing judge erred in law in dismissing the disclosure application. He misapprehended the evidence, because:
 - a. There was no evidence to ‘clearly identify someone other than Officer Pfeifer as taking the lead role’. The evidence was to the contrary: Officer Pfeifer swore all five relevant affidavits, the warrants named her, the Butler Box Evidence Gathering Order specified delivery to her, and the Butler Box search warrant named her; and
 - b. This finding of the hearing judge was contrary to the evidence, and he misdirected himself on the factual underpinning of the *Larosa* test for disclosure.

[19] The AGC restates these proposed grounds of appeal as follows:

- a. Does the applicant seek leave to appeal a question of law?
- b. If the applicant has identified a question of law, has the applicant established that leave ought to be granted to address it?

[20] The AGC submits that PacNet’s proposed grounds reflect questions of fact, not law, and accordingly cannot ground an appeal pursuant to s. 35 of the *Act*. They further submit that PacNet raises a new issue (the admissibility or truthfulness of the Confirmation—specifically, the document from Ms. Carreon) and resiles from positions taken before Justice Edelman.

[21] For the reasons which follow, I would conclude that PacNet’s proposed grounds of appeal do not raise questions of law. The alleged errors, at best, could be characterized as errors of mixed fact and law, which does not meet the statutory prerequisite for leave to appeal under s. 35 of the *Act*.

Legal framework

[22] Appeals of orders made pursuant to the *Act* are governed by s. 35 of the *Act*:

35 An appeal lies, with leave, on a question of law alone, to the court of appeal, within the meaning of section 2 of the *Criminal Code*, from any order or decision of a judge or a court in Canada made under this Act, if the application for leave to appeal is made to a judge of the court of appeal within fifteen days after the order or decision.

[23] In order for leave to be granted, an applicant must identify a question of law and show that leave ought to be granted to address it: *Canada (Attorney General) v. Georgiou*, 2023 ONCA 495 at para. 42.

[24] The Court of Appeal for Ontario discussed the difficulties of distinguishing between questions of law, and questions of mixed fact and law, in *R. v. Kachkar*, 2014 ONCA 560:

[29] The distinction between questions of law, on the one hand, and questions of mixed fact and law, on the other, is often difficult. Sometimes, what appears at first blush to be a question of mixed fact and law turns out to be a question of law. The opposite is also true: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116, at pp. 766-67 S.C.R.

[30] Questions of law are about what the correct legal test is, while questions of fact are questions about what actually took place between the parties. Questions of mixed fact and law are questions about whether the facts satisfy the legal tests: *Southam Inc.*, at pp. 766-67 S.C.R. A question that is about the application of legal standard is also a question of law: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, [2000] S.C.J. No. 65, at para. 18.

[25] Where the issue is in the application of a legal test, the underlying factual findings are entitled to deference, absent palpable and overriding error: *United States of America v. PacNet Services Ltd.*, 2023 BCCA 445, at para. 29 (Chambers).

Analysis

[26] In my view, despite PacNet’s attempts to characterize the proposed grounds of appeal as errors of law, in their proposed appeal they seek to challenge Justice Edelman’s findings of fact and determinations of whether those facts satisfy the applicable legal tests. I will address each of the purported errors in turn.

Did the Hearing Judge impose an evidentiary burden on PacNet to impugn the Ministerial approval?

[27] As the first ground of appeal, PacNet submits that Justice Edelman erred by “imposing an evidentiary burden on the applicant to impugn the purported Ministerial approval”. PacNet emphasizes that ministerial approval is a prerequisite to the

search of the Butler Box materials, per ss. 2, 7, 11 and 17 of the *Act*, and that the authorizations may have been unlawful. Specifically, PacNet takes issue with Justice Edelman treating the Confirmation as “presumptively valid”, and contends that the onus was placed on PacNet to disprove its validity or raise evidence of impropriety. It submits that the *Act* requires “approval”, not an “extension” of an approval by the Minister.

[28] First, in my view, the difference between an “approval” and an “extension of an approval” is effectively a semantic distinction. I see no practical difference between the issuance of an initial approval by the Minister, and a subsequent approval characterized as an extension. In this respect, I note that Justice Edelman expressly found that the Confirmation constituted an “approval on behalf of the Minister for a further search on September 23, 2016”: Edelman Decision at para. 28.

[29] As well, the fact that the form of the Confirmation may have been “entirely different from the original [approval] document”, as PacNet submits, is of no consequence. The *Act* does not prescribe the use of a particular form of Ministerial approval, only the act of approval.

[30] Effectively, PacNet seeks to challenge Justice Edelman’s determination that the Confirmation was valid and constituted ministerial approval. This, at most, could be characterized as an error of mixed fact and law.

[31] In this leave application, PacNet submits that Ms. Carreon could not have approved the search of the Butler Box facility on September 23, 2016, as she stated she did in the Confirmation, as Ms. Pfeifer was not aware that PacNet used off-site storage until September 27, 2016.

