

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*,
2018 BCSC 2251

Date: 20181218
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 (Particulars)

Counsel for Plaintiff:

H. Mickelson, Q.C.
A. L. Doolittle
A. Greer

Counsel for Defendants Rosanne Day,
Gordon Day and 672944 B.C. Ltd.:

P. J. Roberts
L. L. Bevan

Counsel for PacNet Services Ltd.:

M. Bolton, Q.C.
A. Sehmbi
S. Mahmood

Counsel for Peter Ferlow and Ruth Ferlow:

B. D. Vaze
M. Greene

Place and Date of Hearing:

Vancouver, B.C.
November 5-7, 2018

Place and Date of Judgment:

Vancouver, B.C.
December 18, 2018

INTRODUCTION

[1] This is a civil forfeiture action. I have described the background and the allegations advanced in this action in previous rulings: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2018 BCSC 387 (“IPO Reasons”); *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2018 BCSC 2070 (“Sealing Order Reasons”).

[2] In February 2018, the Plaintiff Director of Civil Forfeiture (the “Director”) commenced this proceeding. In May 2018, all the defendants filed responses to Civil Claim. The latest iteration of the Director’s pleading is the Further Amended Notice of Civil Claim filed July 26, 2018 (the “Claim”).

[3] On May 4, August 31, September 4 and 6, 2018, the defendants each demanded particulars of certain aspects of the Director’s claims against them. There is significant overlap in those requests. Broadly speaking, the defendants assert that, without these particulars, they are in the dark as to the claims advanced against them and that they are therefore hampered in their defence of the action.

[4] On May 16, September 11 and 14, October 5, 2018, the Director provided responses to these various demands, by either providing particulars or alternatively, taking the position that further particulars are not known, not required or not appropriate.

[5] Accordingly, the defendants now bring separate applications to compel the Director to provide the demanded particulars. In addition, the defendant Gordon Day has brought an application to dismiss the claims against him. Alternatively, he seeks particulars.

[6] No other pre-trial procedures have taken place to this point in time, beyond the Director’s successful application to obtain an interim preservation order (IPO) and my decision denying the Defendants’ request for a sealing order (see the IPO Reasons and Sealing Order Reasons). The most extensive evidence before the Court in this proceeding is the affidavit #1 of Det. Mah sworn February 13, 2018,

filed by the Director in support of its application for the IPO. The Director has since filed other affidavits attaching further documents from proceedings against clients of the Defendant PacNet Services Ltd. ("PacNet") relating to fraudulent direct-mail schemes.

THE DIRECTOR'S CLAIM

[7] In the Claim, the Director seeks forfeiture of certain property, being bank balances (the "Bank Fund") and real properties (the "Properties") as proceeds of unlawful activity. The Director also seeks the forfeiture of the Properties as instruments of unlawful activity.

[8] The Claim defines the alleged unlawful activity and PacNet's role in that activity at paragraphs 1-5. The Claim provides:

2. PacNet processes payments for individuals and companies (the "PacNet Clients") it knows are engaged in unlawful predatory mail-fraud schemes, primarily targeting the elderly and vulnerable.

...

5. The proceeds of that fraudulent and unlawful activity were used to purchase and maintain the Properties. By converting the proceeds of unlawful activity into the Properties, the Properties were used as instruments of unlawful activity, namely, the laundering of proceeds of crime. The Bank Funds are also the proceeds of that fraudulent and unlawful activity. The plaintiff seeks forfeiture of the Properties and the Bank Funds pursuant to section 3 of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29.

[9] At paragraphs 6-9, the Claim identifies the owners of the Properties and the Bank Funds and how their role in PacNet connects them to the Properties and Bank Funds. Rosanne Day is the director and president of PacNet and she owns the defendant 672944 B.C. Ltd., which is a shareholder of PacNet. Mr. Day is her husband and he is alleged to have been involved in PacNet's business to some extent. Mr. Day is also alleged to own or have an interest in certain of the Bank Funds and Properties.

[10] The defendant Ruth Ferlow is or was an employee and officer of PacNet. The defendant Peter Ferlow is not alleged to have been involved in PacNet *per se*. He is Ms. Ferlow's husband and he has some interests in the Properties and Bank Funds.

[11] Accordingly, leaving aside allegations as to Mr. Day's potential involvement in PacNet's business operations, by reason of s. 4 of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29, both Mr. Day and Mr. Ferlow was therefore required to be named in this action as having interests in the Bank Funds or the Properties: see *British Columbia (Civil Forfeiture) v. Vo*, 2013 BCCA 279 at paras. 11-18 ("Vo BCCA").

[12] At paragraphs 10-24, the Claim provides considerable detail of PacNet's role in fraudulent direct mail schemes, including how those schemes are orchestrated by the defined term "PacNet Clients", meaning only those PacNet clients involved in those schemes. This section of the Claim alleges that the PacNet Clients have been involved, or have admitted their involvement in, these fraudulent mail fraud schemes.

[13] The Claim also includes an allegation that many PacNet Clients has been the subject of various criminal investigations or enforcement proceedings. At paragraph 22, the Claim states that despite PacNet being aware of these criminal investigations or enforcement proceedings, PacNet continued to process payments for PacNet Clients.

