# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Director of Civil Forfeiture v. PacNet Services Ltd.,* 2018 BCSC 387

Date: 20180314
Docket: S182680
Registry: Vancouver

Between:

**Director of Civil Forfeiture**

Plaintiff

And

**The Owners and all Others Interested in the Properties and the Bank Funds, in Particular PacNet Services Ltd., Rosanne Day, Gordon Day, Ruth Ferlow, James Ripplinger, Ivana Ripplinger and 672944 B.C. Ltd.**

Defendants

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | Howard A. Mickelson, Q.C.<br>Allan L. Doolittle |
| Place and Date of Hearing/Judgment with Reasons to Follow: | Vancouver, B.C.<br>February 14, 2018 |
| Place and Date of Written Reasons: | Vancouver, B.C.<br>March 14, 2018 |

## INTRODUCTION

[1] On February 14, 2018, the plaintiff, Director of Civil Forfeiture (the "Director"), commenced this action under the *Civil Forfeiture Act,* S.B.C. 2005, c. 29 (the "*Act*"). The Director then immediately applied, on a without notice basis, for an interim preservation order ("IPO") with respect to certain properties, being various bank balances, said to be owned by the defendants.

[2] On February 14, 2018, I granted the order sought, with reasons to follow. These are those reasons.

## BACKGROUND FACTS

[3] In his notice of civil claim, the Director seeks the forfeiture of certain properties as proceeds of unlawful activities or instruments of unlawful activities. The defined "Properties" in the notice of civil claim include both real property assets, as described in Schedule "A", and certain bank account balances (the "Bank Funds"), as described in Schedule "B".

[4] The defendant PacNet Services Ltd. ("PacNet") was originally incorporated in 1994 as Pacific Network Services Ltd. The name was changed to PacNet in 2008. PacNet operates in conjunction with several other affiliated companies around the world (known as the "PacNet Group") in its payment processing business. PacNet is headquartered at 595 Howe Street in downtown Vancouver, B.C. Until recently, PacNet had been actively operating at that address.

[5] PacNet's founder, director and president is the defendant Rosanne Day. Ms. Day is married to the defendant Gordon Day, who runs Deep Cove Labs Ltd. Deep Cove Labs Ltd. developed the "RAVEN" software that is used by PacNet for scanning and processing cheques through its payment databases.

[6] The defendant 672944 B.C. Ltd. ("944") is a shareholder of PacNet. 944 is Ms. Day's private holding company and she is its sole director and officer.

[7] The defendant Ruth Ferlow is Ms. Day's sister and PacNet's secretary. The defendant Peter Ferlow is Ms. Ferlow's spouse.

[8] The evidence indicates that the defendant James Ripplinger is an indirect owner of PacNet, through a trust owning 30% of PacNet. Mr. Ripplinger is a beneficiary of that trust. The defendant Ivana Ripplinger is Mr. Ripplinger's spouse.

[9] In October 2016, the Vancouver Police Department ("VPD") began an investigation of PacNet and its involvement in fraudulent "direct mail" schemes targeting Canadian residents.

[10] One member of the VPD investigative team is Detective/Constable Dwain Mah of the Organized Crime Section. As a result of Det. Mah's investigation, he believes that since at least 1997, PacNet has provided cheque processing services for companies acting as fronts for individuals and organizations perpetrating mass-mail fraudulent solicitations. Det. Mah indicates that various websites describe PacNet as a leading international payment processing company that specializes in providing payment solutions to merchants. These include credit card processing, cheque processing and electronic payment processing.

[11] Det. Mah's affidavit was the prime source of evidence on this application. He indicated that he reviewed a variety of information received in the course of VPD's investigation, including from the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), a branch of the federal government established by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "*PCML Act*").

[12] FINTRAC receives financial transaction reports and voluntary information in accordance with the *PCML Act* and its regulations, and produces financial intelligence relevant to investigations of money laundering. Under the *PCML Act*, PacNet comes within the definition of a "money services business" which mandates certain registration and reporting requirements for the authorities.

