IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.,* 2018 BCSC 2070

Date: 20181123
Docket: No. S182680
Registry: Vancouver

Between:

Director of Civil Forfeiture

Plaintiff

And

The Owners and All Others Interested in the Properties and Bank Funds, in particular PacNet Services Ltd., Rosanne Day, Gordon Day, Ruth Ferlow, Peter Ferlow and 672944 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sealing Order)

Counsel for the Plaintiff:	H. Mickelson, Q.C. A. Doolittle
Counsel for the Defendants Rosanne Day, Gordon Day and 672944 B.C. Ltd.:	P. J. Roberts L. L. Bevan
Counsel for the Defendant PacNet Services Ltd.:	M. Bolton, Q.C. A. Sehmbi
Counsel for the Defendants Peter Ferlow and Ruth Ferlow:	B. Vaze M. Greene
Place and Date of Hearing:	Vancouver, B.C. October 11-12, 2018
Place and Date of Judgment:	Vancouver, B.C. November 23, 2018

INTRODUCTION

[1] These proceedings are brought by the Director of Civil Forfeiture (the "Director") under the *Civil Forfeiture Act,* S.B.C. 2005, c. 29 (the "*CFA*"). The Director alleges that the Defendants have at best benefited from, or at worst been complicit in, various fraudulent direct mail schemes perpetrated by certain clients of the defendant PacNet Services Ltd. (the "PacNet"). The Director seeks forfeiture of real property and bank account balances held by the Defendants, as proceeds of unlawful activities or instruments of unlawful activities.

[2] These proceedings were commenced in February 2018. On that same date, I granted an interim preservation order (the "IPO") in respect of certain bank accounts held by the various Defendants: *Director of Civil Forfeiture v. PacNet Services Ltd.*, 2018 BCSC 387 (the "Reasons"). The Reasons contain a comprehensive review of the evidence presented by the Director at that time, which I will not repeat here.

[3] Unfortunately, since February 2018, little progress has been made in respect of this litigation. Many issues or potential issues have arisen between the Director and the Defendants. The Defendants suggest that they may apply to set aside the IPO. They have applied for particulars of the Director's pleading and they have sought orders to address the timing and scope of document production in this litigation. Some of these issues will be addressed in my reasons for judgment, in relation to other applications that were also heard in November 2018.

[4] At the outset of this proceeding, PacNet and the Defendants Rosanne Day, Gordon Day and 672944 B.C. Ltd. (collectively, the "Day Defendants") expressed concern about prejudice to them arising from any disclosure of evidence produced by them in this action through the filing of materials in the court file.

[5] In April 2018, PacNet and the Day Defendants filed the present applications. They seek a sealing of the entire court file to prevent members of the public from accessing documents that might be filed, such that only parties of record and counsel for those parties would have access, subject to further court order.

[6] This concern was addressed in my Case Plan Order dated April 5, 2018 which implemented an interim measure pending the hearing of this application. That order allowed the parties to exchange application materials without filing them pending my decision on the merits.

[7] Accordingly, the issue to be decided is whether PacNet and the Day Defendants have met their onus in showing that the sealing of the entire court file from any public access is appropriate. They are supported in their position by the Defendants Ruth and Peter Ferlow, who similarly seek the protection of a sealing order in respect of any evidence placed in the court file.

[8] The Director is opposed to the sweeping nature of the relief sought in terms of a sealing of the entire court file. However, he takes no position with respect to some protection for potential third party witnesses and some protection, assuming a proper evidentiary basis, in relation to third party privacy interests.

THE ISSUES

[9] As an overarching concern, PacNet and the Day Defendants contend that sealing the entire court file from public access is necessary to allow the Defendants the opportunity to fairly defend and refute the serious allegations advanced by the Director in this proceeding. That concern is specifically manifested in three subsidiary concerns where the Defendants seek to:

a) protect various witnesses, said to have relevant evidence relating to the issues in this proceeding, from further adverse consequences;

b) protect the confidential information of third parties, said to be in the possession of the Defendants, from public disclosure; and

c) avoid the compelled production of evidence that may be shared with other law enforcement agencies, which is said to violate the Defendants' rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), including their rights against self-incrimination.

[10] Accordingly, the focus of this application has both domestic and international aspects. The first two specific concerns arise from domestic concerns. The final and third concern is largely international, as PacNet and the Day Defendants seek to avoid the possible sharing of compelled evidence produced in this action with other agencies, either local or in other jurisdictions, in which there are possible or actual criminal investigations.

[11] The Defendants argue that, if the court file is not sealed and information is available to the public, their ability to participate in this action fully by the filing of materials with be impaired; alternatively, if any material is disclosed in the court file, it may be used to their detriment in other proceedings.

BACKGROUND FACTS

[12] PacNet has faced, albeit indirectly to this time, many court proceedings in various jurisdictions, arising from the fraudulent activities of some of its clients.

[13] In 2007, the Australian Competition and Consumer Commission launched an investigation against a PacNet client, Tony Kasday. PacNet was implicated as the payment processor for Mr. Kasday's mail fraud scheme.

[14] Importantly, as indicated in the Reasons, the Director has produced evidence indicating that PacNet and Ms. Day have been embroiled in significant litigation in the United States of America (the "U.S.") for about two decades now arising from PacNet's business operations in that jurisdiction: Reasons at paras. 54-108.

[15] The evidence in support of the application for the IPO was provided by Detective Mah of the Vancouver Police Department (the "VPD"). Det. Mah's affidavit refers to and attaches various public documents which indicate that PacNet and Ms. Day have been implicated in a number of fraudulent direct mail schemes perpetrated by some of PacNet's clients. The U.S. authorities have initiated a number of investigations and prosecutions against those clients in respect of mail fraud schemes which have victimized American citizens.

[16] Most concerning to the Defendants is that, in September 2016, the U.S. Department of the Treasury's Office of Foreign Assets Control (the "OFAC") designated PacNet, Ms. Day and Ms. Ferlow as part of a "significant transnational criminal organization" arising from their involvement in those schemes: Reasons at paras. 99-102. The announcement by the U.S. authorities stated that PacNet had:

> …a lengthy history of money laundering by knowingly processing payments on behalf of a wide range of mail fraud schemes that target victims in the United States and throughout the world.

[17] The OFAC designation with respect to Ms. Day and Ms. Ferlow was removed between February and October 2017. In addition, by agreement, in September 2007, the OFAC designation was lifted by the U.S. authorities with respect to PacNet in conjunction with PacNet filing interpleader proceedings in the U.S. in October 2017 in relation to funds it held on behalf of some of its clients.

[18] Despite the lifting of the OFAC designations, PacNet and the Day Defendants remain fearful of prosecution in the U.S. They contend that events post-April 2018, when these applications were filed, provide further support for their concerns about the sharing of their compelled evidence from this action with the U.S. authorities.

[19] The filing of the U.S. interpleader was not the end of the matter. PacNet has not paid all of the agreed monies (approximately US$5.2 million) into court in that proceeding. Recently, in June 2018, PacNet brought a motion for a declaration that OFAC is in contempt of court for being in violation of various orders. PacNet alleges that OFAC "undermined" the agreement by which PacNet agreed to pay these monies. The dispute appears to have arisen because another U.S. enforcement agency seized approximately US$2.6 million which was held in court, funds that PacNet intended to use to pay the remainder of these monies in the interpleader. OFAC and the U.S. government are disputing the contempt proceedings.

