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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE UNITED STATES COAST GUARD, NINTH DISTRICT - CLEVELAND, OHIO

Issue: Cross-border Distress Calls, Investigation and Potential Compensation

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Spring Semester, 2015

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I. INTRODUCTION

A. Scope

This memorandum examines the criminal ramifications, investigative procedures, and potential remedies associated with a false distress call broadcasted from Canadian territory that results in a United States Coast Guard ("USCG") search and rescue response.* Such a false distress call represents criminal conduct in Canadian territories and may be prosecuted by Canadian authorities under either the Canadian Criminal Code or the Radiocommunications Act of 1985. Legal investigative channels exist in both Canadian statutes and regulations and bi-lateral treaties between the United States and Canada that allow United States law enforcement investigators to obtain telecommunication records that may identify the source of an illegal transmission. Finally, the USCG may seek and be awarded financial compensation in Canadian criminal and civil courts for expenditures stemming from the search and rescue response to a false distress call.

B. Summary of Conclusions

i. The broadcasting of a false distress call constitutes criminal conduct in Canadian jurisdictions.

The sending of a false distress call represents criminal conduct under both the Canadian Criminal Code and the Radiocommunications Act of 1985. Such a broadcast fulfills the enunciated elements of the two aforementioned statutes; however, the nature and severity of the punishment differs according to which particular statute is invoked by the charging authority.

ii. United States law enforcement investigators may conduct extraterritorial investigations within Canadian territory, including interviews with Canadian witnesses and suspects, pursuant to treaties and bi-lateral agreements between the United States and Canada.

Canada and the United States have signed formal international treaties and less-formal bilateral agreements reiterating the need for cooperation between the two nations in the law enforcement and criminal investigatory realms. United States law enforcement investigators, being "competent authorities" under the Mutual Legal Assistance Treaty, may request that Canadian authorities investigate a false distress call or personally conduct such an investigation under the supervision of Canadian authorities. The Royal Canadian Mounted Police have explicit published procedures by which US federal law enforcement may seek such assistance or access/supervision in criminal investigations.

iii. United States law enforcement investigators may request and obtain private telecommunication records from Canadian companies in furtherance of an investigation into a false distress call.

United States federal law enforcement investigators may obtain private information, including subscriber information and telecommunication records, from Canadian-based entities in furtherance of an investigation through a mutual legal assistance request. Pursuant to such a request, Canadian investigators would draft and execute a Canadian-court authorized search warrant in order to obtain the desired information and would, in turn, relay said information to United States law enforcement investigators.

iv. The USCG may have legal recourse by which it may recover funds lost as a result of the USCG's response to a false distress call.

The USCG could potentially, depending on the particular legal action taken in the Canadian courts, recover funds from a false distress call's broadcaster through a criminal

restitution order. The Canadian criminal code provides for victim restitution as either an additional “sentence,” as a condition of a defendant’s probation, or as an element of a defendant’s conditional sentence. Additionally, the USCG could file a civil suit against the offending party in the applicable Canadian jurisdiction.

> v. In cases of cross-border false distress calls that incur significant monetary losses, the USCG may wish to seek the offender’s extradition to the United States.

Canadian courts have historically assigned greater weight to an offender’s ability to pay a restitution order than to the cost incurred by the victim of the criminal act. American courts seem to be less cautious with respect to both the decision to impose of restitution as well as the ultimate restitution amount. As such, the USCG may wish to extradite an offender from Canada to the United States, thereby bringing the offender within the jurisdiction of a more-amicable legal venue.

II. FACTUAL BACKGROUND

On the evening of March 14, 2012, nineteen-year-old Danik Kumar was flying his aircraft solo over Lake Erie.[1] Kumar, a licensed pilot and first year student in Bowling Green University’s Aviation Technology Program, observed what he apparently believed

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* "A false distress call is heard by the USCG, assets are launched and a search is underway. As the USCG investigates the call, it is discovered that the call originated in Canada. Is this criminal conduct in Canada (See 14 U.S.C. 88(c))? Is there any extraterritorial authority for U.S. federal criminal investigators to interview suspects or witnesses in Canada? Can U.S. federal law enforcement agents legally access information from a Canadian cell-phone service provider? Is there any recourse for the USCG?”