[14] The Claim outlines the alleged "Unlawful Activity" at paragraphs 25-29. Two types of allegations are made: firstly, that the Bank Funds and Properties are proceeds of unlawful activity, having been acquired directly as a result of the defendants' unlawful activity; and secondly, and in the alternative, that the Bank Funds and Properties are proceeds of unlawful activity, having been acquired indirectly as a result of the unlawful activity of PacNet Clients:

26. First, the Properties and the Bank Funds are the proceeds of unlawful activity as they were acquired directly as a result of the unlawful activity of PacNet, the Days, Ms. Ferlow ... and other persons unknown to the plaintiff at this time who have engaged in conduct contrary to the following sections of the *Criminal Code*, R.S.C. 1985, C-46 (the "Criminal Code") and the PCMLTFA [*Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17]:

- (a) ss. 21 and 380 of the Criminal Code, party to fraud and/or fraud;
- (b) ss. 21 and 381 of the Criminal Code, party to using mails to defraud;

- (c) s. 354 of the Criminal Code, possession of property obtained by crime;
- (d) s. 462.31 of the Criminal Code, laundering proceeds of crime;
- (e) s. 6.1 of the PCMLTFA, verifying the identity of a person or entity in accordance with the PCMLTFA regulations;
- (f) s. 7 of the PCMLTFA, reporting suspicious transactions in accordance with the PCMLTFA regulations;
- (g) s. 9 of the PCMLTFA, reporting specified or prescribed financial transactions in accordance with the PCMLTFA regulations; and
- (h) s. 9.6 of the PCMLTFA, implementing a program intended to ensure compliance with Part 1 and Part 1.1 of the PCMLTFA in accordance with the PCMLTFA regulations.

27. Second, and in the alternative, the Properties and the Bank Funds are the proceeds of unlawful activity as they were acquired indirectly as a result of the unlawful activity of the PacNet Clients, who have engaged in conduct contrary to the following sections of the Criminal Code:

- (a) s. 380, fraud;
- (b) s. 381, using mails to defraud; and
- (c) s. 462.31, laundering proceeds of crime.

PacNet, the Days, Ms. Ferlow ... and other persons unknown to the plaintiff at this time had knowledge of the unlawful activity of the PacNet Clients set out above, and received a financial benefit from the unlawful activity in the form of money used to acquire the Properties and Bank Funds.

[15] At paragraphs 30-32, the Claim alleges that the Properties and Bank Funds are entirely or substantially proceeds of the Unlawful Activity:

30. As part of its engagement in and facilitation of the Unlawful Activity, PacNet has attempted to create an appearance that it has engaged in a broad-based spectrum of legitimate business activity, of which only a small portion is illegitimate.

31. In fact, the plaintiff says that all or substantially all of PacNet's proceeds come from the Unlawful Activity set out above, and that any "legitimate" sources of revenue have been deliberately established as a cover for its otherwise unlawful operations. As a result, all or substantially all of the revenue generated by PacNet is the proceeds of unlawful activity.

32. PacNet, the Days, Ms. Ferlow ... and other persons unknown to the plaintiff at this time, have been solely concerned with the operation of PacNet and its related companies that have directly or indirectly engaged in the Unlawful Activity. As a result, all, or substantially all of the income and/or assets in the name of PacNet, the Days, Ms. Ferlow ... and other persons unknown to the plaintiff at this time, are the proceeds of unlawful activity under the Act.

[16] Finally, at paragraphs 33-34, the Claim specifically alleges that the Properties were used as instruments of the Unlawful Activity, namely for laundering the proceeds of crime contrary to s. 462.31 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “*Criminal Code*”). At paragraph 34, the Director specifically advances an “instruments” allegation in relation to the PacNet Property, which was the business premises for PacNet’s operations:

33. By converting the proceeds of the Unlawful Activity into the Properties, the Properties were used by the defendants as instruments of unlawful activity, namely, the laundering of proceeds of crime contrary to s. 462.31 of the *Criminal Code*.

34. Further, the PacNet Property (as defined below) is an instrument of unlawful activity because it was used, or is likely to be used to engage in fraud or being a party to the commission of fraud, being a party to the commission of mail fraud, the possession of the proceeds of crime, and laundering of the proceeds of crime.

[17] Further details regarding the Properties and Bank Funds are found, respectively, at paragraphs 35-52 and 53-76 of the Claim.

RELEVANT LAW RE PARTICULARS

[18] There is no dispute that whether and if so, when, particulars will be ordered in a matter is an exercise of judicial discretion.

[19] The parties agree that the relevant framework in respect of a particulars application is found in *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.). At para. 11, the court discussed the inevitable tension and difficulty that exists in distinguishing between whether particulars are truly to delineate the issues between the parties or whether they are better characterized as the means by which the issues will be proved.

[20] In *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada*, [1993] 79 B.C.L.R. (2d) 126 (S.C.), the Court stated at 128-129:

The scope of particulars that may be demanded lies in the answer to the question whether what is sought is intended to, and does, delineate the issues between the parties, or does no more than disclose the way in which the case will be proven: *Cansulex* at pp. 8-9.

[21] Material facts, perhaps supplemented by particulars, are the means by which the allegations are framed so as to inform the defendants of the case they must meet. They are to be distinguished, however, from the *evidence* by which those allegations are to be proved.

[22] At para. 15 in *Cansulex*, the court outlines the function of particulars:

...

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial
- (4) to limit the generality of the pleadings;
- (5) to limit and decide the issues to be tried, and as to which discovery is required, and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[23] The court in *Cansulex* did not set out any hierarchy of the above objectives. As such, the exercise in discretion will be informed by the particular circumstances at play and involves balancing these objectives as a whole. For example, some objectives may be more relevant in some cases than others. The overarching consideration in applying the *Cansulex* principles is to ensure the integrity of the justice system is upheld: *Powell v. 349131 B.C. Ltd.*, [1992] B.C.J. No. 1088 (S.C.) at para. 61. This integrity is best protected when litigation is allowed to proceed in a fair manner toward a just resolution between the parties.

[24] The Director also refers to other authorities that inform a consideration of the issue as to whether particulars are appropriate at this early stage of this litigation.

[25] One consideration is whether some information may *only* be in the hands of the defendants, such that to order particulars would disproportionately hamper the plaintiff in exploring the evidentiary basis for their claim through the discovery process toward proving its claim. In that event, an order for particulars that in turn

limited the claim would effectively disallow the yet unknown specifics of the claim from the discovery process at that early stage.