[20] Throughout the course of the lengthy investigations and prosecutions in the U.S., and at least one investigation in Australia, PacNet and in particular, Ms. Day, have steadfastly denied any wrongdoing. To the extent that any of PacNet's clients, who were either alleged to be fraudsters or found to be fraudsters, Ms. Day

contends that only a small number of PacNet clients were "bad apples". Ms. Day argues that PacNet simply unwittingly assisting those fraudsters in the facilitation of those illegal schemes through PacNet's normal business operations.

[21] Despite this significant connection to various mail fraud schemes, PacNet and its principals have never been indicted, charged or prosecuted with any criminal offences in respect of PacNet's business activities in any jurisdiction, including Canada and the U.S.

[22] In addition, PacNet has not faced any civil proceedings arising from its business activities in any jurisdiction until the Director filed these civil proceedings in February 2018, based on allegations that PacNet received some of the proceeds of those fraudulent schemes as proceeds of crime and further, that PacNet and its principals knowingly facilitated these fraudulent mail schemes.

[23] Clearly, PacNet and its principals take a broader view of these proceedings beyond British Columbia. Indeed, the Day Defendants state in their argument:

> 12. This is the first legal proceeding that has afforded the defendants any opportunity to make answer to the serious and unsupportable allegations levied against them here and in the United States, albeit with the pall of the new rescinded executed action taken by OFAC still impairing the defendants' ability to make full answer and defence to these allegations.

[24] Although PacNet's headquarters are in Vancouver, its business operations are international and extend beyond Canada and the U.S.

[25] The Defendants also refer to civil forfeiture proceedings filed in Ireland against PacNet, some related corporations and a number of individuals. It is not clear when the Irish proceedings began and what exactly they entail.

[26] The Day Defendants refer to an affidavit of Detective Garda Heneghan of the Criminal Assets Bureau (CAB) in Dublin, Ireland dated July 25, 2018 which was filed in the Irish forfeiture proceeding. Det. Heneghan refers in her affidavit to the CAB liaising with authorities in the U.S., the U.K., the Isle of Man and "other jurisdictions". The U.S. authorities include the Department of Treasury and Department of Justice.

The Canadian authorities include the RCMP, the VPD, the Civil Forfeiture Office of B.C. and FINTRAC.

[27] Det. Heneghan also refers to the International Mass Marketing Fraud Working Group (IMMFWG) formed in 2007 by various law enforcement, regulatory and consumer protection agencies from many countries (Australia, Belgium, Canada, the U.S., U.K., Netherlands and Nigeria) in an effort to ”combat the globalization of these fraud schemes”. The agencies involved in the IMMFWG include various law enforcement agencies in those jurisdictions (for example, the FBI and the RCMP) and regulatory agencies (for example, FINTRAC in Canada).

[28] Det. Heneghan’s affidavit indicates that the various authorities are co-operating with each other in the sense of sharing certain documentation, although in some instances, the source of those documents is unclear. Her evidence refers to materials seized by the Irish authorities. In addition, she makes specific reference to Det. Mah’s affidavit filed in this action and it is attached as an exhibit to her affidavit. There are also references in her affidavit, either directly or indirectly, to the authorities or agencies having received and reviewed various materials filed in court proceedings in various jurisdictions.

[29] Finally, the Day Defendants refer to further *Mutual Legal Assistance Treaty* (the “*MLAT*”) issues that have arisen beyond that referred to by Det. Mah in his affidavit filed in support of the IPO: Reasons at paras. 54-57. The previous evidence indicated that the U.S. has made *MLAT* requests to Canada in 1997 and 2001 which led to PacNet’s books and records being seized for the periods September 1991 to December 1997 and January 1998 to February 2000. PacNet’s challenges to those seizures were not successful.

[30] In August 2016, the U.S. authorities made another *MLAT* request to Canada in order to further its “criminal investigation” into PacNet, DeepCove Laboratories Ltd. (the “DeepCove”), Ms. Day, Ms. Ferlow and various other individuals.

[31] On September 21, 2016, this Court issued a search warrant authorizing the search and seizure of PacNet's offices in respect of documentation from January 1, 2003 to September 21, 2016. The warrant was issued based on evidence that found reasonable grounds to believe that these parties had violated various U.S. laws, including conspiracy, importing or transporting of lottery tickets, mailing lottery tickets, mail fraud and wire fraud. The search warrant was executed by the VPD on September 21 and 25, 2016.

[32] I am advised by PacNet and the Day Defendants that challenges to the 2016 *MLAT* proceedings are still before this Court and are not yet resolved.

THE TEST

[33] The jurisdiction and authority to grant a sealing order is derived from the inherent authority and power of the court with respect to its records: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at 189.

[34] The presumption is in favour of public access to court records and anyone seeking to reverse that presumption bears the onus of supporting that result: *MacIntyre* at 189. Similarly, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 876-877, the Court confirmed that freedom of expression, including freedom of the press, is a paramount value in Canadian society, as enshrined in s. 2(b) of the *Charter*, which guarantees the rights of all Canadians to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

[35] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, the Court states that the principle of open and accessible court proceedings is fundamental, and that:

> 52. …The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner:…

[36] Within the context of this civil forfeiture action, the Defendants say that several competing interests arise here which are in conflict to the principles of freedom of expression and freedom of the press:

a) the right to a fair trial as a fundamental principle of justice and the general public interest in protecting the right to a fair trial: *Sierra Club* at paras. 50-51;

b) the right to protect important commercial interests;

c) the right to remain silent: *Charter*, s. 7;

d) the right not to be compelled to be a witness in criminal proceedings against that person in respect of the offence: *Charter*, s. 11(c); and

e) the right not to have incriminating evidence used to incriminate that person in another proceeding: *Charter*, s. 13.

[37] As stated in *Dagenais*, and approved in *Sierra Club*, it is not appropriate to apply a hierarchy of rights so as to favour one over the other; rather, where a conflict exists, the task of the court in the exercise of its discretion is to “balance” the applicable principles, rights and interests in a manner that respects the importance of all of them: *Dagenais* at 877; *Sierra Club* at paras. 38, 40, 44.

[38] The parties agree that the applicable test as to when a sealing order should be granted is set out in *Sierra Club* at para. 53:

> …
>
> (a) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.

[39] The Court in *Sierra Club* at paras. 54-57 stated that, under the first aspect of the test, the court will consider:

a) whether the risk is real and substantial, in that the risk is well grounded in the evidence and poses a serious threat to the important interests in question;

b) the articulated "important commercial interest" cannot be specific to the party requesting the order, but must be expressed in terms of a public interest in confidentiality; and

c) whether there are "reasonably alternative measures" to a confidentiality order and, if not, to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[40] Also particularly relevant to this application is the Court's discussion in *Sierra Club* as to the weight or importance to be assigned to the open court principle in terms of the degree of public interest. At paras. 82-84, the Court stated that, while public interest is a factor that strengthens the importance of open justice, the level of media interest should not be addressed as an independent consideration within the test.