[13] The phrase “direct mail” is used to refer to unsolicited communications sent to potential customers via the postal service and other delivery services. Often, the promoters of these schemes refine their activities into targeted mailings, by which the communications are sent to certain recipients seen as more receptive to these mailings. Operators can also rent or purchase mailing lists containing names of people who are similarly seen as potential customers. When I say “customers”, I mean people who the promoters consider can be more easily convinced or duped into sending money in response to the solicitation.

[14] Det. Mah describes the participants in mail fraud operations as being grouped in several categories, including:

a) “copywriters” or “coordinators” who create the content of the fraudulent solicitations;

b) “list brokers” who assemble lists of addresses to which the solicitations will be sent;

c) “printers” who produce the paper solicitations;

d) “caging services” who open envelopes and remove cash, cheques, and other forms of payment, and who then forward them to “payment processors”; and

e) “payment processors” or “third party payment processors” who are responsible for processing payments (including personal cheques, cashier cheques and money orders) sent by customers (i.e. victims) in response to solicitations. Payment processors earn a fee which is deducted before the proceeds are sent to the “coordinators”.

[15] It is alleged that PacNet falls into the category of a “payment processor” given its activities as a payment processor for large numbers of direct mail solicitation schemes.

[16] The solicitation schemes investigated by the VPD are generally of two types:

a) “prize” schemes which falsely represent that a customer has won a prize and will receive their winnings upon paying a processing fee; and

b) “Maria Duval”-type schemes which falsely represent that a person has psychic or other supernatural powers and will use those abilities to improve a customer/victim’s financial or emotional situation.



[17] In both schemes, the solicitations appear to be personalized through the repeated use of a customer’s name when, in reality, the customer’s name was obtained from a commercially-available mailing list. The recipients are generally asked to pay between $10 and $50 to obtain their “prize” or “psychic service”. As I stated earlier, the customers are better described as victims. They receive nothing in return for their payment, other than an increased number of similar solicitations and/or a worthless trinket.

[18] A large number of individuals receiving such communications might simply dismiss them as nonsense and throw it away. Therein lies the catch – the Director alleges that these types of mail fraud schemes are usually targeted to people who are seen as vulnerable. Unfortunately, this usually includes elderly people who are perhaps mentally challenged or who are more gullible and more easily duped by such “offers”.

[19] Det. Mah states that he has learned that solicitations of this type entering Canada typically contain pre-addressed reply envelopes and the documents instruct recipients to send their payments in these envelopes. A large percentage of the solicitation responses he reviewed are addressed to postal box addresses in the Lower Mainland of British Columbia.

[20] The Director alleges that PacNet has processed payments relating to millions of such fraudulent and deceptive multi-page solicitations sent to hundreds of thousands of victims and potential victims throughout Canada, the United States and the world. Further, it is alleged that these victims sent money to PacNet. Det. Mah states that, based on his investigations and knowledge of other investigations, on

average PacNet charged approximately 2–5% commission on payments it processed for these solicitations. After deducting its fees and commissions, PacNet would then forward the net amounts to its clients, amounting to hundreds of millions of dollars.



[21] In this action, the Director alleges that the amounts paid to PacNet through this scheme were proceeds of unlawful activities, namely fraud/mail fraud or being a party to the commission of fraud/mail fraud. The Director further alleges that such proceeds were then used by the defendants to purchase and maintain the Properties. The Director also alleges that the Properties were used as instruments of unlawful activities, namely the laundering of the proceeds of crime.

[22] The specific provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, said to be engaged in this action include: s. 354 (possession of property obtained by crime); s. 380 (fraud); s. 381 (mail fraud); s. 462.31 (laundering proceeds of crime); and s. 21 (party to an offence).

[23] Despite the broad allegations contained in the notice of civil claim, the Director's application for an IPO was focussed only in relation to the Bank Funds (not the real properties) and was based on the allegation that the Bank Funds are proceeds of unlawful activities (not instruments of unlawful activities).

## FRAMEWORK OF THE *ACT*

### a) General

[24] Before turning to the specific facts adduced on this application in relation to PacNet and the other defendants, it is helpful to consider the statutory framework under the *Act* and the specific test to be applied on this application.