[26] In *Central Power Products v. 238022 B.C. Ltd.*, 2003 BCSC 1088, the Court described the balancing of the *Cansulex* factors in those circumstances:

20. These considerations must, however, in a practical sense, be balanced against considerations that will allow the plaintiff to properly explore its claim, particularly where some of the information it needs to make out its claim may be in the hands of the defendant. In this respect *Neptune Bulk Terminals (Canada) Ltd. v. Kilborn Engineering Pacific Ltd.*[1994] B.C.J. No. 75, quoting *Mexican Northern Power Co. v. S. Pearson & Son Limited*, (1913), 25 O.W.R. 422 at 425, per Middleton J., is instructive:

Discovery is of necessity limited by the pleadings and by the particulars which may have been given under them. To order particulars at this stage would, I think, unfairly hamper the plaintiff. The plaintiff is entitled to search the conscience and the conduct of the defendant, its agent, to the utmost; and it is better that this should all be done before the final formulation of the particular charges to be investigated at the trial. If the particulars given in the pleadings turn out to be so vague and general as to be insufficient to direct the mind of the party to be examined for discovery to the real issues, this may create difficulty when the examination is on foot; but it seems to me to be better that this should be left to work itself out during the progress of the examination than that an attempt should be made unduly to tie the hands of the plaintiff at this stage.

21. Further in the same judgment, *British Columbia Liquors Company Limited v. Consolidated Exporters Corporation Limited et al*, [1930] 2 W.W.R. 379 is quoted, per MacDonald C.J.B.C.:

When the plaintiff alleges fraud *prima facie* it ought to particularize, but the Courts are careful to avoid making an order which might preclude him from proceeding when there is evidence that the defendants themselves are the sole depositaries of the particulars asked for. The order appealed from is, with respect, futile, because, if it orders discovery, it confines that to those matters of which particulars have already been given and are not wanted, and does not permit the plaintiff to inquire into the matters in respect to which it required the information which would enable it to answer the demand for particulars, and may find it in the sole possession of the defendants who are demanding them.

[Emphasis added.]

[27] Another consideration is whether the plaintiff has produced some evidence that may, at least to some extent, provide the very particulars requested so as to supplement the claim as set out in the pleading.

[28] In *Proconic Electronics Limited v. Wong* (1986), 67 B.C.L.R. 237 (S.C.) at 239, the Court noted that some fishing expeditions are specifically contemplated by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the “Rules”). At 241, the Court noted that a defendant should not be called upon to respond to a “bald allegation”; rather, a plaintiff may respond to an application for particulars by providing “some evidence even if very little” which a defendant should answer.

[29] A number of decisions have demonstrated that an application for particulars can be rejected if the plaintiff has some evidence, even if “very little”, which elevates their claim above the level of a bald allegation and provides a sufficient evidentiary basis upon which to proceed: *Waynes Merthyr Company v. D. Radford & Co.*, [1896] 1 Ch. 29 at 36; *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.*, [1993] B.C.J. No. 599 at paras. 13-17; *VSM MedTech Ltd. v. Elekta AB*, 2008 BCSC 466 at paras. 14-21, cited in *XY LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2017 at paras. 161-165; *XY LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 1616 at paras. 37-39.

DISCUSSION

[30] The defendants have, on this application, and at many times in earlier hearings, continued to stress the seriousness of this type of proceeding and the jeopardy they face.

[31] They refer to the discussion of the court in *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72, where Saunders J.A. stated that:

13. ...There is, however, an extra element in the civil forfeiture cases, and that is the jeopardy faced by a civilian, at risk of losing a great deal and at risk of being labelled for criminal behaviour. This jeopardy arises from evidence gained by police using their special authority but without the case ever having fed into the criminal proceedings stream, with the defendant now caught in a proceeding that requires presentation for cross-examination at an examination for discovery....

[32] It is not clear at this time whether, in proving its claim, the Director will be relying on evidence seized by the police. The documents produced by the Director to date includes, for the most part, that which is publicly available.

[33] In any event, I accept that this is, as stated in *Lloydsmith*, a “high stakes” circumstance for the defendants and that the procedural rights of the defendants must be recognized: *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 at para. 31.

[34] However, I reject the defendants’ submission that this case and the particulars applications before me requires a “novel” or “unique” approach under the *Rules* given the matters at stake.

[35] This is a civil proceeding and not a criminal or *quasi*-criminal proceeding: *British Columbia (Director of Civil Forfeiture) v. Liu*, 2018 BCSC 1518 at para. 31 citing *Ontario (Attorney General) v. Chatterjee*, 2007 ONCA 406 at paras. 40-44; *aff’d Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 at paras. 4 and 23.

[36] As Justice Duncan stated in *British Columbia (Director of Civil Forfeiture) v. Cronin*, 2016 BCSC 284:

13. A forfeiture trial is a civil proceeding. An individual who defends a forfeiture claim against his or her property is subject to the usual rules in a civil proceeding, which includes the requirement to submit to an examination for discovery. Evidence from an examination for discovery can be used against a forfeiture defendant at trial. There are no rules shielding a defendant from the use of information obtained during discovery. In other words, the rights that exist for accused persons in criminal cases, such as the right against self-incrimination, are not replicated in the *in rem* proceedings.

[37] Accordingly, the *Rules* apply in this civil proceedings and will govern the procedures to be followed. In my view, the *Rules* and the exercise of this Court’s jurisdiction under the *Rules* provide a sufficient basis upon which to ensure that the matter proceeds in a fair manner toward a proper resolution of the issues. Contrary to the defendants’ position on these applications, there is no need to craft a different framework in the context of these civil forfeiture proceedings.

Civil Forfeiture and Particulars

[38] Civil forfeiture cases in this province have not been immune from applications for particulars.