[41] The Court addressed the distinction between media interest and public interest, stating:

> 85. However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity".
>
> 86. Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the

> public interest in disclosure, and consequently attached excessive weight to this factor. …
>
> Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:
>
> > One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.
>
> 87. In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.
>
> [Emphasis added.]

[42] I accept PacNet and the Day Defendants' contention that the OFAC designation in the U.S. in September 2016 attracted a substantial amount of media coverage with respect to PacNet and its business operations. Media reports on the commencement of the U.S. proceedings were issued in the U.S., Canada and the U.K.. To say the least, the coverage would likely not have cast PacNet and its principals in a very favourable light in terms of the public's perception of them arising from their involvement in these schemes.

[43] Media coverage of PacNet's legal problems either continued or were renewed by the filing of these civil forfeiture proceedings in February 2018. Shortly thereafter, at least one media outlet, CNN, contacted the B.C. government in order to obtain copies of the court documents filed.

[44] The Day Defendants argue that the "court of public opinion" has already branded them as "criminals". They point to several comments from members of the public to these news agencies to that effect. In my view, it is folly to attempt to rely on any social media in terms of assessing public opinion, even if relevant, which is doubtful. In any event, other media reports properly and responsibly acknowledge that none of the allegations have been proven in court.

[45] Perversely, the Defendants acknowledge the media and/or public interest in these proceedings and the allegations of mail fraud in relation to them generally, but then argue that this level of interest *supports* a closing of the court file.

[46] Here, I agree with the Director that, in addition to increased media interest, there is also considerable *public* interest in these proceedings by reason of the nature of these proceedings. This is not litigation between private parties over private interests. The Director is a public body fulfilling a public function in pursuing these types of cases.

[47] As noted by the Court in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 at paras. 16-23, followed in *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at para. 14, the practical effect of the legislation it to take the profit out of crime and deter perpetrators of crime, all of which benefits the public. It is apparent enough that these mail fraud schemes are pernicious crimes, particularly as they typically target elderly and vulnerable people who succumb to the empty promises of fortunes to be received. The public is, *prima facie*, entitled to see that justice is done in these types of cases in terms of the Director achieving these public objectives. Litigating these issues without public access risks diminishing public confidence in our justice system that a just result has been achieved in these cases.

[48] Accordingly, I agree that, in the balancing exercise here, where there in considerable public interest, there must be greater scrutiny of the importance of the open court principle in terms of whether a limitation attenuating that principle is appropriate and, if so, to what degree any restrictions should be imposed.

DISCUSSION

[49] I find it useful to discuss the appropriateness of the sealing order sought in relation to the three specific concerns expressed by PacNet and the Day Defendants.

1) Protect Various Witnesses

[50] PacNet and the Day Defendants argue that the ruinous and disproportionate consequences of the OFAC designation extend beyond the individuals and entities named in the OFAC designation. They argue that:

> 16. PacNet needs to marshal this evidence not only directly from the defendants, but from former PacNet employees, whose lives have been disrupted by the OFAC sanctions and the consequences of those sanctions. PacNet will also need evidence from third parties who are likely to be reluctant to assist if there may be adverse consequences to them of a public connection to the defence of PacNet's operations.

[51] PacNet says that when it ceased its operations in Vancouver in 2016, after the OFAC designations, it employed approximately 80 people. It says that all but three of those employees are said to have lost their jobs as a result of the consequences of the OFAC sanctions. Finally, PacNet says that the remaining three employees are engaged solely in winding down and closing the business, after which they too will lose their jobs.

[52] The Defendants says that some of the remaining and former employees have evidence that they need to refute the Director's allegations. They further say that the disproportionate consequences that have occurred as a result of these witnesses' public association with PacNet are a serious deterrent to any participation by them such that the Defendants' ability to defend the proceeding fairly is in jeopardy as a result.

[53] In support of this aspect of the application, the Day Defendants have proffered six affidavits of potential key witnesses who are said to have evidence that will support defences to the Director's allegations. They include four former employees of PacNet or DeepCove, one of whom in particular the Director agrees will likely be an important witness. Another witness is an external accountant who provided accounting services to PacNet in the past. The final witness is a former employee of a Canadian bank that did business with PacNet.

[54] Each of these witnesses attests as to the considerable adverse and personal consequences suffered by them after the OFAC sanctions, arising from their association with PacNet. I would, however, stress that there is nothing this Court can do to address the consequences that flow from past associations between these persons and PacNet. This is particularly so with respect to the information confirming that past association, that continues to be available to the public, and such other information that might normally be disclosed by those persons in the ordinary course.

[55] However, the basis for the sealing order is said to be supported from the stated concerns and fears of these persons as to potential *future* and *further* consequences to them in the event of media coverage of their continuing association to PacNet. As one witness states, he fears that the media coverage will "unfairly perpetuate and exacerbate the negative connotations of my past employment to PacNet". Each of the witnesses states that they are either reluctant or unwillingly to provide evidence in this proceeding unless they can be shielded from further damage to their reputations and future prospects by mere association with the Director's claim against the Defendants in this proceeding.

[56] Further evidence on this issue arises from the affidavit of a legal assistant working at the Day Defendants' counsel's office. She states that she met an unnamed professional person who provided advice to PacNet prior to the OFAC designation in 2016. This individual told the legal assistant that both s/he and his/her partner suffered adverse consequences arising from the professional's previous association with PacNet. This professional is said to have also indicated that s/he was unwilling to provide evidence in this action without a sealing order because of the possibility of further adverse consequences to him/her and his/her family and business. I would not give any effect to this evidence, as it is unpersuasive without any indication as to who this professional is and what relevant evidence s/he might provide.

[57] I am however persuaded that some protection should be granted to the six affiants in terms of their identity as might be disclosed in the court file. This would achieve the salutary effect of ensuring that this evidence is available to the parties in the truth seeking process toward a determination of issues in this action in a fair and just manner.

[58] The only question is how that protection can be implemented with as little violence to the open court principle as possible. I disagree that this protection can only be afforded by a complete sealing of the Court file. Such a remedy is an entirely disproportionate response to the Defendants' concerns, especially given that there is no evidentiary basis for the necessity of such sweeping protections, either for these six people or for speculative further witnesses who may materialize with similar concerns.

[59] As required by *Sierra Club*, reasonably alternative measures which will prevent the risk in question are to be considered. In my view, there is sufficient support upon which to protect the identity of these six witnesses based on the evidence on this application. Protections can be put in place with minimal limitations on the open court principle, by simply designating these witnesses by their initials or, if they wish, as Witness #1, Witness #2, etc. in relation to any materials that might be filed in this court: *A.A. (Re)*, 2016 BCSC 511 at para. 9.

[60] In addition, I grant an order that the affidavits of the six persons filed on this application are to be filed under seal and are to be accessed only by the parties to this action and their counsel or pursuant to further court order.

[61] If PacNet and the Day Defendants identify any other witness who has similar concerns and takes a similar position in respect of evidence to be filed, a further application can be made on notice and with the appropriate evidentiary basis for the relief sought.