[25] In *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at para. 14, the court described the three overarching purposes of the *Act* as follows:

> (a) to take the profit out of unlawful activity;
>
> (b) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and

> (c) to compensate victims of crime and fund crime prevention and remediation. …

See also *British Columbia (Director of Civil Forfeiture) v. Angel Acres*, 2007 BCSC 1648 ("*Angel Acres #1*") at para. 19; *British Columbia (Civil Forfeiture) v. Cheung*, 2008 BCSC 824 at para. 11.

[26] The *Act* provides for an *in rem* cause of action against "property" located in British Columbia that is either an "instrument of unlawful activity" or "proceeds of unlawful activity", with only the latter definition being relevant on this application: s.3, s.15. "Property" can be either real or personal property (s. 1(1)). Again, this application is in relation to the Bank Funds and not the real properties. The relevant portion of the definition of "proceeds of unlawful activity" is:

> (a) the whole or a portion of an interest in property if the whole or the portion of the interest, as the case may be, is acquired directly or indirectly as a result of unlawful activity…

[27] Section 1(1) provides that "unlawful activity" means: an act or omission that occurred in British Columbia where that act or omission was an offence under British Columbia or federal law; an act or omission in another Canadian province where that act or omission was an offence under that province's or federal law and would be an offence if committed in British Columbia; and, an act or omission outside of Canada where that act or omission would be an offence under an Act in that jurisdiction and would be an offence if committed in British Columbia.

[28] The Director here relies on all aspects of the definition of "unlawful activity" depending on where the acts or omissions are ultimately found to have taken place.

[29] The Director is created by Part 5 of the *Act* and is given conduct of proceedings under it: ss. 21–22.

[30] Under ss. 5 and 6 of the *Act*, if the Court finds that property is either proceeds of unlawful activity or an instrument of unlawful activity, or both, the property is forfeited to the government unless forfeiture is clearly contrary to the interests of justice. The *Act* codifies the common law principles that a person cannot have an

enforceable property right as a result of illicit possession and, in the absence of a true owner, unowned property is escheated to the Crown: *British Columbia (Civil Forfeiture Act) v. Nguyen,* 2009 BCSC 185 at para. 42.

[31] The burden of proof that the property comes within either or both of these two definitions is on the Director on a balance of probabilities. The burden of proof of any defence is on the person asserting it, also on a balance of probabilities.

**b) IPOs**

[32] Part 3: Division 1 of the *Act* specifically contemplates the granting by the Court of interim preservation orders, or IPOs. The purpose of such orders is quite straightforward; namely, to preserve the value of property that is the subject of a forfeiture action filed under the *Act* pending a final determination: *Onn* at paras. 16 and 31.

[33] Subsections 8(1) and 8(2) of the *Act* provide that the Director may apply in a proceeding for an IPO against property or an interest in property where that property is alleged to be either proceeds of unlawful activity or instruments of unlawful activity, or both.

[34] Subsection 8(3) sets out the types of orders that the Director may seek and the Court may grant relating to the "…preservation, management or disposition of property…". The order sought on this application is to restrain the "…disposition or transmission…" of the Bank Funds (s. 8(3)(a)). Other potential orders, not sought on this application, include: possession and delivery of the property to the Director for safekeeping (s. 8(3)(b)); appointment of a receiver manager of the property (s. 8(3)(c)); disposition or sale of the property (s. 8(3)(d)); payment of sale proceeds into court (s. 8(3)(e)); placement of a lien on the property (s. 8(3)(f)); and, other orders that the court considers appropriate in certain circumstances and generally (ss. 8(3)(g), (h), (i)).

[35] Section 9 of the *Act* allows the Director to make an application under s. 8 without notice to any person, although any order granted may not be effective for a period greater than 30 days.

[36] Justice Davies discussed the Director's standard of disclosure when applying for an IPO on a without-notice basis in *Director of Civil Forfeiture v. Angel Acres Recreational and Festival Property Ltd.*, 2009 BCSC 322 at para. 26, aff'd 2010 BCCA 539 ("*Angel Acres #2")*. Davies J. stated:

> [52] I have accordingly concluded that when making without notice applications for interim preservation orders under ss. 8 and 9 of the *Act*, the Director must, in good faith, make full and fair disclosure of material facts, including those facts that would tend to diminish the Director's right to the relief sought. The Director must also not misstate or exaggerate the strength of the Director's case or the evidence adduced to obtain the relief sought.