[39] The defendants argue that all of these claims must be fully particularized, as they request, given the fraud allegations contained in the Claim. They say this is required by Rule 3-7(18) which provides:

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[40] Again, in this respect, they cite the seriousness of such a claim in terms of the consequences to a party alleged to have committed the fraud. In *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 168, the court stated that it is a fundamental rule that fraud be “scrupulously” pleaded. See also *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19.

[41] In this case, the Director’s primary contention is that the fraudulent activities, perpetrated either directly by the defendants or by the PacNet Clients, are the basis for the proceeds claim advanced at paragraphs 25-32 of the Claim.

[42] In *British Columbia (Director of Civil Forfeiture) v. Vo*, 2012 BCSC 1476, the defendant was facing forfeiture of her home as proceeds of the unlawful activity of Mr. Bui who was alleged to have been dealing in marihuana. Ms. Vo opposed an amendment to the pleadings; in the alternative, she sought particulars of the alleged illegal activities of Mr. Bui and the connection of these illegal activities to her.

[43] Beginning at para. 29 of *Vo*, Justice Williams addressed whether particulars were “necessary” in the context of Rule 3-7(18) in relation to the proceeds claim. In that case, the Director took the position that, since he did not have to show any particular drug transaction or unlawful activity, he did not need to plead any. It was further argued that the Director did not need to allege specific incidents of unlawful activity in order to find that the property in question was the proceeds of unlawful activity and that, if the Director did not need to prove a particular crime, it need not plead one.

[44] After reviewing a number of authorities, including *Chatterjee*, Williams J. agreed with the Director and found that the Director did not have to plead any

specific transactions or refer to any *specific* unlawful activities in the pleadings if the circumstances alone could support a reasonable cause of action that the proceeds were derived from unlawful activity:

39. These cases suggest that the surrounding circumstances of the property can be enough to find that the money is proceeds of unlawful activity on a balance of probabilities, even without any evidence of a particular crime.

...

42. As in the case at bar, the defendants in the above cases were not made aware of places, dates, or any other details of alleged drug transactions. The Director may not even have this information, but the information is not necessary for the purposes of the Act. It is open to the Director to invite the court infer the unlawful activity from the totality of the circumstances. Ms. Vo has the opportunity to rebut any inferences that might be drawn from the Director's evidence and reply with evidence as to the actual source of the funds. The lack of evidence as to the unlawful activity alleged may weaken the Director's case; indeed, it may ultimately fail. However, it is still open to the Director to advance his case in that fashion.

[45] This part of the decision was upheld on appeal: *Vo BCCA* at para. 26.

[46] *Vo* was followed in two later decisions of this Court in the *Hells Angels* civil forfeiture litigation and. in *British Columbia (Director of Civil Forfeiture) v. Sanghera*, 2018 BCSC 1919.

[47] In *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corp.*, 2013 BCSC 1003 (the "HAMC Pleadings Ruling"), Justice Davies was addressing the defendants' application to strike portions of the claim or alternatively obtain particulars. Similar to what has been argued here, the defendants were seeking specifics of the "vague and sweeping" allegations of unlawful activities. This litigation involved claims that the clubhouses were both proceeds of crime and instruments of the Hells Angels alleged criminal activities.

[48] At para. 57(5) of the HAMC Pleadings Ruling, Davies J. followed *Vo* (albeit before the BCCA decision) in relation to the proceeds claim. He found that only a "passive nexus of "direct or indirect acquisition" needed to be plead in respect of the proceeds claim, as opposed to the "active causal nexus of "has been used to engage" or "is likely to be used to engage" needed for instrument claims: para. 64.

[49] Regarding instruments claims, Davies J. found that it was necessary to outline in the pleadings, as material facts, the alleged specific unlawful activities that engaged the use of the property to support proving the causal connection or nexus between the property sought as an instrument of crime and the alleged unlawful acts: paras. 64-65.

[50] Accordingly, given the clear distinction between proceeds and instruments claims, as further indicated by their separate treatment under 3(1) and 3(2) of the *Civil Forfeiture Act*, proceeds claims do not require details of any *specific* underlying unlawful activity from which the proceeds flowed. It is enough to plead that proceeds came from unlawful activity, directly or indirectly. As proceeds claims are about origin, while instruments claims are about use, the two types of claims are properly distinct and subject to differing causal nexuses.

[51] This distinction between proceeds and instrument cases, per *Vo* and the HMAC Pleadings Ruling, was confirmed in Davies J.'s later decision in *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corporation*, 2014 BCSC 1488 (the "HMAC Particulars Ruling"). That decision arose from the defendants' application to obtain further and better particulars of the amended claim. The amended pleadings had, in part, referenced the unlawful activities as including fraud (para. 9).

[52] At para. 70, Davies J. ordered the Director to provide further particulars to the extent that these particulars were then known to the Director. However, he was clear in stating that his reasoning was *only* in relation to the instruments claim, not the proceeds claim, in accordance with his previous ruling:

73. I must also emphasize that these particulars are only necessary to the extent that they relate to the Director's claims to the forfeiture of the property sought as "instruments of unlawful activity" under s. 3(2) of the *Civil Forfeiture Act*, not those claims that seek forfeiture of the property as "proceeds of unlawful activity" under s. 3(1), as I explained in paras. 61 and 62 of the Pleadings Decision.

[53] Finally, the *Hells Angels* litigation also included Davies J.'s decision in *British Columbia (Director of Civil Forfeiture) v. Violette*, 2014 BCSC 1514 on this same

point. At para. 76, the further particulars ordered were only necessary in relation to the instruments claim, not the proceeds claim.

[54] Applying the above authorities, I agree with the Director that, since it is not necessary for the Director to prove the particular unlawful activities in terms of the who/what/when/where/how of those crimes, it is likewise not necessary for the Director to provide those details in respect of its proceeds claim. In any event, paragraphs 26-27 of the Claim, as above, provide specifics of the *Criminal Code* and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 provisions relied on by the Director in making out their claim.