2) Confidential Information of Third Parties

[62] In *Sierra Club*, the Court agreed that a "serious threat" to an "important commercial interest" had been established in accordance with the first part of the test.

[63] The Court's finding related to the disclosure sought of certain confidential documents which comprised reports in the possession of the appellant which included information which was the property of the Chinese authorities. The appellant resisted disclosure because to do so would have resulted in it being in breach of its contractual obligations with the Chinese authorities since it had agreed to protect the confidentiality of that information. Accordingly, the dilemma faced by the appellant was either to breach its contractual obligations by public disclosure or not present the documents at all which would have hindered its ability to advance its case: *Sierra Club* at paras. 49-50.

[64] On the first branch of the test, the Court agreed that a potential breach of the confidentiality requirements was sufficient to justify a "serious risk" to the appellant's and the public's "important commercial interest" in avoiding such breaches and that a sealing order was necessary to prevent that risk: paras. 60-61. On the second branch of the test, the overall salutary effects weighed in favour of granting the sealing order as it allowed the appellant to utilize the documents in question, which in turn enhanced their ability to present their case: paras. 70-71. While it was clear enough that a sealing order would have a negative effect on the open court principle, overall the sealing order was seen as promoting the search for truth: paras. 74-81.

[65] The Day Defendants have proffered an affidavit from one of PacNet's current employees. He states that, in order to defend the Director's allegations, PacNet will have to release confidential and proprietary information of its former clients, including confidential banking and financial information, employee verifications, internal policies and procedures, client subscriptions, production information, customer and donor lists. He also refers to these clients having provided this information on the "understanding" that it would be kept confidential. Finally, he

refers to PacNet's standard form agreement as including non-disclosure obligations with respect to certain clients, although he does not attach that form.

[66] In support, PacNet and the Day Defendants point to a sealing order that was granted in the U.S. interpleader proceeding on October 20, 2017. OFAC had created and supplied to PacNet a list of persons or entities that it believed had committed fraud or money laundering. The sealing order permitted PacNet to hide the identity of the names of 73 of its clients, identified in this list as interpleader claimants, from public view. The U.S. court agreed with PacNet's submission that, among other things, the legitimate commercial interests of the third parties clients selected by OFAC were significantly affected by the interpleader proceeding and that a sealing order in relation to those names was appropriate.

[67] Similar to my finding that the sealing of the entire court file is an entirely disproportionate to these concerns, I do not consider that the evidence on this aspect of the application supports any such relief on the following grounds:

a) It is entirely speculative that any lists of PacNet clients or specific PacNet clients and information provided by those clients will ever be adduced in affidavits to be filed in these proceedings;

b) There is no allegation by the Director that all of PacNet's clients were involved in mail fraud. Some no doubt were entirely legitimate. The fact that those clients chose to associate themselves with PacNet is not a relevant factor;

c) There is no allegation that the Director is seeking relief against any PacNet clients, similar to the U.S. interpleader proceeding where specific allegations of illegality were being advanced against them;

d) There is no persuasive evidence as to PacNet's alleged agreement to keep such information and documentation confidential, similar to that in *Sierra Club*. Evidence as to an "understanding" is simply insufficient. PacNet has not established that it is faced with the choice presented in *Sierra Club,* namely the dilemma of having to choose between

breaking clear confidentiality agreements and not relying on relevant documentation to present its case. *Sierra Club* can therefore be distinguished;

e) There is no explanation as to why the standard form agreement, said to support PacNet's obligations as to confidentiality, was not produced on this application; and

f) It is questionable that any protection should be granted to those PacNet clients who have already been found liable and/or guilty of mail fraud in the U.S. where their association with PacNet and the details of their criminal activities have already been laid bare in the public domain. It is difficult to imagine what "salutary effects" could possibly be achieved by non-disclosure of their identity and information at this stage.

[68] PacNet and the Day Defendants ignore the clear import of our Court's Practice Direction PD-35 "Sealing Orders in Civil and Family Proceedings" to consider whether the entire court file should be sealed *or* only particular documents should be sealed. This analysis is required in order to apply the *Sierra Club* test in assessing whether "reasonably alternative measures" can be invoked to prevent the risk to important commercial interests.

[69] The usual procedure in this Court would be to prepare the evidence that might otherwise be filed in the court file and seek a sealing order *only* with respect to any information or documentation that was truly confidential. This usually results in the entire affidavit being sealed. It also usually results in the affidavit, with redactions of the truly confidential information and/or documentation, being filed. In *Sierra Club*, it was only the confidential documents that were filed under seal: para. 6. This is the "surgical" approach to addressing the problem that is warranted, as opposed to the blunt and extraordinary remedy of a blanket sealing of the entire court file that is sought here, in order to preserve the right of the public to otherwise unobjectionable evidence.

[70] In summary, I would not accede to a sealing of the entire court file in order to address concerns about disclosure of information and documentation concerning PacNet's clients. The Defendants are at liberty to advance this argument on any further application as might be appropriate based on proper evidence that may support the need for confidentiality and the scope of the protections sought in relation to the interests to be protected, all as it may relate to the proposed filing of that information in the court file.

3) Sharing of Information / *Charter* Rights

[71] PacNet, the Day Defendants and the Ferlows contend that they are impaired in their ability to make full answer and defence in this action if Ms. Day's evidence may be shared with other enforcement agencies through public disclosure via the court file. Their real fear is that, if Ms. Day is required to (or does give) evidence in this proceeding toward defending the matter, the evidence will be shared with the U.S. authorities.

[72] Specifically, the Day Defendants argue:

> 12. … This impairment is additionally significant because of the nature of civil forfeiture proceedings generally and in this case in particular. A civil forfeiture proceeding is very public in nature, and will result in the defendants providing compelled evidence by way of document disclosure, examinations for discovery, and other compellable process.
>
> 13. To date, evidence relating to the subject-matter of these proceedings has already been shared amongst various law enforcement agencies for diverse purposes. It is possible, if not likely, that compelled evidence may find its way into the public sphere. In these circumstances, which may place undue pressures on defendants in conflict with *Charter* and other protections, concerns arise that the *Civil Forfeiture Act* (the "*CFA*") is fundamentally unfair and prevents the defendants any meaningful opportunity to provide full answer and defence to what may be spurious allegations of criminal conduct. These concerns, which raise questions concerning the constitutionality of the *CFA*, may be mitigated where there is a sealing order that prevents the proceedings from being public in their totality and prevents the sharing of compelled evidence beyond this proceeding.

[73] The Defendants point to paragraph 21 of Det. Mah's affidavit which refers to him having sourced certain information in publicly available court records, as well as through "conversations with law officers involved in the investigation of PacNet in the

U.S." I have already referred to the most recent *MLAT* proceedings which resulted in the VPD seizing various PacNet records in September 2016, the validity of which is still yet unresolved by this Court.

[74] Ms. Day's alleged fears also appear to stem from other events coincident with the filing of this action and the granting of the IPO on February 14, 2018.

[75] On February 22, 2018, approximately one week after the IPO was granted, the U.S. Department of Justice announced "the largest coordinated sweep of elder fraud cases in history". Hundreds of criminal, civil and forfeiture actions were commenced, involving more than 250 defendants "from around the globe", 200 of whom were charged criminally. The press release refers to the U.S. government having benefitted from the efforts of the IMMFWG. Specific reference is made to the execution of search warrants, some of which were said to have been coordinated with the VPD (which I assume are likely the subject of the current *MLAT* proceedings).