### c) Test for an IPO

[37] Section 8(5) of the *Act* sets out the two-prong test that the Director must meet before any IPO is granted:

> 8(5) Unless it is clearly not in the interests of justice, the court must make an interim preservation order applied for under this section if the court is satisfied that one or both of the following constitute a serious question to be tried:
>
> (a) whether the whole or the portion of the interest in property that is the basis of the application under subsection (1) is proceeds of unlawful activity;
>
> (b) whether the property that is the basis of the application under subsection (2) is an instrument of unlawful activity.

[38] Accordingly, the Court must first consider whether there is a serious question to be tried regarding whether or not the property is either an instrument of unlawful activity or proceeds of unlawful activity, or both. If that aspect of the test is met, the Court must then consider whether the granting of the IPO would be clearly not in the interests of justice. Assuming that the Director satisfies both aspects of the test, the Court must (not may) grant the IPO: *Angel Acres #1* at para 47.

[39] Turning to this application, on the first prong of the test, the onus is on the Director to satisfy the Court that there exists a "serious question to be tried" that the Bank Accounts are the proceeds of unlawful activity, as defined in the *Act*.

[40] The leading decision on the interpretation of the first prong of the test is that of Davies J. in *Angel Acres #2* where the Court adopted the well-known approach applied on injunction applications. The Court stated:

> [180] The new threshold test in s. 8(5) requiring the Director establish a "serious question to be tried" is obviously derived from the civil law test for the granting of interlocutory injunctive relief, that being the first prong of the test that must be met by an applicant before the Court will be required to determine whether the balance of convenience favours the granting of the relief sought.
>
> [181] As to that first prong analysis, in *RJR MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311,111 D.L.R. (4th) 385 at 337-338, Justices Cory and Sopinka observed:
>
> > What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...
> >
> > Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> [182] I see no reason why the phrase "a serious question to be tried" in s. 8(5) of the *Act* should not be interpreted in a manner that is consistent with the decision of the Supreme Court of Canada in *RJR.* That is so because the relief available to the Director under the Act is in the nature of injunctive relief relating to the preservation of property pending the determination of the merits of a claim at trial.
>
> [Emphasis added.]

[41] In *Angel Acres #2*, Davies J. also discussed certain amendments to the test found in s. 8(5) of the *Act* which, in 2008, changed that test from "reasonable grounds to believe" to a "serious question to be tried". At para. 184, he describes that the earlier test, described as "relatively low", is now even lower. As such, meeting that low threshold involves only a preliminary review of the merits toward determining that the relief sought is neither vexatious nor frivolous.

[42] On the second prong of the test, the issue is whether the IPO should be granted or whether it is "clearly not in the interests of justice".

[43] This phrase is also used in relation to any final forfeiture order that might be granted: see s. 6(1) of the *Act*. Factors considered in this context were discussed in *British Columbia* (*Director of Civil Forfeiture) v. Wolff*, 2012 BCCA 473 at paras. 35-43 and include the purposes of the *Act*, proportionality and fairness.

[44] However, the "interest of justice" factors that must be considered in relation to a final order for forfeiture are different from those which must be considered on an application for an IPO: *British Columbia (Director of Civil Forfeiture) v. Fischer,* 2010 BCSC 568 at paras. 17-20.

[45] In *Wolff* at para. 35, the court addressed this issue in the context of a final order and stated that the phrase "interests of justice" confers a very broad discretion on the court, although that discretion must be exercised judiciously. In my view, this broad discretion similarly frames the consideration of this issue on this without-notice application for an IPO.