[55] I agree that the fraud allegation does engage Rule 3-7(18) in respect of requiring “full particulars” in the pleading, “if applicable”. Fraud is one of the underlying unlawful acts alleged here. However, in appropriate circumstances, the Court may order that any particulars be delayed until after discovery even if they might otherwise be required under Rule 3-7(18): *Sanghera* at paras. 29-36.

[56] The defendants also refer to s. 19 of the *Civil Forfeiture Act* as relevant to what the Director must prove at any trial. This is a misreading of that provision.

[57] Section 19 is included in Part 4 (Proceedings, Presumptions and Proof) of the *Civil Forfeiture Act* and addresses various evidentiary matters in relation to the issues to be determined at trial. That provision only contains an evidentiary presumption with respect to the manner by which the Director may seek to prove at trial that the whole or a portion of an interest in property is proceeds of unlawful activity: see *British Columbia (Director of Civil Forfeiture) v. Rai*, 2011 BCSC 186 at para. 82(1).

[58] I see little relevance in relation to s. 19 in the context of the particulars sought here. Section 19 does not establish the test for forfeiture under s. 3 of the *Civil Forfeiture Act* in terms of what the Director must prove in order to succeed in making out its *in rem* claim.

[59] I will now address the specifics of the requested particulars.

Paragraph 2

[60] The defendants seek particulars as to paragraph 2 of the Claim and specifically, the names of the PacNet Clients who engaged in predatory mail-fraud schemes and the particulars of how PacNet had knowledge that this fraudulent activity was going on.

[61] The background of this matter is of some importance in terms of this assertion.

[62] PacNet and Ms. Day have been well aware that PacNet has been processing payments for clients who have sent mailings to persons in what can only be described as a fraudulent and predatory endeavour. The details of such schemes and PacNet's participation in the processing of those mailings are outlined in the IPO Reasons at paras. 13-20. These mailings typically involve references to lottery winnings or psychic blessings, both of which promise riches to come in exchange for some payment by victims of such schemes to the perpetrators. These are the very payments that PacNet processed for its clients.

[63] PacNet's response to the Claim at paragraphs 5-9 specifically admits that it has done payment processing for its direct mail clients. Beyond that, PacNet and the other defendants deny any participation or knowledge of any nefarious activities on the part of any of PacNet's clients.

[64] In addition, the Director's "open source" and public documents, contained in Det. Mah's affidavits and the other affidavits, clearly reference many documents by which PacNet and Ms. Day acknowledge the criminal or illegal activity of some of its clients in these types of schemes. In 2017, PacNet also identified various "high risk" clients in relation to money laundering. In the OFAC interpleader, OFAC identified 73 of PacNet's clients who it alleged were involved in such predatory schemes and for whom payments were processed by PacNet. Only PacNet and OFAC know the names of these clients. The Director does not.

[65] Various documents attached to Det. Mah's affidavit include emails from PacNet employees specifically referring to these schemes: see, for example, the IPO Reasons at paras. 83, 91, 93. As alleged in paragraph 14 of the Claim, these fraudulent mailings come in a variety of forms. However, they all have the common feature of promising non-existent money or other benefits in exchange for a fee which the fraudsters accept without any promised winnings being later sent or, at most, a worthless token being sent to the victim. Other documents attached to Det. Mah's affidavit suggest that PacNet's employees were in fact in possession of and reviewed various mailings of this type which contained these false promises.

[66] I agree with the Director that, in the above circumstances, the defendants and in particular, PacNet and Ms. Day are in the best position to know which of their clients were processing direct mailings and more particularly, mailings involving these types of predatory schemes. For example, it should be a simple matter for PacNet and Ms. Day to identify which of its clients were sending mailings relating to lottery winnings or psychic readings.

[67] The particulars requested by the defendants are clearly an inappropriate attempt to unfairly restrict the Director in pursuing its Claim in respect of only those PacNet Clients that it can identify at this time. A similar argument was expressly rejected by this Court in *Cambie Forming Ltd. v. Accuform Construction Ltd.*, 2016 BCSC 266 at paras. 24-27.

[68] In my view, there is a sufficient basis in both the pleadings, and Det. Mah's and the other affidavits, upon which to allow discovery to proceed. The Director's allegations are far from bald, and do not amount to a fishing expedition. The current pleading should provide the Director with the means to discover the defendants with respect to information and documentation about potential other PacNet clients who were engaged in these fraudulent activities to the extent that they have, to this time, escaped the authorities and publication of their activities. It may be the case that particulars will be warranted once discovery is completed; however, there is no basis upon which to prematurely tie the Director's hands at this point.

[69] On the issue of particulars of PacNet and the other defendants' knowledge of the illegal schemes of its clients, Rule 3-7(17) dealing with pleadings provides:

(17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

[70] The Director asserts that, therefore, a plaintiff alleging knowledge or a condition of the mind is not required to plead material facts or particulars in support of that allegation. In *Strauss v. Jarvis*, 2007 BCCA 605, the court dismissed an appeal from an unsuccessful application to strike the plea of malicious prosecution where particulars had not been provided. Justice Mackenzie held that:

16 ... To require the respondent to plead more would place an unfair burden on him having regard to the relative means of knowledge of the respondent and the appellants as to their state of mind. ...

[71] I agree that, at this stage, the court is not concerned with whether the elements of fraud have been successfully made out, but only whether the elements of fraud have been successfully pled. One of those elements is knowledge. Rule 3-7(17) plainly allows the Director to allege knowledge without pleading specific facts as to that knowledge in establishing its fraud claim. Accordingly, as has been done, the Director's pleading is sufficiently particularized in terms of the defendants knowledge and no further particulars must be disclosed.