[76] PacNet and the Day Defendants do not believe in coincidences. They are of the belief that the U.S. authorities are in the process of conducting a criminal investigation against them and that the U.S. authorities are being assisted by other jurisdictions and agencies around the world and specifically, the VPD. I agree that the *MLAT* proceedings in B.C. and the Irish proceedings currently underway does give rise to a reasonable inference to support that belief.

[77] However, as noted above, there are currently no criminal charges pending against any of the Defendants in the U.S. or elsewhere; nor are there any civil or forfeiture actions pending against any of the Defendants, save in B.C. and Ireland. There is no certainty that there ever will be any further proceedings.

[78] The right to remain silent and not be compelled to provide incriminating evidence against oneself if subject to criminal charges is a cornerstone of our criminal justice system: *Charter*, ss. 7 and 11(c). Section 13 of the *Charter* also

enshrines protection against self-incrimination in relation to evidence given being used in another proceeding:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[79] Section 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, provides further protection against self-incrimination in respect of compelled testimony:

> **5 (1)** No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> **(2)** Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

[80] The British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124 contains similar protections for witnesses against self-incrimination in later criminal or civil proceedings:

> **4** (1) In this section, **"witness"** includes any person who testifies in the course of any proceedings authorized by law.
>
> (2) A witness must not be excused from answering a question or producing a document on the ground that the answer or the document may tend to incriminate the witness or any other person, or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act.
>
> (3) If a witness objects to answering a question on any of the grounds referred to in subsection (2), and if, but for this section or any Act of Canada, the witness would have been excused from answering the question, then, although the witness is by reason of this section or by reason of any Act of Canada compelled to answer, the answer given must not be used or receivable in evidence against that witness in any civil proceeding or in any proceeding under any Act.

[81] Accordingly, under the above protections, witnesses do not have the right to refuse to answer questions in a proceeding on the basis that the answer might incriminate them. They must answer; however, that evidence may not be used against them in another proceeding to establish a crime or civil liability.

[82] In addition, all parties acknowledge the protections afforded the Defendants in this proceeding by reason of the implied undertaking rule that prevents the Director from using compelled evidence for any purpose other than prosecuting the present action: *Juman v. Doucette*, 2008 SCC 8 at paras. 4-5; *No Limits Sportswear Inc. v. 0912139 B.C Ltd.*, 2014 BCCA 258 at para. 28.

[83] There is no substance to the stated concerns of the Defendants that "somehow" the VPD "may" gain access to document disclosure in this case in breach of the implied undertaking. There is no suggestion that the Director will not comply with that undertaking, although I recognize that the Director has the ability to share information with other agencies in accordance with s. 22(4) of the *CFA*. In any event, the Defendants have not brought any application to expand or amend the implied undertaking imposed upon the Director in this case or address any concerns arising under s. 22 of the *CFA*.

[84] Ms. Day has yet to provide any evidence in this proceeding, whether in affidavit form, by production of documents or by examination for discovery. I accept that, in doing so, the Defendants will have given "compelled" evidence: *National Financial Services Corp. v. Wolverton Securities Ltd.,* [1998] 46 B.C.L.R. (3d) 275 (B.C.S.C.) at paras. 7-8; *Juman* at para. 1. In that event, there are no rules that prevent such testimony from being used against a defendant in a civil forfeiture action: *British Columbia (Director of Civil Forfeiture) v. Cronin*, 2016 BCSC 284 at para. 13.

[85] Accordingly, to the extent that actions of the state result in relevant evidence to be used in this civil forfeiture action, it is subject to the rigors and requirements of the *Charter*: *Cronin* at para. 14. Further protections are in place under both *Evidence Acts* and pursuant to the implied undertaking rule concerning the use of any

compelled testimony and evidence arising in this civil proceeding: *Juman* at para. 54; *Ontario Psychological Assn. v. Mardonet*, 2015 ONSC 1286 at paras. 27-35.

[86] With these protections in place, the question to be asked is whether the Defendants have satisfied the first *Sierra Club* condition which requires that the Defendants' establish the necessity of a sealing order to prevent a "serious risk" to an important interest. In this case, the Defendants contend that their interests are at serious risk, not in Canada, but in other jurisdictions around the world as a result of the laws that apply in those jurisdictions.

[87] PacNet and the Day Defendants refer in particular to potential jeopardy they face in the U.S. where their Fifth Amendment rights would otherwise allow them to refuse to provide incriminating evidence that might be used against them. As the above discussion makes clear, in Canada there is no such right to refuse to answer, although the answers may not later be used to incriminate them. This is said to give rise to a "gap" between the rights faced by individuals in Canada and in the U.S.

[88] In terms of proving a "serious risk" to their interests, PacNet and the Day Defendants contend that whether a compelled statement obtained in a foreign jurisdiction may be used as evidence in a U.S. criminal proceeding is an "unsettled question" in U.S. law.

[89] The first difficulty with this contention is a lack of evidence to support such a statement. They only cite two appeal cases in support, being *Mickey v. Ayers*, 606 F.3d 1223 (9th Cir. 2010) and *U.S.A. v. Allen and Conti*, 864 F.3d 63 (2nd Cir. 2017).

[90] The Defendants have not produced any expert evidence from a U.S. attorney to establish the accuracy of this statement. This state of affairs is perplexing since counsel for the Day Defendants in particular was well aware of the need to establish foreign law as a fact before this Court through appropriate expert evidence: see *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at paras. 46-47; *Pitre v.*

Nguyen, 2007 BCSC 1161 at para. 18; *First Majestic Silver Corp. v. Santos*, 2011 BCSC 363 at para. 9; Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf v.1 (Markham: LexisNexis Canada, 2005) at § 7.1-7.3.

[91] The fact that the Director did not specifically dispute the contention as to the state of U.S. law in its response to the application is not a complete answer to the lack of evidence on this point. It is the ***Court's*** duty to consider only *reliable* evidence as may be relevant to a determination of the issues. As it is, I can have no confidence that the Day Defendants have accurately stated the current U.S. law on the potential for self-incrimination in the U.S. arising from Canadian compelled evidence. In that event, the Day Defendants sought an adjournment so that they could take steps to obtain the necessary expert evidence.

[92] In any event, on a quick review, these two U.S. authorities do not support the Defendants' statement.

[93] In *Mickey*, the accused sought to exclude certain statements made by the accused to the police, relying in part on the conditions he faced while in a Japanese prison. The U.S. court rejected this argument, stating at 1234 that "it is well-established that "coercive police activity is a necessary predicate to finding a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment" *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)". This case did not address the U.S. Fifth Amendment right to remain silent.

[94] *Allen* is more on point, as it concerned the question as to whether involuntary testimony by an individual under legal compulsion of a foreign power may be used against that individual in a criminal case in the U.S. The court found at 68 and 82-86 that the Fifth Amendment prohibition on the use of compelled testimony in American criminal proceedings applies even where a foreign sovereign has compelled the testimony so as to prohibit the use of such testimony against the defendant who provided it. To similar effect, see *R. v. Eurocopter Canada Ltd.* (2004), 185 C.C.C.