[46] The approach of the Court regarding these "interests of justice" factors in the context of granting an IPO was considered by Davies J. in *Angel Acres #2*, although in relation to certain real property interests (not bank accounts) and with defence submissions and evidence. He stated that these factors include not only the interests of the parties to the litigation, but other broader societal interests. Davies J. stated,

> [219] I agree with the Director's submission that the consideration of the "interests of justice" under s. 8(5) of the *Act* should include more than the interests of the parties to the litigation.
>
> [220] Although *Haldorson* and *Butler* were decided in very different contexts, both establish that a consideration of the interests of justice will usually require the exercise of judicial discretion not only in assessing the competing interests of the parties, but also in assessing and balancing any identifiable societal interests in the matter under consideration.
>
> [221] The interests of the Director in the continued seizure of the Clubhouse as well as Lots 7 and 8 are obvious. The Director seeks to preserve the property in its present state pending the trial of his claims under the *Act*, so that if ultimately successful, the property will be available for forfeiture without diminution of value.

> [222] The defendants' interests in precluding the continued seizure of the Clubhouse are also obvious. They have rights of ownership which have existed for many years, have already been denied any use of their property for more than a year, and will continue to suffer that loss of use for a further considerable period of time before this case will finally be resolved at trial. If they are successful at trial in resisting the Director's assertions, they will receive no recompense for the loss of the use of their property.
>
> [223] The societal interests that are engaged by this dispute are also fairly easily identified. The right to own property and the freedom to enjoy it without state interference is one of the hallmarks of a free and democratic society. On the other hand, no property owner has the right to use his, her or its property for illegal purposes and cannot do so with impunity.



[47] This Court has stated a number of times that, assuming the Director has satisfied the "serious question to be tried" prong of the test, the onus shifts to the defendant to show that the granting of the IPO would clearly not be in the interests of justice: *Fischer* at para. 12; *British Columbia (Director of Civil Forfeiture) v. Warwick*, 2016 BCSC 1471 at para. 15. However, even in the absence of anyone opposing the application with evidence and submissions, such as on this application, the Court must still consider these same factors.

[48] Some guidance in this respect is found in *Attorney General of Ontario v. $7,950.05 in Canadian Currency (In Rem)*, 2017 ONSC 5855 [*$7,950.05*]. The Ontario Attorney General applied to preserve funds as proceeds and/or instruments of unlawful activity; however, the respondent had not been served with the application. Before declining to consider any possible *Charter* breaches that might be raised at the final hearing for forfeiture, Justice Petersen stated,

> [36] Having reached this conclusion, the Attorney General is entitled to a preservation order pursuant to ss. 4(2) and 9(2) of the *Civil Remedies Act, 2001*, unless it is "clearly not in the interests of justice" to grant the order. This "interests of justice" exception operates where, "on any reasonable view," preservation or forfeiture of property "would be a draconian and unjust result." …
>
> [37] The question of whether or not to order preservation or forfeiture of property under the *Civil Remedies Act, 2001* is not determined based on a balancing of the pros and cons of making the order. <u>The word "clearly" in the statute modifies the phrase "not in the interests of justice" and must be given some meaning. In the context of a forfeiture proceeding, the Court of Appeal has ruled that the word "clearly" speaks to the "cogency of the claim advanced for relief from forfeiture". The Court of Appeal has also ruled that the "party seeking relief must demonstrate that, in the circumstances, the</u>

> forfeiture order would be a manifestly harsh and inequitable result." *Ontario v. Aubin Road*, *supra*, at para.85.
>
> [38] Since preservation orders are interlocutory in nature, the "clearly not in the interests of justice" exception should be applied even more stringently at this motions stage than at the final forfeiture stage of the proceeding. See *Ontario (Attorney General) v. $51,000 CAD (in Rem)*, 2012 ONSC 4958 at para. 38.
>
> [39] Mr. Cormier is not before the court. He has not submitted any evidence or arguments to show that a preservation order would be draconian, manifestly harsh, unjust or inequitable. However, in the unique circumstances of this case, where dispensation with service on Mr. Cormier has been granted, the Court must be cautious not to ignore relevant "interests of justice" considerations simply because there is no party seeking relief from the preservation order.
>
> [Emphasis added.]



[49] I agree that the comments of the Court of Appeal in *Wolff*, and Davies J. in *Angel Acres #2*, cited above, provide a general framework within which the "interest of justice" factors can be considered.