[72] In my view, to order particulars at this stage would unduly tie the plaintiff's hands. As in *Central Power Products* at paras. 20-21 cited above, and *Cambie Forming* at paras. 42-43, I conclude that it is preferable to let the discovery process (including discovery of documents and examinations for discovery) proceed before ordering particulars because the discovery process may disclose information and documentation that is only now known by the defendants.

[73] Applying these authorities, I agree with the Director that it is not necessary to provide the particulars requested, at least at this time, as to the specifics of how and when PacNet and the other defendants allegedly became aware of and gained knowledge that it was processing payments for the fraudsters.

Paragraph 13 and 19

[74] The defendants seek particulars relating to paragraph 13 of the Claim as to the “relationship” that the Director alleges exists between the PacNet Clients and other participants in the process (including PacNet) by which these schemes were advanced. The defendants also seeks particulars relating to paragraph 19 of the Claim as to how PacNet transferred funds to PacNet Clients so as to minimize the chance of detection of fraudulent activities by financial institutions.

[75] Again, I agree with the Director that, in the above circumstances, the defendants and in particular, PacNet and Ms. Day, are in the best or only position to know the nature of their relationship with the PacNet Clients and any other persons who were part of the process by which these mailings were sent out and payments received. For example, it might be expected that PacNet entered into contracts or agreements with the various participants in the scheme that would further define their relationship. These documents would only be in the hands of PacNet.

[76] In my view, paragraphs 11-17 of the Claim set out with sufficient particularity of the process by which these schemes are accomplished. Further, while not a pleading, Det. Mah’s affidavit also provides some evidence on this issue that supplements the Director’s allegations sufficient to allow discovery to proceed.

[77] As for the sought-after particulars relating to the transfer of funds, in my view, this is more a matter of facts that will be explored on discovery. I do not see how the manner of transfer of funds by PacNet to PacNet Clients is anything other than an allegation meant to support the overall claim that PacNet was involved in the fraudulent activities and that it took steps to assist PacNet Clients (and presumably itself) in avoiding any detection of those activities by the authorities.

[78] In any event, Det. Mah’s affidavit also provides some evidence to support the Director’s allegations that PacNet took steps to avoid detection.

Paragraphs 20-22

[79] The defendants have requested particulars of paragraph 20 of the Claim as to which PacNet Client have been the subject of criminal proceedings in the U.S. or elsewhere and the details of those proceedings. The defendants have requested particulars of paragraph 21 of the Claim as to those proceedings in which PacNet was referenced as the payment processor and results of such proceedings. Finally, the defendants have requested particulars of paragraph 22 of the Claim as to which PacNet Clients were subject to criminal proceedings to the knowledge of PacNet and where PacNet continued to process funds for those clients in any event.

[80] Again, I agree with the Director that, in the above circumstances, the defendants and in particular, PacNet and Ms. Day, are in the best or only position to know the specifics of the proceedings against certain PacNet Clients and also, PacNet and Ms. Day's knowledge and involvement in those proceedings.

[81] In my view, paragraphs 20-22 of the Claim set out with sufficient particularity the complicity of some PacNet Clients. The allegations of knowledge on PacNet's part in relation to some clients are supported by documents found in Det. Mah's affidavit where Ms. Day herself addressed PacNet's involvement. This request is again an attempt by the defendants to tie the hands of the Director in terms of the discovery process going forward.

[82] Finally, the Director's allegations of knowledge on the defendants' part and the sufficiency of that allegation is supported by Rule 3-7(17), as above.

Paragraphs 25-29, 30-31, 37

[83] These paragraphs address the Director's proceeds claim.

[84] The defendants seek particulars of paragraph 26 as to the conduct that they are alleged to have undertaken in contravention of the statutes listed in that paragraph. The defendants also seek particulars of paragraph 27 as to the means by which they are said to have acquired knowledge of the unlawful activity of PacNet Clients. Both of these paragraphs refer to the "Unlawful Activity" as including fraud.

[85] The Director took the position that further particulars of paragraphs 26-27 of the Claim were not required. In the alternative, relating to Mr. Day, the Director alleges that he has close financial and business connections to PacNet and that he had knowledge of and was aiding and abetting the unlawful conduct of PacNet in which his wife, Ms. Day, was the principal.

[86] In my view, the allegations in the Claim, together with the further particulars and Det. Mah's and the other affidavits, are a sufficient basis upon which the defendants, including Mr. Day, can understand the claims against them for the purpose of mounting a defence. In particular, Det. Mah's affidavits attaches various emails from PacNet employees (including Ms. Ferlow) inferring knowledge of mail fraud schemes and also inferring participation by PacNet employees by way of advice in avoiding complaints to the authorities.

[87] Particulars of knowledge do not need to be plead at this time: Rule 3-7(17). Further, any further details would essentially be pre-trial disclosure by the Director of evidence upon which it might prove the claim. Finally, it can be expected that the details of the involvement of the other defendants in PacNet and its operations are within the knowledge of the defendants.

[88] Finally, the defendants seek particulars of paragraphs 30-31 as to what the Director says were "legitimate" sources of PacNet's revenue and which were not in furtherance of the unlawful activity. They assert that without such specifics, the scope of the claim is "unmanageable and untriable".

[89] In my view, this is simply the converse of the particulars sought in relation to identifying the PacNet Clients, who are defined as those engaging in unlawful predatory mail-fraud schemes. The answer to this request is the same; this is not a necessary or appropriate basis for particulars for the reasons set out in relation to paragraph 2 of the Claim. In any event, there are no issues raised with respect to PacNet's "legitimate" revenue such that it is irrelevant.

[90] Paragraph 37 of the Claim is an allegation that the proceeds of crime were used to benefit the PacNet Property by the payment of taxes, improvements and maintenance costs. Again, per *Vo*, no further material facts are required as to the “nexus” between the PacNet Property and specific unlawful activities. In any event, these particulars can be expected to be in the sole possession of PacNet and not in the possession of the Director.