[1] *U.S. v. Kumar*, 750 F.3d 563, 564 (6th Cir. 2014) [Reproduced on accompanying flash drive at Source 27].

to be an emergency flare fired from a boat somewhere below his aircraft.[2] Kumar reported his "sighting" to the air traffic control authority at Cleveland Hopkins International Airport and, at the controller's direction, flew by the area at a lower altitude in order to gain additional information related to the signaling watercraft.[3] The young pilot was unable to see a boat in the vicinity. Instead of relaying a truthful status report, Kumar, who was "fearful of sounding stupid and hurting his chances of one day becoming a Coast Guard pilot," instead described a "25–foot fishing vessel with four people aboard wearing life jackets with strobe lights activated."[4]

Kumar's false report kicked off a bi-national rescue effort with both the United States Coast Guard ("USCG") and the Canadian Armed Forces contributing resources to rescue of the "vessel in distress."[5] Elements tasked to the twenty-one hour search and rescue operation included a "140–foot [United States] Coast Guard cutter with a crew of about twenty; three smaller rescue boats, each with a crew of four; a 65–foot search and rescue helicopter with a crew of four; and [a] Canadian CC130 Hercules airplane with a crew of seven."[6]

On April 25, 2012, Kumar admitted to USCG investigators that he had not seen the "vessel" in question and that his follow up report to the Cleveland Hopkins International Airport air traffic authority had been false. Based upon this admission,

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[2] *Id.*, at 565.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Kumar was prosecuted in the United States District Court for the Northern District of Ohio (based in Cleveland, Ohio) for a violation of 14 U.S.C. 88(c)(1).[7] [8] The making of a false distress call is a class D felony punishable by a maximum of "less than ten years but five or more years" in federal prison.[9] Additionally, any individual that makes a false report to the USCG is "liable for all costs the Coast Guard incurs as a result of the individual's actions."[10] [11] Kumar pleaded guilty on January 17, 2013, and was sentenced to a three-month prison term, three years of supervised release, and ordered to pay restitution totaling $277,257.70 to the USCG and $211,750.00 to the Canadian Armed Forces.[12] The *Kumar* trial court permitted the USCG to recover the "full cost" of the agency's expenditures, including both "direct and indirect costs to any part of the Federal Government of providing a good, resource, or service." [13] The trial court, however, limited Kumar's restitution to the Canadian Armed Forces to "the cost directly related to

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[7] 14 U.S.C. Section 88(c)(1) [Reproduced on accompanying flash drive at Source 1] reads: "An individual who knowingly and willfully communicates a false distress message to the Coast Guard or causes the Coast Guard to attempt to save lives and property when no help is needed is--

> (1) guilty of a class D felony;
> (2) subject to a civil penalty of not more than $10,000; and
> (3) liable for all costs the Coast Guard incurs as a result of the individual's action."

[8] *Kumar*, supra. [Reproduced on accompanying flash drive at Source 27].

[9] 18 U.S.C. Section 3559(a)(4) [Reproduced on accompanying flash drive at Source 4].

[10] 14 U.S.C. Section 88(c)(1)(3) [Reproduced on accompanying flash drive at Source 1].

[11] See, *Kumar*, at 565-566. [Reproduced on accompanying flash drive at Source 27].

[12] *Id*., at 566.

[13] Office of Management and Budget Circular No. A-25 Section 6.d.1. [Reproduced on accompanying flash drive at Source 12].

employing this aircraft on this particular SAR incident" as a result of the United States Attorney's inability to carry "its burden of proving the Canadian Armed Forces' entitlement to the larger amount, full cost, by a preponderance of the evidence."[14] Kumar appealed the District Court's decision on both jurisdictional and due process grounds, but was overruled by the Sixth Circuit Court of Appeals on April 22, 2014.[15]

The circumstances surrounding Kumar's prosecution and conviction illustrate the deadly seriousness of modern day search and rescue operations. Based on a single radio broadcast describing a vessel potentially in distress, the military forces of two nations mounted a twenty-one hour operation involving over forty personnel, four surface vessels, and a rotary-wing and fixed wing aircraft. Kumar's false distress call cost American and Canadian taxpayers nearly half a million dollars and unnecessarily engaged valuable resources that were unable to respond to other emergencies during that twenty-one hour window.

Due to the venue of Kumar's prosecution (i.e.: United States federal court) and explicit statutes approving monetary compensation,[16] the USCG was able to recuperate funds lost during the period following the false distress call. The Canadian Armed Forces

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[14] See, *Kumar*, at 570. [Reproduced on accompanying flash drive at Source 27].

[15] *Id*.

[16] See, 18 U.S.C. Section 3563(b)(governing conditions of supervised release) [Reproduced on accompanying flash drive at Source 5], 18 U.S.C. 3556 (restitution specifically) [Reproduced on accompanying flash drive at Source 3], and 18 U.S.C. 3553(a)(federal sentencing factors) [Reproduced on accompanying flash drive at Source 2]; *Kumar*, at 569 [Reproduced on accompanying flash drive at Source 27].

were able to recover part of their expenditures as a result of the District Court's wide discretionary authority as it relates to supervised release.[17]

Given the high degree of air and water traffic on the Great Lakes and the commonality of long-range communication devices (including both radio and telecommunication systems) among individuals in the Great Lakes vicinity, there is a high probability that the USCG will deploy assets pursuant to a false distress call that originates in Canadian territory. The USCG could presumably wish to investigate and assist Canadian law enforcement authorities in the prosecution of the false distress call's broadcaster. Additionally, as the Canadian Armed Forces did in *Kumar*, the USCG would likely desire to recuperate costs incurred as a result of such a false distress call.