[50] No doubt each case will be considered based on its own facts and a consideration of the relevant factors will differ from case to case. However, as noted in *$7,905.05*, the Court cannot simply ignore this aspect of the test just because no one has been served, and therefore, no one is opposing the granting of the IPO. In any event, it is incumbent upon the Director to fully and fairly present all known relevant facts and circumstances on this application so that this aspect of the test can be adequately considered by the Court even in the absence of the defendants.

## THE EVIDENCE

[51] As stated above, the VPD allege that PacNet has processed payment for fraudulent direct mail schemes since at least 1997.

[52] In addition to the more general description of PacNet's business practices, as above, Det. Mah refers to substantial circumstantial and direct evidence concerning PacNet's knowledge of, involvement in and/or facilitation of its clients' (i.e. the "coordinators") illegal business activities. Det. Mah states that for nearly two decades, PacNet has continued to facilitate mail fraud by its clients despite:

a) PacNet having been repeatedly contacted by law enforcement agencies and regulators in relation to civil and criminal fraud proceedings against its clients;

b) PacNet having been notified on multiple occasions that its clients are engaged in fraudulent mass-mailings; and

c) PacNet and its principals having been drawn into various civil and criminal fraud and money laundering investigations and prosecutions concerning its clients.



[53] In substance, the Director suggests that this evidence refutes PacNet's ongoing protestations of innocence – over the last 20 years or so – that it is not actively involved in and/or facilitating these illegal mail fraud operations. Det. Mah's evidence concerning PacNet's knowledge, participation and involvement, as above, is as follows.

**1997-2001 - Mutual Legal Assistance Treaty ("*MLAT*") Requests**

[54] In 1997, the United States of America, as the "Requesting State", made an *MLAT* request to Canada to obtain PacNet's records relating to payments processed on behalf of a number of organizations and individuals, one being David Stuckey. The investigation concerned a fraudulent lottery scheme where it had been revealed that victims of the fraud were sending cheques to be processed by PacNet in Vancouver. In the usual fashion, victims were advised that they had won "prize money" which could be claimed upon returning certain documents and a subscription fee, although no prizes were ever delivered.

[55] In accordance with that *MLAT* request, PacNet's banking and business records were seized for the period from September 1992 to December 1997. PacNet and Ms. Day, through their counsel, Michael Bolton, Q.C., unsuccessfully applied to set this seizure aside based on an alleged violation of PacNet and Ms. Day's rights: *United States of America v. Stuckey* (1999), 181 D.L.R. (4th) 144 (S.C.) at paras. 7-8. Apparently, PacNet's attempt to appeal that decision was similarly unsuccessful.

[56] Further reasons for judgment of this Court reveal later skirmishes concerning a second *MLAT* request from the U.S. in 2001 relating to this investigation. As with the first request, this request concerned Ms. Day and PacNet's banking and business records but for the period from January 1998 to February 2000: *Canada (Attorney General) v. Pacific Network Services*, 2003 BCSC 171 at para. 9, leave to appeal ref'd 2003 BCCA 685.

[57] The Director also refers to further litigation in the U.S. concerning this investigation. In 2005, one person indicted had pled guilty to money laundering. In addition, a motion by other persons indicted for illegal gambling and money laundering to set that indictment aside was unsuccessful: *United States v. Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005). In its reasons, the New York court specifically referred to the indictment as alleging that PacNet had processed cheques and money orders as part of the solicitation for the fraudulent lottery scheme.

**2001 - Seizure of Funds in PacNet's Bank Accounts**

[58] In November 2001, the United States Postal Inspection Service seized over $450,000 from two U.S. bank accounts owned by PacNet. In May 2002, a Verified Complaint for Forfeiture was filed in U.S. District Court, Western District of Washington. In that action, it was alleged that the bank accounts were used to deposit the proceeds of lottery and other direct mail promotions from various international locations and that these deposits were laundered funds derived from violations of U.S. federal law.