[91] With respect to the other Properties and Bank Funds, the Director alleges at paragraphs 35-52 and 53-76 of the Claim that they were all acquired or were benefitted by the use of the proceeds of the Unlawful Activity. As with the PacNet Property, these particulars can be expected to be in the sole possession of defendants who own the Properties or Bank Funds. They are not in the possession of the Director.

Paragraphs 33-34

[92] These paragraphs address the Director’s instruments claim. The Director seeks forfeiture of the Properties as instruments only on the basis they were used to facilitate the commission of the offence of laundering proceeds of crime.

[93] The defendants have requested particular as to how, and the manner by which, proceeds from unlawful activity were allegedly used to increase the value of the equity in the Properties, including that held by PacNet in the PacNet Property.

[94] I agree that the Director has provided sufficient material facts in relation to its assertion that the Properties are instruments of laundering proceeds of crime.

[95] The offence of laundering proceeds of crime is found in s. 462.31 of the *Criminal Code*:

Laundering proceeds of crime

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that

property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

[96] Accordingly, there are three elements of this offence: the dealing in the property (the *actus reus*); the intention to deal with that property; and, knowledge that the property or proceeds were derived from unlawful activity (*mens rea*).

[97] The Claim provides the very details sought in relation to the elements of the offence of money laundering and the involvement of the Properties:

- a) At paragraphs 38-52 of the Claim, the Director sets out the material facts of the transactions whereby the proceeds were used (*actus reus*) and from which the intention element may be inferred (*mens rea*); and
- b) At paragraph 31 of the Claim, the Director sets out the knowledge component. As set out in Rule 3-7(17), particulars of how or when this knowledge was acquired is not required; it is sufficient to plead, as the Director does, that all or substantially all of PacNet's revenues were proceeds of unlawful activity obtained under a "deliberate" scheme and that those proceeds were converted into the Properties.

[98] At paragraph 34 of the Claim, the Director advances its instruments claim specifically against the PacNet Property. In addition, in the Director's counsel's letter of October 5, 2018, further particulars of the fraud and the mail fraud claims in relation to paragraph 34 were provided:

At all material times, Ms. Day, Ms. Ferlow and other employees or principals of PacNet, working out of the PacNet Property, aided and abetted in the fraud of PacNet Clients by facilitating the payment processing for fraudulent mail solicitation, by providing assistance with the content of the "mail-outs" associated with the PacNet Clients' direct mail schemes, and by sending email correspondence containing instructions to assist PacNet Clients for the purpose of avoiding detection by the authorities of their fraudulent mail schemes.

At this time the Director does not know what precise times, persons, documents or PacNet Clients were involved in the [mail] fraud. Particulars of this allegation are known only to the defendants.

At all material times, Ms. Day, Ms. Ferlow and other employees or principals of PacNet, working out of the PacNet Property, aided and abetted in the fraud of PacNet Clients by using, or storing at the PacNet Property, equipment to process payments for or correspond with PacNet Clients to facilitate PacNet Clients' fraudulent direct mail schemes.

At this time the Director does not know what precise times, persons, equipment or PacNet Clients were involved in the mail fraud. Particulars of this allegation are known only to the defendants.

[99] In my view, the Claim, together with the above particulars, provide more than sufficient notice to PacNet as to the instruments claim advanced with respect to the PacNet Property.

[100] Simply put, the allegation is that PacNet and the other defendants knowingly obtained proceeds from these fraudulent mail schemes and those proceeds were intentionally used or converted by the defendants to either purchase or improve the Properties.

[101] The specific details as to the flow of these alleged proceeds of crime into the hands of PacNet and the other defendants and the use of those funds can only be within the knowledge of the defendants. At the present time, the Director alleges that these proceeds were used as unlawful activity by reason of the laundering of the proceeds, given their use in relation to the Properties.

[102] The underlying unlawful activities that gave rise to the proceeds of crime, which were then allegedly laundered by the defendants, is not a material fact. Accordingly, the details of the direct-mail fraud of the PacNet Clients is not required to be pleaded or proven, even in criminal proceedings. On this point, the Director relies on the statements found in *R. v. Tejani*, [1999] O.J. No. 3182 (C.A.):

36. ... the trial judge correctly stated that "The *mens rea* of laundering consists of both the intent to either conceal or convert the property and the knowledge that the property is proceeds of an offence under ss. 4, 5 or 6 of *Narcotic Control Act*." In the passage the appellant relies on, the trial judge simply indicated, correctly in my opinion, that the Crown did not have to prove the appellant knew what specific narcotics were trafficked or how the trafficking was carried out. In other words, although the Crown was required

to prove that the appellant believed Debellis' money was derived from the commission of an offence under s. 4 or s. 5 of the *Act*, it was not required to prove that the appellant knew or had any belief about the details of the offence. ...

[103] I agree with the comment in *Tejani*. As the Director argues, if it establishes that PacNet was aware that it was processing funds derived from mail fraud, and PacNet proceeded to act as an intermediary for those funds through a bank account, PacNet will have committed the offence of laundering proceeds of crime without the Director having to prove any knowledge of the specific transactions of the underlying designated offence(s). As a result, the Director could show that the Properties were instruments of unlawful activity without proving any offence other than money laundering.