(3d) 233 (Ont. S.C.J.) at para. 64 in relation to the treatment of such evidence under German law.

[95] A close reading of *Allen* at 83-84 also confirms the court's view that the reasoning in *Connelly*, relied on in *Mickey*, did not address Fifth Amendment rights.

[96] At its highest, PacNet, the Day Defendants and the Ferlows simply argue that they "don't know" if any evidence compelled in this proceeding can be used in any action that might be taken against them in the U.S. As such, their current concern is therefore only complete speculation that *Allen* may not be applied in other U.S. courts other than the Second Circuit or that *Allen* might be overturned by the U.S. Supreme Court at some point in the future.

[97] Given the above circumstances, I agree with the Director that the Defendants have abjectly failed to put forward any "cogent evidence" before this Court that would support the exceptional limitation on the important open court principle and the public interests that arise in this proceeding by a sealing of the entire court file: *Elsner v. British Columbia (Police Complaints Commissioner)*, 2016 BCSC 1914 at para. 30.

[98] A review of Canadian jurisprudence on the issue provides strong support for the Director's position where a party seeks to abrogate *Charter* or other rights arising in Canada in relation to actual or possible extra-territorial proceedings. The following cases consider that issue both in the context of sealing orders and otherwise.

[99] *Wolverton Securities*, decided in 1998, involved a consideration of the possible use of evidence from a Canadian civil action being used against a party in a later U.S. criminal proceeding. There, the defendants had not yet been charged in the U.S.; however, they applied to stay the Canadian proceeding given that perceived risk. Justice Henderson accepted that evidence in that proceeding would be admissible in a subsequent U.S. criminal proceeding: para. 36. However, he declined to impose the "drastic remedy" of a stay in the face of speculation of the "possibility" as to whether any charges might be laid and if so, what decision a U.S.

court might make as to the admissibility of such evidence in that proceeding: paras. 43-45.

[100] In *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* [2000], 49 O.R. (3d) 187 (S.C.J.), leave to appeal ref'd [2000] O.J. No. 4245 (Ont. S.C.J.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 11, an American corporation pleaded guilty to criminal conspiracy in the U.S. for selling shares at an artificially inflated price. The defendant Bogatin, a director of the corporation, an American citizen, was the subject of an ongoing criminal investigation in U.S. Civil proceedings were also brought against Bogatin in Canada relating to matters within the scope of the U.S criminal investigation.

[101] Similar to the relief sought in *Wolverton Securities*, Bogatin applied to stay the Canadian civil actions on the grounds that his participation in the proceedings would deprive him of the right against self-incrimination with respect to any U.S. criminal trial. In denying the stay, Cumming J. ruled that Canadian courts should not impose *Charter* rights against self-incrimination in order to protect against apparent deficiencies in American protection against self-incrimination, emphasizing that the *Charter* does not apply extra-territorially: see paras. 35-38. He further held that the issue as to whether a U.S. court would admit such evidence, if admission was not in violation of procedural requirements, was for an U.S. court to determine based on an application of American law.

[102] Cumming J.'s reasoning is apposite in a sealing order context:

> 39. In my view, this Court should not give a stay for the purpose of denying the American authorities access to incriminating evidence where the American court would admit such evidence because its admission would not shock the judicial conscience or violate baseline due process requirements. This is a matter of standards for the American court to determine when applying American law. The principles at stake arise from American constitutional requirements and not Canadian constitutional requirements: see *National Financial Services Corp.* at page 289. The principle of comity and respect for the sovereignty of another nation applies, particularly when that other country is a recognized democracy governed by the rule of law.
>
> 40. The *Charter* does not apply extraterritorially. It does not govern the actions of a foreign country and cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted:

> see *United States v. Dynar*, [1997] 2 S.C.R. 462, *R. v. Schmidt*, [1987] 1 S.C.R. 500, *Argentina (Republic) v. Mellino*, [1987] 1 S.C.R. 536, *United States v. Allard*, [1987] 1 S.C.R. 564. Although all of these decisions are in the context of extradition hearings, I find that their reasoning also applies to the case at hand.
>
> 41. To accept Mr. Bogatin's position would also, in effect, have the paradoxical result that the laws of the United States would shape the conduct of Ontario civil proceedings. It is not for a Canadian court to frustrate the rights of Canadian plaintiff litigants on the assumption that it must remedy the deficiencies of the Fifth Amendment.
>
> 42. Finally, each principle of fundamental justice must be interpreted in light of those other individual and societal interests of sufficient importance that they too are "characterized as principles of fundamental justice in Canadian society.": *R. v. White* at page 439. When considering the balancing of interests of the plaintiffs and the defendant, it becomes apparent that a stay of the three Canadian civil proceedings is a drastic step. It might compromise the plaintiffs' ability to achieve redress. … Mr. Bogatin has not yet been charged in the United States. It is conceivable he might never be charged or that, if so, the charges are not laid for some time yet.…
>
> [Emphasis Added.]

[103] In *Catalyst Fund General Partner I Inc. v. Hollinger Inc*. (2005), 261 D.L.R. (4th) 591 (O.N.C.A.), the court declined to provide a constitutional exemption for broad anticipatory protection in relation to a proposed examination that was to be conducted of Hollinger's officers. The officers resisted having to submit to the examination, submitting that their right to remain silent and be free from self-incrimination under ss. 7 and 13 of the *Charter* would be infringed as the answers they might give in response to a Canadian investigation may be used against them in an ongoing U.S. criminal investigation. Of note, there were no criminal charges against the appellants in the U.S. at the time.

[104] At paras. 9-12 of *Hollinger*, the court dismissed the appeal, finding that the basis for the relief sought was speculative and advanced in a "factual vacuum" where self-incrimination issues may or may not arise in the United States.

[105] The Director also specifically refers to *Hallstone Products Ltd. v. Canada Customs and Revenue Agency* (2006), 82 O.R. (3d) 368 (S.C.J.) where the relief sought was a sealing order in relation to discovery evidence that might be placed in the court file.

[106] The plaintiffs in *Hallstone*, including Mr. Stucky, were involved in the cross-border mail promotion of the sale of lottery tickets. They came under criminal and regulatory investigation by Canadian and U.S. authorities, and were charged with three counts of fraud in Canada. When the Canadian charges were stayed, the plaintiffs commenced an action for damages against the CRA for malicious prosecution, negligence, abuse of process and violations of the *Charter* and the *Income Tax Act*.

[107] The plaintiffs sought a sealing order for the evidence adduced during pretrial proceedings. They argued that testimony compelled in the course of the Canadian proceedings would, in all likelihood, be considered admissible in an American court. They argued that this compulsion would violate Mr. Stucky's *Charter* and *Canada Evidence Act* rights against self-incrimination, despite that he not yet been charged with an offense in the United States. Similar to the circumstances in this case, there was an ongoing investigation in the U.S., however, no charges had been laid: *Hallstone* at para. 19.