This memorandum details the criminal nature of false distress calls under Canadian law and the means by which American agencies can conduct investigations in Canadian territory and theoretically recover costs associated with a search and rescue operation following the receipt of a false distress call of Canadian origin.

III. SUBSTANTIVE LEGAL DISCUSSION AND ANALYSIS

A. Criminal Culpability for False Distress Calls Under Canadian Law.

The broadcasting of a false distress call represents criminal conduct under American federal criminal law.[18] This fact, coupled with the American federal system's sentencing and restitution structure, allows for both the punishment of the convicted

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[17] *Kumar*, at 569. [Reproduced on accompanying flash drive at Source 27].

[18] See, 14 U.S.C. 88(c)(1) [Reproduced on accompanying flash drive at Source 1]; *Kumar*, supra [Reproduced on accompanying flash drive at Source 27].

broadcaster and potential recovery of funds lost as a result of any search and rescue efforts.

The broadcasting of a false distress call also represents criminal conduct in Canadian jurisdictions. While it appears that such conduct may be prosecuted under a single section in American courts,[19] a false broadcast represents a violation of both the Canadian Criminal Code and the Radiocommunications Act of 1985.

i. The Canadian Criminal Code

The Canadian Criminal Code states that "[e]very one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."[20] This indictable offense, titled "False Messages," may be prosecuted in a "superior court of criminal jurisdiction."[21] While Section 372(1) is typically referenced in non-maritime matters such as bomb threats[22] and false land-based emergency call outs,[23] the statutory language supports a prosecution in false distress call incidents where the competent

[19] 14 U.S.C. 88(c)(1) [Reproduced on accompanying flash drive at Source 1].

[20] Criminal Code, R.S.C., 1985, c. C-46, s.372(1) [Reproduced on accompanying flash drive at Source 9].

[21] See, *id*., at s.2. A "superior court of criminal jurisdiction" may be either the superior court of the province in which the accused is currently held or any court given explicit jurisdiction over an accused by some other court of proper criminal jurisdiction. *Id*., at s.470.

[22] *R. v. R.* (E.), 2002 BCCA 361 (CanLII) [Reproduced on accompanying flash drive at Source 19].

[23] *HMQ v. Whalen*, Rex, 2007 NLTD 79 (CanLII) [Reproduced on accompanying flash drive at Source 16].

authority can prove both the intent to alarm and the broadcaster's knowledge of the falsity of the communication. Indictable offenses are not subject to statutes of limitations under Canadian criminal law.[24]

ii. The Radiocommunications Act of 1985

Additionally, the broadcasting of a false distress call constitutes a violation of the Canadian Radiocommunications[25] Act of 1985. The Act applies to conduct occurring within Canadian territory, aboard Canadian-flagged ships and aircraft (including "spacecraft"), and on "any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada."[26] Under the Act, "[n]o person shall knowingly send, transmit or cause to be sent or transmitted any false or fraudulent distress signal, message, call or radiogram of any kind."[27] Any person[28] who violates

[24] See, e.g., *Rourke v. The Queen*, [1978] 1SCR 1021, 1977 CanLII 191 (SCC)("I cannot find any rule in our criminal law that prosecutions must be instituted promptly and ought not to be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused. In fact, no authority was cited to establish the existence of such a principle, which is at variance with the rule that criminal offences generally are not subject to prescription except in the case of specific offences for which a prescription time has been established by statute.") [Reproduced on accompanying flash drive at Source 24].

[25] "'[R]adiocommunication' or 'radio' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide. " Radiocommunications Act, R.S.C., 1985, c. R-2, s.2 [Reproduced on accompanying flash drive at Source 13].

[26] *Id.*, at s.2(3).

[27] *Id.*, at s.9(1)(a).

[28] "Person" includes both individuals and corporations under substantive Canadian law. See, e.g., An Act Respecting the Special Powers of Legal Persons, CQLR c. P-16 [Reproduced on accompanying flash drive at Source 6].

section 9(1)(a) is "guilty of an offence punishable on summary conviction[29] and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars."[30] In instances where a false broadcast occurs on multiple days or continues unabridged through a multi-day period, "the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued."[31] The statute of limitations for a violation of section 9(1)(a) is three years.[32]

B. United States Federal Law Enforcement's Extraterritorial Authority and Mutual Legal Assistance Treaty Requests to Canadian Authorities

i. Generally

The United States and Canada have a long history of bi-lateral assistance in the realm of criminal investigations and prosecutions. In 1985, representatives from the two countries signed the "Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters," more commonly known as the Mutual Legal Assistance Treaty ("MLAT"). The MLAT's explicit purpose was the improvement of both countries' effectiveness "in the

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[29] "Summary conviction offenses" are offenses that may be tried before a provincial judge without the presence of a jury. An individual charged with such an offense "need not appear personally in court," unless directed to do so by the presiding court. Coughlan, Steve, et al., *Learning Canadian Criminal Law*, Carswell (11th ed. 2009) [Reproduced on accompanying flash drive at Source 29].