[32] To the extent that PacNet highlights purported inconsistencies in the evidence regarding the nature and timing of the issuance of the Confirmation, these inconsistencies would reflect errors of fact or mixed fact and law and cannot ground

an appeal under s. 35. In any event Justice Edelman addressed the alleged inconsistency in his reasons:

[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 Pfeifer 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.

[33] In his reasons, Justice Edelman noted that Ms. Pfeifer was not the Bureau officer leading the execution of the warrant at the PacNet and DeepCove offices, where evidence of off-site file storage was found on September 23, 2016—that is, implying that someone else had told Ms. Carreon about off-site storage prior to September 27.

[34] These comments, among others, clearly demonstrate that the purported errors identified by PacNet concern findings of fact made by Justice Edelman. It was open to the judge to weigh the evidence before him and his factual findings are owed deference. Accordingly, I would not grant leave for the first proposed ground of the appeal, on the basis that it does not raise a question of law.

Did the Hearing Judge misapprehend evidence?

[35] PacNet submits that Justice Edelman “erred in law and misapprehended evidence in dismissing [its] disclosure application, concerning who [with the Bureau] was leading the investigation.” It refers to Justice Edelman’s comment at para. 23 of his reasons that “the materials clearly identify someone other than Officer Pfeifer as taking the lead role in relation to the office searches.” This submission is relevant to PacNet’s contention that there was no way that Ms. Carreon could have known about the files stored at the Butler Box facility on September 23, 2016, when she approved a search at that location.

[36] It is clear that, at para. 23, Justice Edelman was referring to someone other than Officer Pfeifer discovering that PacNet utilized off-site storage for its files. I note the submission of the AGC that when the parties appeared before Justice Edelman there was no controversy between them that Officer Smyth of the Bureau acted as the search lead and supervised the execution of the warrants for search of the PacNet and DeepCove offices or that it was Officer McAuley who discovered that PacNet stored files off-site. In my view, there is no inconsistency between Ms. Pfeifer performing a role as lead investigator for the Bureau and someone else taking on a lead role in respect of the search of the PacNet and DeepCove offices.

[37] PacNet also contends that Justice Edelman “probably” misapprehended the evidence regarding the reference to “executing authorities” in the Confirmation. In this document, Ms. Carreon stated that she had notified the “executing authorities” of her authorization for search of the Butler Box facility. PacNet submits that the evidence before the judge indicates that the Bureau and in particular Officer Pfeifer were the executing authorities and there was no evidence to suggest that this term referred to the AGC.

[38] The AGC submits that this submission is incorrect. It says that before Justice Edelman, counsel for PacNet stated that he accepted and did not quarrel with the representation made by counsel for the AGC that it was AGC counsel who “executes” a request. As well, they point out that the *Treaty* was before the hearing judge and the *Treaty* repeatedly refers to the “requested state” (in this case Canada) “executing” a request made for assistance pursuant to the *Treaty*.

[39] Again, it was open to the judge to weigh the evidence before him and his factual findings are owed deference.

[40] PacNet also contends that the hearing judge erred in applying the test for disclosure. In this respect, they refer to the test from *R. v. Larosa* (2002), 166 C.C.C. (3d) 449, 2002 CanLII 45027 (Ont. C.A.), which governs disclosure applications in the context of the *Act*. PacNet does not dispute that Justice Edelman properly set

out the test in his reasons, but rather impugn his application of it. Justice Edelman’s analysis in this regard was as follows:

[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.”

[41] Justice Edelman found that PacNet had not established an air of reality to the assertion that there was no ministerial approval at the relevant time, nor to the claim that Ms. Carreon was not a delegate of the Minister of Justice at the relevant time. He further found that the materials were consistent with the AGC’s claim that Ms. Carreon granted approval on behalf of the Minister of Justice for a further search on September 23, 2016: Edelman Decision at para. 28.

[42] PacNet’s challenge to Justice Edelman’s reasons focuses on the “factual underpinning” of the test. As held in *Kachkar*, “[q]uestions of mixed fact and law are questions about whether the facts satisfy the legal tests”: at para. 30. This is precisely what is at issue in this case. With respect to PacNet’s argument that Justice Edelman erred in this regard, it would be properly characterized as an argument that he committed an error of mixed fact and law.

[43] For the reasons set out earlier, I would also decline to grant leave on the second proposed ground of appeal.

[44] As I have determined that neither proposed ground of appeal raises questions of law, it is unnecessary to consider the second stage of the analysis regarding whether leave ought to be granted.

Disposition

[45] PacNet’s application for leave to appeal the orders of Justice Edelman pursuant to s. 35 of the *Act* is dismissed. PacNet’s application for a stay of the sending order is also dismissed.

“The Honourable Justice Mayer”