[108] The court in *Hallstone* found that the concern that compelled evidence could become available to U.S. authorities was, as here, speculative, and did not tip the balance in favour of granting a sealing order given the *Charter* rights of the public to an open court procedure. The court refused to derogate from the open court principle in those circumstances:

> 27. …The Canadian judicial system is based on a presumption that all court proceedings must be conducted in an open and public manner so as to maintain confidence in the administration of justice. The party seeking a sealing order must establish that such an order is necessary to protect societal values of superordinate importance in order to rebut the presumption. Hence, the test for granting a sealing order is whether the social value raised by the plaintiffs is one of superordinate importance to the rights of the public to open access.
>
> …
>
> 33. However, the case law is clear that a party seeking a publication ban or, indeed, a sealing order, bears the burden of showing that it is necessary to prevent a real and substantial risk, and also that the relief sought is minimally impairing of the *Charter* protected interest of the public.

> 34. In this case, we are dealing with the concern that discovery testimony and productions which are presently protected by the deemed undertaking rule could become available to U.S. authorities should a pre-trial motion be brought, and discovery transcripts and/or productions are made part of the public record on such a motion … However, it is pure speculation at the moment that any such motion will, in fact, be brought thereby creating risk of public exposure. Until such time, there is no specific context in which to assess the extent of the risk faced by Stucky. The Court of Appeal in *Hollinger Inc., supra*, made the following apposite comment at para. 12:
>
> > The protection under the Charter is witness-specific and fact-specific. The balancing of potential prejudice to a particular appellant against the necessity of obtaining the evidence must be undertaken in context.
>
> 35. Decisions about one *Charter* right overriding another should not be made prematurely based on hypothetical scenarios without the court having before it the appropriate context.
>
> [Emphasis Added.]

[109] In 2006, when the *Hollinger* litigation was still underway, Lord Black was then in fact facing criminal charges in the U.S. Applying *Hallstone* at that time, Justice Campbell maintained a previously issued protective or sealing order in Ontario of certain motion materials in light of those circumstances, despite requests by the media for access to those materials: *Hollinger Inc. v. The Ravelston Corp.* (2006), 83 O.R. (3d) 258 (S.C.J.) at paras. 66, 82.

[110] That decision was overturned on appeal: *Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207. The majority of the court overturned the protective or sealing order on the basis that Campbell J. had erred in not granting the media intervenor status. Therefore, the sealing order had been continued without necessary input from the media and the balancing exercise was "tainted": para. 123-124. The result was to send the matter back to the lower court for a full consideration of the issue then with media input.

[111] Although in dissent on the appropriate remedy regarding the erroneously issued protective order, the comments of Juriansz J.A., adopted by the majority in *Hollinger*, have relevance here in terms of the (in)adequacy of a "simple assertion" by a party as to any prejudice or risk toward displacing the open court principle:

> 89. What we are left with is the potential that the U.S. prosecutors might conceivably find the material filed by Hollinger to be of some assistance to them in their prosecution of Mr. Black. Any civil litigant involved in related criminal proceedings, even those taking place in Canada, would be concerned that information filed by another party in the civil proceeding might assist the prosecution in the criminal case. Recognizing such a bald, unformulated concern as sufficient reason to seal a civil court file would significantly erode the open court principle and frustrate the public interest in the prosecution of crime. The open availability of information fosters the goal of criminal and civil proceedings to ascertain the truth. The fact that probative evidence becomes available to the prosecution does not, in itself, render a criminal trial unfair. Additional circumstances would have to exist to support the discretionary sealing of a civil court file to prevent prejudicial information becoming available to a criminal prosecutor.
>
> 90. The motion judge did not indicate any additional circumstances that existed in this case that made continuing the protective order "necessary" to ensure the fairness of Mr. Black's trial. Rather, he stated that [he] was aware of the charge against Mr. Black "in only the most general way" and so he would not be able to determine what of the material "might be said to be relevant or prejudicial to the defence of those charges". The motion judge's reasoning in this regard failed to apply the burden on the respondents to establish that continuing the sealing order was necessary to prevent Mr. Black's U.S. trial from being unfair. It was for the respondents to place before the court sufficient information to enable it to understand how prosecutor access to the sealed material would render Mr. Black's trial on the specific charges he was facing unfair. Something more than the simple assertion that prosecutor access to the material would be to Mr. Black's disadvantage in his criminal trial was required.
>
> [Emphasis Added.]

[112] Other cases have considered the above issues, not in the context of a sealing order, but in the context of Canadian courts considering requests to assist U.S. courts in procuring evidence for use in U.S. proceedings.

[113] Justice L. Smith of this Court addressed such a request in *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225 where there were Letters Rogatory and Requests for Judicial Assistance from the U.S. court. The persons who were the subject of those requests for documents objected on the basis that to do so would deprive him of his Fifth Amendment rights in relation to any subsequent proceedings against him in the U.S. The Court noted that similar arguments in that same context were made and rejected by Justice Davies in *GST Telecommunications v. Provenzano*, 2000 BCSC 72 at paras. 66-67.

[114] At para. 54 of *EchoStar*, the Court notes that no U.S. criminal proceedings were underway or contemplated. Further, the Court commented:

> 62. …While the *Charter* does not have extraterritorial application, except in certain limited and rare circumstances (see *R. v. Cook*, [1998] 2 S.C.R. 597, *R. v. Hape*, 2007 SCC 26), a Canadian court should not turn a blind eye to the possible consequences of compelled testimony outside this country, particularly where the compulsion is at the request of a court of the country where those consequences might materialize.

[115] After summarizing *Wolverton Securities*, *Hollinger*, *Fisherman* and *Hallstone*, and the balancing of rights in those cases, L. Smith J. similarly concluded that the request should be considered in the context of any proven "material risk" of a rights violation and whether there were any means by which to reasonably protect these rights:

> 77. … cases such as *Cuenca*, *National Financial Services Corp. v. Wolverton Securities Ltd., Ritter v. Hoag, Catalyst Fund, Fisherman, Hallstone Products*, and *Sun-Times* show that in other contexts involving compelled testimony or production of evidence in Canadian proceedings, the impact of an order on an individual's right to protection from self-incrimination in another jurisdiction may be a factor for the court's consideration.
>
> 78. If this is so in Canadian proceedings, it must be so in the context of a request from a foreign court. Specifically, Canadian courts, when asked to assist courts of the United States in procuring evidence for civil trials there, should be aware of the risk that they might put citizens or residents of Canada in the worst of both worlds - compulsion to testify in Canada followed by use of the compelled material in the U.S..
>
> 79. It does not follow that whenever there is any possibility of criminal proceedings the civil proceedings in the foreign court should be deprived of the desired evidence. The starting point in responding to a Letter of Request, as I have said, is that the foreign court should be assisted unless there is good reason to the contrary. <u>The individual who resists the application must show that there is a material risk that the evidence will be used to incriminate him or her, and even where there is a material risk, it does not follow that the order should be refused if there are ways to afford some reasonable measure of protection. It is a question of achieving the balance appropriate to the circumstances.</u>
>
> [Emphasis Added.]