[30] R.S.C., 1985, c. R-2, s.10 [Reproduced on accompanying flash drive at Source 13].

[31] *Id.*, at s.10(3).

[32] *Id.*, at s.10(6).

investigation, prosecution and suppression of crime through cooperation and mutual assistance in law enforcement matters."[33] Under the MLAT, competent authorities[34] from either nation may request assistance in "all matters relating to the investigation, prosecution and suppression of offences."[35] "Offenses" for purposes of the MLAT include crimes that may prosecuted via an indictment in Canada and American crimes for which the statutory penalty is a term of imprisonment of one year or more.[36] [37]

"Assistance shall include:

- examining objects and sites;
- exchanging information and objects;
- locating or identifying persons;
- serving documents;
- taking the evidence of persons;
- providing documents and records;
- transferring persons in custody;
- executing requests for searches and seizures.[38]

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[33] Mutual Legal Assistance in Criminal Matters Act (R.S.C., 1985, c. 30 (4th Supp.)), s.1 [Reproduced on accompanying flash drive at Source 11].

[34] "'Competent Authority' means any law enforcement authority with responsibility for matters related to the investigation or prosecution of offences." *Id*., at s.1.

[35] *Id*., at s.2(1).

[36] *Id*., at s.1.

[37] "Offenses" also refer to special categories of crimes such as securities and wildlife, consumer, and environmental protection, regardless of the statutory punishment.

[38] *Id*., at s.2(2)(a-h).

Furthermore, under the MLAT "[a]ssistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State."[39]

ii. Formal Requests for Assistance Under the MLAT

In 2013, Canada's Department of Justice published an official guide ("DOJC MLAT Guide") detailing the process by which competent foreign law enforcement authorities may request assistance via MLATs.[40] The DOJC MLAT Guide recommends that requesting authorities contact the Canadian Central Authority[41] to ensure, as a preliminary matter, that the request comports with both Canadian law and the specific legal requirements associated with such a request.[42]

"In general, to obtain court-ordered assistance under the [United States/Canada MLAT], the request must establish reasonable grounds to believe that,

- an offence has been committed; and

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[39] *Id*., at s.2(3)

[40] See, "Requesting Mutual Legal Assistance from Canada: A Step-by-Step Guide," Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, 2013 [Reproduced on accompanying flash drive at Source 32].

[41] "The International Assistance Group (IAG) at the Department of Justice, Canada, was established to carry out most of the responsibilities assigned to the Minister of Justice under the Extradition Act and the Mutual Legal Assistance in Criminal Matters Act. The IAG reviews and coordinates all extradition and mutual legal assistance requests made either by or to Canada, and is known as the 'Central Authority' for Canada in these areas of international cooperation." Government of Canada, Department of Justice, *About the International Assistance Group* (January 7, 2015), http://www.justice.gc.ca/eng/cj-jp/emla-eej/about-apropos.html [Reproduced on accompanying flash drive at Source 30].

[42] DOJC MLAT Guide at 3 [Reproduced on accompanying flash drive at Source 32].

- evidence of the commission of the offence, or information that may reveal the whereabouts of a suspect, will be found in Canada."[43]

"This requires a clear connection between the foreign investigation and the Canadian evidence sought."[44]

The DOJC MLAT Guide asks that requesting authorities "ensure that the request for assistance is proportionate to the level of crime being investigated."[45] Canada's desire to triage requests based on the severity of the crime being investigated, the magnitude of the requested action, and the "need for the evidence in question" is understandable. One could presume, however, that a request related to the investigation of a false distress call (especially if law enforcement investigators believe that the broadcaster is involved in a continuing course of such conduct) will be viewed with interest by Canadian authorities. False distress calls within the Great Lakes region are likely to draw the attention of both Canadian and American forces. The significant monetary expenditures associated with a search and rescue response to a false broadcast, especially when coupled with the ease with which an offender may repeat such conduct, may prioritize MLAT requests made pursuant to an American investigation into this type of criminal conduct.

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[43] Government of Canada, Department of Justice, *Mutual Legal Assistance Requests to Canada* (January 27, 2015), http://www.justice.gc.ca/eng/cj-jp/emla-eej/mlatocan-ejaucan.html [Reproduced on accompanying flash drive at Source 31].

[44] *Id*.

[45] DOJC MLAT Guide at 4 [Reproduced on accompanying flash drive at Source 32].