[104] The Director's allegations are in regard to specific unlawful activities, i.e. fraud and money laundering, and are sufficiently connected to the Properties for the purposes of establishing the required active causal nexus for an instruments claim: *HAMC Pleadings Ruling* at paras. 64-65. This is unlike the situation addressed by Davies J. in the *HAMC Pleadings/Particulars Rulings* and *Violette* where the Director was unable to state which specific unlawful activities were connected with the Hell's Angels clubhouses, thus failing to satisfy the required nexus

[105] Further, I would respectfully adopt the analysis of Master Muir in *Sanghera* where she was similarly dealing with an application for particulars. At para. 26, she followed *Vo* with respect to the proceeds claim. With respect to the instruments claim where the underlying offence was money laundering, as here, she found that the *Vo* approach was more appropriate since this allegation was simply an extension of the proceeds claims:

42. It seems to me that the allegation of money laundering, although technically an instrument of unlawful activity pleading, is really an extension of the pleas of use of the proceeds of crime. If proceeds were used to purchase or maintain the Properties, the Properties would have been used for money laundering.

43. As money laundering is an inevitable result of using the proceeds of crime, to require particulars of the money laundering alleged would defeat the

analysis developed in *Vo* and *Hells Angels* to conclude that particulars of proceeds need not be provided.

44. I have concluded, therefore, that particulars of the allegations of money laundering are not required ...

[106] Therefore, in a money laundering case, the line between proceeds and instruments claims may be blurred such that the same pleadings and particulars will establish a sufficient nexus with respect to both claims, with the result being that additional particulars will not be needed for the instruments claim. Such appears to be the case here.

[107] In summary, I conclude that no further particulars are required at this time in respect of the Director's instruments claim.

CONCLUSION

[108] As the saying goes, this is not PacNet's "first rodeo" in relation to allegations as to its involvement in fraudulent direct-mail schemes.

[109] The evidence adduced in this litigation to date is that PacNet and Ms. Day have been well aware for the past two decades that PacNet has processed payments for fraudsters. PacNet has been ensnared in litigation around the world involving its clients. PacNet has had substantial legal representation in respect of extracting themselves from those proceedings.

[110] A cursory review of documents filed in those other legal proceedings would not leave any doubt in a reasonable person's mind as to the general nature and circumstances of the schemes that were the subject of the proceedings against the fraudster PacNet clients. When these schemes, as described in Det. Mah's affidavit, are laid bare, no one, let alone the defendants, suggests that they are anything but fraudulent and predatory schemes meant to defraud victims of their money.

[111] PacNet and Ms. Day appear to have steered away from any responsibility in those earlier proceedings based on the assertion, which was accepted, that these fraudster clients were only "bad apples" in their clientele list and that PacNet and Ms. Day were not aware of the true nature of their activities.

[112] The Director in this proceeding is now challenging that contention. Contrary to the position that PacNet and Ms. Day have earlier taken, the Director contends that indeed, they well knew what their “bad apple” clients were up to and that they assisted those clients in the fraudulent schemes and benefitted handsomely in doing so.

[113] The defendants strenuously deny the Director’s allegations in this action. It remains to be seen whether the Director can prove its claims.

[114] Overall, the approach of the defendants has been toward having the Director disclose all of the *evidence* in its possession to benefit the defendants at this pleading stage, particularly as to any evidence obtained by the Director through any police investigation. While stating that they only seek particulars as to what the Director knows, in the next breath they state that this disclosure “could” restrict the later discovery process. The defendants’ suggestion then is that, after initial discovery, the Director could request further discovery if any “pattern” emerges that might justify it.

[115] This is, in my view, a disingenuous submission. I consider that the overall and fundamental objective of the defendants is to severely and unfairly tie the hands of the Director in terms of the scope of discovery, both documentary and oral, that the defendants will ultimately say is required. The defendants’ approach is consistent with their continuing intention to have this Court endorse procedures that would be akin to a criminal proceeding where the Crown is required to fully disclose its case at the outset per *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and before the accused is required to respond. Implicitly, restricting discovery in this fashion would allow them to “remain silent” in respect of what the Director does not know. I have no doubt that further requests for discovery will be strenuously opposed with further consequent cost and delay.

[116] As the Director notes, we are at the very preliminary stages of this proceeding. There has been no document or oral discovery and, indeed, the defendants, in subsequent motions, are seeking to postpone any form of pre-trial

discovery. The defendants are in possession of the documents concerning their own actions in relation to such direct mail schemes. It is this evidence that the Director will no doubt seek to have disclosed by the defendants in the discovery process toward proving its claims.

[117] This discovery process is expressly allowed in this *civil* proceeding under the *Rules*, as noted in *Proconic* and *Cronin*. Further, as Justice Schultes said in *British Columbia (Director of Civil Forfeiture) v. Huynh*, 2012 BCSC 740:

47. ... there is normally nothing inherently unfair or contrary to basic trial principles for a litigant to continue to attempt to buttress its case through the procedures for ascertaining facts after the action has been started. ...

[118] It seems clear enough that the discovery process will be the subject of many disputed applications to come. The defendants have already brought one such application in respect of document production, which is presently under reserve pending my decision. In any event, from a pleadings perspective, there is a sufficient basis for the discovery process to begin at this time based on the Claim, supplemented by the Director's affidavits, including that of Det. Mah. The scope of the Director's Claim is broad and encompasses a long timeline. However, the defendants' approach is not consistent with the objective of particulars. Any disclosure issues can be addressed at a later time to address any unfairness in that process.

[119] In light of the above circumstances, I have no hesitation in concluding that the Claim as currently constituted, as supplemented by the affidavits and the further particulars provided by the Director, provides a clear picture of the allegations advanced and the case the defendants will be required to meet. That includes Mr. Day who is, in any event, a necessary party to this proceeding because of his interests in certain of the Bank Funds and Properties.

[120] There is a sufficient basis upon which to conclude that it is appropriate at this time that discovery proceed.

[121] All of the defendants' applications are dismissed. In these reasons, I have alluded to the fact that it may be appropriate at a later stage to require the Director to set out further particulars, consistent with the intention behind Rules 3-7(20), (22) and (23). In that event, the defendants are at liberty to bring such an application if the parties are unable to settle the matter directly between themselves.

Fitzpatrick J.