[116] In *EchoStar*, the "balancing" of interests was achieved by compelling the witnesses to testify and provide their documents; however, the evidence was

protected by an order setting out 16 specific conditions regarding the obtaining, use and disclosure of the evidence (see paras. 85-102). *EchoStar* demonstrates that if a "material risk" is shown, a court can impose appropriate restrictions on the use of information to protect those interests. The Court did not endorse any "blanket" approach to protection in the face of speculation as what "material risks", if any, arose.

[117] In *Davidson v. Barnhardt*, 2012 ONSC 6016, the court, following *Fisherman*, refused to allow a witness to decline to answer questions under oath (i.e. plead the "Fifth") on the basis that her answers might be used against her in Californian civil proceedings and possible U.S. criminal proceedings. At paras. 16-18, the court found that it was for the American court to determine whether any such evidence would be admissible. *Davidson* did not impose any conditions on the subsequent use of the compelled evidence.

[118] *Fisherman* was also applied in *Beaudette v. Alberta (Securities Commission)*, 2015 ABQB 57. The Court dismissed Beaudette's application for a declaration that the provincial securities legislation violated ss. 7, 8 and 13 of the *Charter* by permitting cross-border sharing of information. Beaudette was compelled to testify in Canadian proceedings and feared future implications arising from an investigation in the U.S. At paras. 72-73, the Court found that the U.S. approach would not necessary lead to any rights infringement justifying an extension of *Charter* protection to individuals faced with prosecution in the U.S.

[119] The practical effect of the *Fisherman*, *Beaudette* and *Davidson* approach is for Canadian courts to leave it to U.S. courts to rule on whether the use of such evidence is permissible, and whether the use of such evidence violates an individual's Fifth Amendment rights. This approach respects the principle of comity. Until such time as a U.S. court rules directly on the matter, that ruling is brought to the attention of a Canadian court, and the effect of that ruling on U.S. law can be attested to by a qualified expert, a Canadian court should not assume procedural irregularity or a violation of legal rights in the U.S. legal process.

[120] The above authorities are persuasive in supporting the Director's position that the defendants' claim for a sealing order must fail for want of any concrete evidence as to any actual material risks that may be faced by the defendants if the court record is not sealed and the American authorities seek to use that testimony in later U.S. proceedings. Nor have the defendants established that any such possible material risks are of such importance that they are sufficient to override the public's right to open court access in the balancing exercise.

[121] Further, while it cannot be stated as a matter of fact, given the lack of expert evidence on the point, the unequivocal statement of the law in *Allen* stands to give Ms. Day the procedural protections the defendants claim she will lack, should she ever face prosecution in the U.S. Accordingly, there is no basis to suppose any U.S. court's procedure would violate the *Charter*, or otherwise "shock the conscience" of a Canadian court, per *Fisherman*, *Beaudette* and *Davidson*, so as to justify the extraordinary remedy a granting a sealing order over the entire court file in this case.

[122] Finally, while no material risk of a rights violation has been made out in regard to Ms. Day's alleged self-incrimination should a sealing order not be granted, it is also the case that there exists a reasonable alternative measure to protect the defendant's interests and allow them to fully defend this proceeding. That is the implied undertaking rule. Subject to the *CFA*, the scope of the implied undertaking of confidentiality in *Juman* affords the defendants protection from the Director sharing or otherwise using any documentary or oral information obtained on discovery, except for the purpose of that litigation: *Juman* at para 4.

[123] There is another aspect of the relief sought here that highlights that it is extremely overreaching. The defendants suggest that the sealing of the *entire* court file is "necessary" in order to address the risks or perceived risks at play. In seeking a sealing of the entire court file, PacNet and the Day Defendants seek to protect disclosure of both inculpatory and exculpatory evidence. There is simply no basis for the latter, particularly in terms of trumping the open court principle. The protection against self-incrimination under s. 13 of the *Charter* only applies to incriminating

evidence and does not apply in respect of any and all compelled evidence: *R. v. Nedelcu*, 2012 SCC 59 at paras. 8-11.

[124] To conclude, the first condition of the *Sierra Club* test is not made out by the defendants such that they have not met the onus upon them in proving any "real and substantial" or "serious" risk to an important interest, namely self-incrimination. In any event, if such risks exist, a sealing order is not "necessary" to address that risk where other reasonable alternative measures exists to prevent any such risk.

[125] These are Canadian proceedings. The parties, both plaintiff and defendants, are Canadian entities or persons. The subject matter of the proceeding is properties located in Canada. The issues in this litigation will be determined by Canadian and British Columbia laws. As such, I see no basis upon which the rights and interests of these Canadian parties, including the right of the public to access publicly filed documents, should be dictated by unsupported and speculative constitutional issues that may arise in other jurisdictions. The concerns advanced here – from a constitutional perspective – begin and end with the *Charter* and the other protections noted above. There is no suggestion on the part of the Director that the *Charter* rights of the Defendants, and those arising from the *Evidence Acts* and the implied undertaking rule, will not be respected.

[126] It will be obvious from the above discussion that the Defendants – and now this Court – have focussed on potential jeopardy arising in the U.S. In the circumstances of this case, it is possible that PacNet and the Day Defendants face jeopardy elsewhere in the world where they operated. They have already referred to ongoing court proceedings in Ireland and investigations by the Irish authorities in support of their arguments that the Court file needs to be sealed.

[127] Despite the Defendants' vague references to possible jeopardy arising internationally, PacNet and the Day Defendants have mounted no evidence or arguments that would even allow this Court to assess any possible prejudice arising outside of the U.S. (including Ireland) if authorities in those jurisdictions obtain evidence from the court file. There may be many jurisdictions involved, given the

level of international cooperation that the Heneghan affidavit suggests is underway. The lack of any evidence or submissions in relation to Ireland may have arisen because no issues of self-incrimination arise there. These circumstances only serves to highlight the need to consider these issues in context and with an appropriate evidentiary foundation in respect of the relief sought.

[128] Accordingly, while I have considered and rejected the application as it concerns perceived risks of self-incrimination, I acknowledge that factual circumstances may change in relation to these issues. Accordingly, I grant liberty to the Defendants to apply for later relief if that is appropriate. In that event, the parties may follow the procedures outlined in *Hallstone* at para. 36, although any such application should only be in relation to the proposed introduction into the court file of any inculpatory discovery evidence of the Defendants on an interlocutory application. By that process, advance notice of the introduction of such evidence is to be given, which will allow the Defendants an opportunity to apply for any protections that might be appropriate based on a specific consideration of the factual context at that time.

CONCLUSION

[129] The applications by PacNet and the Day Defendants are dismissed, save for the order allowing the names of the six potential third party witnesses to be anonymized in any court materials to be filed, as detailed above.

[130] In addition, I confirm that the Defendants have leave to further apply in respect of the evidence of any other third party witnesses and also, any information or documentation of PacNet clients that might be filed in this Court in advance of the trial. I will consider the merits of any such applications based on the facts advanced at that time.

[131] Finally, I decline to order a sealing of the entire court file on the basis of the present unsubstantiated and speculative concerns of PacNet and the Day Defendants about possible self-incrimination. However, the Defendants will be given advance notice of the introduction into the court file of any inculpatory evidence

arising from discovery of them, so as to allow them time to further apply for any appropriate relief as might arise at that time.

"Fitzpatrick J."