Next, a requesting authority should identify both the "mechanism used to seek assistance" (i.e.: the Mutual Legal Assistance in Criminal Matters Act of 1985, as revised) and the "authority conducting the investigation/prosecution."[46]

The requesting agency should provide the Canadian Central Authority with "a detailed outline of the case under investigation or prosecution, including a summary of the evidence that supports the investigation/prosecution."[47] The DOJC MLAT Guide designates additional information that should be included in the case summary where the requesting authority wishes to obtain witness statements/testimony, documentary evidence, the execution of a search warrant, or the seizure/confiscation of criminal proceeds.[48] For witness statements/testimony requests in particular,[49] it appears that the additional details assist Canadian law enforcement in delineating the resources and potential precautions required to honor a request as opposed to the legality of the request itself.

Despite the fact that under the United States/Canada MLAT "[a]ssistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State,"

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[46] *Id.*

[47] *Id.*

[48] *Id.*, at 4-5.

[49] "If witness statement/testimony is being sought, include:
- The name, nationality and location of the witness(es);
- Their status in the case (suspect/accused or simply a witness);
- A clear explanation of how the information sought from the witness is relevant to the case;
- If known, an indication of whether the witness is likely to cooperate in providing the statement/testimony." *Id.*, at 4.

the DOJC MLAT Guide requests that the requesting authority "[i]dentify and set out the verbatim text of all relevant legal provisions under investigation and/or prosecution, including applicable penalties."[50] This is likely an additional means by which the Canadian Central Authority can prioritize requests for assistance and, given the seriousness of false distress calls under both American[51] and Canadian criminal law,[52] such an investigation may obtain greater priority.

The requesting agency should next describe the exact assistance being sought via the MLAT request and any "particular requirements that must be met" by Canadian authorities (e.g.: "certification/authentication needs").[53] As with the case summary, the requesting authority should include additional information when requesting witness statements/testimony, documentary evidence, any searches and seizures, or the seizure/confiscation of criminal proceeds.[54] Unlike other categories of assistance under the MLAT, for seizures and confiscations of criminal proceeds, the target of the seizure/confiscation must first be charged (seizures) or convicted (confiscations) in an

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[50] *Id*., at 5.

[51] See, 18 U.S.C. Section 88(c)(1)(categorizing a false distress call as a Class D felony punishable by a maximum term of imprisonment of five to ten years) [Reproduced on accompanying flash drive at Source 1].

[52] See, Criminal Code, R.S.C., 1985, c. C-46, s.372(1) [Reproduced on accompanying flash drive at Source 9]; Radiocommunications Act of 1985, R.S.C., 1985, c. R-2, s.9(1)(a) [Reproduced on accompanying flash drive at Source 13].

[53] DOJC MLAT Guide at 5 [Reproduced on accompanying flash drive at Source 32].

[54] *Id*., at 5-6.

American jurisdiction and the underlying crime in the American charge/conviction must constitute a criminal act in Canada.[55]

The requesting agency should then identify any confidentiality concerns or specific urgency associated with the MLAT request.[56] The DOJC MLAT Guide also asks that a requesting authority should "[i]nclude a list of the names and contact numbers for key law enforcement/prosecution authorities familiar with the case" and contact information for the requester's Central Authority (in the United States, the Attorney General and his representatives, e.g.: the local United States Attorney).[57] If the case underlying the MLAT request has received media attention in the requesting country or if the case is "otherwise high profile," the DOJC MLAT Guide asks that the nature of the public attention be included in the request.[58] Finally, the DOJC MLAT Guide states: "any evidence which Canada provides in response to a mutual legal assistance request may only be used for the specific purpose stated in the request. If further use of the evidence is required, your country must first seek Canada's consent to the further use."[59]

It is important to be cognizant of the fact that "foreign criminal investigators or persons acting on their behalf do not possess peace officer status or jurisdiction in Canada, [and] are required to rely on the assistance and supervision of the appropriate Canadian police force of local jurisdiction" during the pendency of the MLAT

[55] *Id.*

[56] *Id.*, at 6.

[57] *Id.*

[58] *Id.*, at 7.

[59] *Id.*, at 6.

investigation.[60] Additionally, United States law enforcement officers acting in an official capacity within Canadian territory must comply with Canadian law and the Canadian Charter of Rights and Freedoms."[61, 62]

C. Procurement of Private Business Records in Furtherance of a United States Criminal Investigation

United States federal law enforcement agents may gain access to a Canadian cell-service provider's private business records via a MLAT request. This section pertains to the procurement of business records held by the Canadian corporation themselves (e.g.: account subscriber information, call and text logs, cell tower locational information), not necessarily data located on an arrestee's physical phone. Although Canadian case law is

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[60] Royal Canadian Mounted Police, *Protocol On Foreign Criminal Investigators In Canada* (February 15, 2007), http://www.rcmp-grc.gc.ca/interpol/fcip-pcece-eng.htm [Reproduced on accompanying flash drive at Source 35].

[61] *Id*.

[62] See, Constitution Act, 1982, Canadian Charter of Rights and Freedoms, s.7-14 (enunciating protection from unreasonable searches and seizures, arbitrary detention, and "cruel and unusual treatment or punishment." Upon arrest or detention, Canadian citizens retain the right to "be informed promptly of the reasons" underlying the detention or arrest.) [Reproduced on accompanying flash drive at Source 8].

generous with respect to the latter category of information,[63] gaining access to a physical device involves a dissimilar process from the procurement of business records.[64]

Canadian corporations, including the telecommunications industry, register with and are regulated by Corporations Canada ("CC").[65] Pursuant to the Canada Business Corporations Act, Canadian corporations are required to maintain business records for a period of six years.[66] Each of Canada's three principal telecommunications providers,[67] Rogers Wireless, TELUS Mobility, and Bell Wireless Affiliates, make mention of the need to comply with court orders compelling the production of private business records.[68]

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[63] *R. v. Fearon*, 2014 SCC 77, paragraph 83 [Reproduced on accompanying flash drive at Source 18](finding that the search of a cell phone complies with Canadian Charter of Rights and Freedoms, s.8, where:

- the arrest was lawful;
- the search is both objectively reasonable and "truly incidental" to the arrest;
- the nature and extent of the search are tailored to the purpose of the search; and,
- law enforcement "take detailed notes of what they have examined on the device.")

[64] Criminal Code, RSC 1985, c C-46, s.487 (section pertaining to general search warrants) [Reproduced on accompanying flash drive at Source 9].

[65] Industry Canada, Corporations Canada, *About Us* (August 12, 2010), https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03928.html [Reproduced on accompanying flash drive at Source 33].

[66] Canada Business Corporations Regulations, 2001 (SOR/2001-512), s.1(15) [Reproduced on accompanying flash drive at Source 7].

[67] See, Canadian Wireless Telecommunications Association, Facts and Figures: Wireless Phone Subscribers in Canada, 2014, http://cwta.ca/wordpress/wp-content/uploads/2011/08/SubscribersStats_en_2014_Q1.pdf [Reproduced on accompanying flash drive at Source 28].

- Rogers Wireless - approximately 9,400,000 subscribers
- TELUS Mobility - approximately 7,800,000 subscribers
- Bell Wireless Affiliates - approximately 7,760,000 subscribers

[68] See, e.g., Rogers Wireless, Privacy, CCTS & CRTC, https://www.rogers.com/web/content/Privacy-CRTC ("We fully comply with Canadian privacy law and take active steps to fully safeguard the information of our customers. At

In order to obtain private business records from a Canadian telecommunications corporation, United States federal law enforcement investigators must utilize a MLAT request.[69] As part of said MLAT request, the American investigators must first tie the request (i.e.: the execution of a Canadian search warrant) to the facts of the investigation/prosecution and delineate how the information/records to be seized will assist the investigation/prosecution.[70] Secondly, the American investigators must identify exactly what should be seized (e.g.: subscriber information, call/text logs, cell tower locational information), to whom the order should be directed, and any other particular certification or authentication requirements related to the request.[71] Once the Canadian Central Authority approves the MLAT request, United States Federal law enforcement investigators may coordinate directly with the appropriate Canadian law enforcement authority (likely a regional division of the Royal Canadian Mounted Police) in the search warrant drafting and execution process.

Under Canadian criminal law, "a justice may order that any person or body that lawfully possesses records of telephone calls originated from, or received or intended to be received at, any telephone give the records, or a copy of the records, to a person

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the same time we are compelled by law to respond to federal, provincial and municipal government and law enforcement agencies when they have a legally valid request - like a search warrant or court order.") [Reproduced on accompanying flash drive at Source 34].

[69] See, Section B: United States Federal Law Enforcement's Extraterritorial Authority and Mutual Legal Assistance Treaty Requests to Canadian Authorities, supra.

[70] See, DOJC MLAT Guide at 4 (Step 5(c)) [Reproduced on accompanying flash drive at Source 32].

[71] *Id.*, at 5 (Step 7).

named in the order."[72] A Canadian court may issue a search warrant upon proof of "reasonable grounds to suspect that an offence […] has been or will be committed and that information that would assist in the investigation of the offence" would be obtained as a result of the warrant.[73] Once issued, a search warrant "is valid for the period, not exceeding sixty days, mentioned in it."[74] Canadian law enforcement authorities would then execute the search warrant (presumably through simple transmission of the document to the appropriate telecommunications entity) and, upon the target's compliance with the warrant, would pass the information/records on to the requesting American agency.

If the records obtained pursuant to the search warrant assist in the American criminal investigation, the Canadian court may issue further warrants[75], including a warrant concerning the installation, maintenance, and monitoring of a "number recorder."[76] Canadian law enforcement could utilize a number recorder to track both the origin and destination of a target's phone communications. This information, in turn could lead to additional investigation by both Canadian and American law enforcement authorities.

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[72] Criminal Code, RSC 1985, c C-46, s.492.2(2) [Reproduced on accompanying flash drive at Source 9].

[73] *Id.*, at s.492.2(1).

[74] *Id.*, at s.492.1(2).

[75] *Id.*, at s.492.1(3).

[76] *Id.*, at s.492.2(4)("'[N]umber recorder' means any device that can be used to record or identify the telephone number or location of the telephone from which a telephone call originates, or at which it is received or is intended to be received.").

If the requesting United States federal law enforcement agency were to utilize the records obtained via the MLAT request in an American criminal prosecution, they could be properly admitted as non-testimonial business recorded pursuant to 18 U.S.C. 3505[77] and/or Federal Rule of Evidence 803(6).[78]

D. Potential Avenues of Financial Recovery in Cross-Border False Distress Call Cases

"The fundamental purpose of sentencing [under Canadian criminal law] is to contribute […] to respect for the law and the maintenance of a just, peaceful and safe society."[79] Additionally, "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[80] Under the Canadian criminal code, Canadian courts have the authority to order a convicted offender to pay restitution "in

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[77] 18 U.S.C. 3505, titled "[f]oreign records of regularly conducted activity," states that "[i]n a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--

> (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> (B) such record was kept in the course of a regularly conducted business activity;
> (C) the business activity made such a record as a regular practice; and
> (D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

[78] See, e.g., *U.S. v. Hing Shair Chan*, 680 F.Supp. 521 (E.D.N.Y. 1988) [Reproduced on accompanying flash drive at Source 26]; *U.S. v. Brodnik*, 2010 WL 4318573 (S.D.W.V. 2010) [Reproduced on accompanying flash drive at Source 25].

[79] Criminal Code, RSC 1985, c C-46, s.718. [Reproduced on accompanying flash drive at Source 9].

[80] *Id.*, at s.718.1.

addition to any other measure imposed on the offender."[81] A Canadian court may impose restitution as either a condition of probation[82] or as a predicate element of an offender's conditional sentence.[83] In cases where an organization is held criminally liable, a court may order the organization to "make restitution to a person for any loss or damage that they suffered as a result of the offence."[84] Restitution payments are distinct from fines imposed pursuant to a criminal violation's statutory sentence.[85] A restitution order is limited to "an amount not exceeding the replacement value of the property as of the date the order is imposed."[86]

Canadian courts view the restitution issue as being subject to a balancing of interests between the public, the victim, and the convicted offender.[87] As explained by British Columbia's Court of Appeal,

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[81] *Id.*, at s.738(1).

[82] *Id.*, at s.732.1(3)(h)("The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following […]comply with such other reasonable conditions as the court considers desirable […] for protecting society and for facilitating the offender's successful reintegration into the community.")

[83] *Id.*, at s.742.3(2)(f)("The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following […] comply with such other reasonable conditions as the court considers desirable […] for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences."

[84] *Id.*, at s.732.1(3.1)(a).

[85] See, *id.*, at s.716 ("'[F]ine' includes a pecuniary penalty or other sum of money, but does not include restitution.")

[86] *Id.*, at s.738(1)(a).

[87] *Her Majesty the Queen v. Fitzgibbon*, [1991] 1 S.C.R. 1005, ¶ 13 ("Sentencing is always a difficult process, requiring a careful balancing of many factors. The courts must strive to make every sentence imposed fit and proper not only for the crime, but also for

> [W]hen determining whether a restitution order is appropriate, the court must consider, amongst other things, both the present and future ability of the accused to pay restitution. Further, where the circumstances of the offence are particularly egregious (for example, where a breach of trust is involved) a restitution order may be made even where there does not appear to be any likelihood of repayment.[88]

If the broadcaster of a false distress call is tried and convicted in Canadian court, the court may be able to order the offender to pay restitution to the USCG (or any other agency that suffered financial loss as a result of the false signal) under s.738(1)(a) of the Canadian criminal code,[89] or, if the court chooses to impose a punishment in lieu of incarceration, as part of either a term of probation or as an element of the offender's conditional release. It is, however, unlikely that a Canadian court would order a restitution amount analogous to the near-"full cost" restitution order issued by the United States District Court in *Kumar*. In the words of the Supreme Court of Canada: "[A]n order for compensation should only be made with restraint and with some caution."[90] A number of mid to high-level Canadian courts have placed greater weight upon the offender's ability to pay and less on the degree of loss actually incurred by the

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the convicted person and the community.") [Reproduced on accompanying flash drive at Source 14].

[88] *Her Majesty the Queen v. Yates*, [2002] B.C.J. No. 2415, ¶ 17 [Reproduced on accompanying flash drive at Source 15].

[89] "[I]n the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence […] by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed."

[90] *R. v. Zelensky*, 1978 CanLII 8 (SCC), [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97 [Reproduced on accompanying flash drive at Source 23].

victim(s).[91] The *Siemens* court held, in part, that "[a]n order of restitution need not be for the full amount of the loss."[92] The *Siemens* court cited a British Columbia Court of Appeal case[93] in which "a restitution order of $42,500 was reduced […] to $10,000 to better reflect the accused's capacity to meet the obligation which the order imposed."[94]

Due to the apparent hesitancy of Canadian courts to impose significant (or, in the case of losses incurred as a result of a large-scale search and rescue response, meaningful) restitution costs upon offenders, the USCG and other involved American law enforcement authorities (e.g.: the local United States Attorney's Office) may desire instead to seek an offender's extradition to the United States,[95] thus bringing the offender within the jurisdiction of a more-amicable venue.

E. Overview of Canada's Criminal Extradition Process

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[91] See, e.g., *R. v. Siemens* (K.G.) (1999), 1999 CanLII 18651 (MB CA) [Reproduced on accompanying flash drive at Source 21]("The means of the offender are to be considered as an important factor in determining whether restitution should be ordered."); *R. v. Scherer* (1984), 16 C.C.C. (3d) 30 [Reproduced on accompanying flash drive at Source 20]("It may be that in some cases it would be inappropriate and undesirable to make a compensation order in an amount that it is unrealistic to think the accused could ever discharge."); *R. v. Spellacy* (R.A.) (1995), 1995 CanLII 9898 (NL CA), 131 Nfld. & P.E.I.R. 127, at ¶ 79 [Reproduced on accompanying flash drive at Source 22]("A compensation order which would ruin the accused financially, thus impairing his chances of rehabilitation, should not be imposed.").

[92] *Siemens*, supra, at ¶ 5 [Reproduced on accompanying flash drive at Source 21].

[93] *R. v. Ali* (K.N.M.) (1997), 98 B.C.A.C. 239 [Reproduced on accompanying flash drive at Source 17].

[94] *Siemens*, supra [Reproduced on accompanying flash drive at Source 21].

[95] See, Section E: Overview of Canada's Criminal Extradition Process, infra.

Pursuant to the 1999 Extradition Act, Canadian authorities may extradite a person to a foreign nation if either "the offence [in question] is punishable by the extradition partner, by imprisoning […] the person […] for a maximum term of two years or more, or by a more severe punishment," or if "the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada" by a term of imprisonment of five years or two years, depending on the basis of the extradition request.[96] Furthermore, "[a] person may be extradited whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and whether or not Canada could exercise jurisdiction in similar circumstances."[97]

The Canadian Minister of Justice is "responsible for the implementation of extradition agreements, the administration of [the Extradition Act] and dealing with requests for extradition made under them."[98] Once the Minister of Justice is "satisfied" that the underlying rationale of the request fulfills requirements pertaining to extraditable conduct, the Minister will "issue an authority to proceed that authorizes the Attorney General to seek" a court order for arrest and extradition.[99] A court of competent jurisdiction "shall, on receipt of an authority to proceed from the Attorney General, hold

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[96] Extradition Act (S.C. 1999, c. 18), s.3(1) [Reproduced on accompanying flash drive at Source 10].

[97] *Id.*, at s.5.

[98] *Id.*, at s.7.

[99] *Id.*, at s.15(1).

an extradition hearing."[100] During the hearing, the court will hear testimony and consider evidence[101] from both parties (i.e.: the Attorney General and the individual facing extradition). The court will order the individual "committed" pending extradition if the Attorney General presents admissible evidence that "would justify committal for trial in Canada on the […] and the judge is satisfied that the person is the person sought by the extradition partner."[102] Following such a determination, the individual being sought for extradition will remain in Canadian custody for a 30-day period unless the individual waives the pre-extradition delay in writing.[103] The actual surrender of the individual being extradited may then "take place at any place within or outside Canada that is agreed to by Canada and the extradition partner."[104]

IV. CONCLUSION

It is increasingly likely that, given the widespread presence of both traditional radios and other telecommunications devices, that the United States Coast Guard will respond to a false distress call that originates in Canadian territory. Such a false signal represents criminal conduct in Canada punishable by at least a one-year prison term and, if charged as a violation of the Radiocommunications Act of 1985, by fines not exceeding

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[100] *Id*., at s.24(1).

[101] In the case of evidence collected within Canada, the evidence "must satisfy the rules of evidence under Canadian law in order to be admitted." *Id*., at s.32(2). Much like many American pre-trial hearings, Canada's Rules of Evidence do not retain their traditional clout during extradition proceedings.

[102] *Id*., at s.29(1)(a).

[103] See, *id*., at s.62.

[104] *Id*., at s.63.

$5,000 (in the case of an individual offender) or $25,000 (in the case of a corporate offender). A Canadian court may impose an order of restitution upon a convicted offender; however, Canadian case precedent illustrates a general hesitancy to impose restitution orders in amounts greater than the offender's means to pay. United States law enforcement investigators may conduct investigations and interviews within Canada pursuant to a Mutual Legal Assistance Treaty request (and obtain business records, including private telecommunications records, via the same) and, if desired, extradite the offender to the United States for prosecution in a legal venue more likely to impose a restitution order that would more significantly offset costs incurred following the receipt of a false distress signal.