[59] In December 2002, a consent judgment for forfeiture was filed by PacNet, Ms. Day and others by which they stipulated and agreed that US$360,884 was subject to forfeiture on the grounds alleged in the complaint. The consent judgment states in part:

> [PacNet], by its president , [Ms. Day], and PNSE [Pacific Network Service Ltd. Europe] … hereby respectively acknowledge that they are now aware that the use of the mails to market lottery chances, shares and interests within the United States, and the use of the facilities of interstate or foreign commerce within the United States to transmit, carry, send, or transport cheques, credit card charges, or other financial instruments, issued for the

> purchase of chances, shares, and interests in lotteries, in response to interstate or international mail or telephone solicitations, constitute violations of United States Federal criminal statues …. They further acknowledge that the knowing transfer or deposit of the proceeds of violations of sections 1952 and 1953 into accounts at financial institutions, either for the purpose of promoting such offences or to conceal the nature, location, source, ownership, or control of such proceeds, constitutes criminal money laundering…. [PacNet], by its president, [Ms. Day], and PNSE …further represent that they will not, in the future, utilize the mails or other facilities of interstate or foreign commerce within the United States, including banking facilities in the United States, to engage in the business or practice of processing, cashing, factoring, or clearing cheques or credit card charges, issued in payment for such unlawfully solicited lottery purchases.
>
> [Emphasis added.]



**2006 – John Rincon and National Prize Information Group**

[60] In 2006, the U.S. Federal Trade Commission ("FTC") filed a civil lawsuit in the U.S. District Court (District of Nevada) against John Rincon ("Rincon") and the National Prize Information Group ("NPIG"). The FTC alleged that, since at least 2004, the defendants had been conducting mass mailing campaigns which were false and misleading deceptive practices in connection with prize solicitations.

[61] In August 2009, the U.S. District Court granted judgment against Rincon and NPIG in the amount of approximately US$26.8 million.

[62] PacNet was well aware of Rincon and NPIG and another of Rincon's companies, Divine Research, since PacNet had been providing services to Divine Research and NPIG since 2003/2004. Eventually, in February 2007, Ms. Day filed a declaration stating that PacNet had processed approximately US$18.1 million for Rincon's companies from 2003 to 2005.

[63] Ms. Day further stated that the average value for the NPIG and Divine Research payments were US$20 and that she understood that NPIG was selling newsletters about sweepstakes that consumers might want to use. She declared that she never personally saw these newsletters or any other solicitations sent by NPIG.

**2010 - Tully Lovisa and National Awards Service Advisory**

[64] In 2010, the FTC filed a civil lawsuit in the U.S. District Court (Northern District of California) against Tully Lovisa ("Lovisa") and companies operated by him for engaging in deceptive practices in connection with prize solicitations. In 2012, a stipulated order, permanent injunction and monetary judgment were entered which provided in part for an approximate US$15.4 million judgment against Lovisa and certain of the companies operated by him.

[65] As with the Rincon litigation, PacNet was also drawn into this FTC investigation and litigation. Det. Mah states that PacNet was ordered to surrender the defendants' funds held by it to the FTC.

[66] In April 2011, Ms. Day signed a declaration for the FTC stating that PacNet processed approximately US$7.5 million in payments for Lovisa's companies from 2007 to 2010.

**2010 - PacNet's Relationship with Huntington Bank**

[67] As above, Det. Mah states that in order to process cheques written by U.S. residents, PacNet has had a relationship with at least one U.S. bank at all times. The Director alleges that over the years, PacNet has tried to hide the nature of its customers' business from the banks. Examples include certain emails in relation to both the Sandra Rochefort Scheme (defined below at para. 80) and the Maria Duval Scheme (defined below at para. 84), both as described below.

[68] Det. Mah also states that PacNet has frequently had to move its business from bank to bank when a bank becomes aware of what PacNet's customers are doing and as a result, terminates PacNet as a customer. He points to email records which indicate that Huntington Bank in Ohio terminated its business with PacNet in March 2010 after only a few months of processing amounts for PacNet. Shortly thereafter, personnel in Huntington Bank's money laundering compliance department discussed PacNet's processing activity. In a March 22, 2010 email, the compliance employee found that the vast majority of the deposits were from "doing

business as" companies, almost all of which appeared to be involved in "Fraud 'Sweepstakes' or 'Contests'".

**2011 - International Caging Services Ltd.**

[69] In late 2011, the VPD initiated an investigation into International Caging Services Ltd. ("ICS") and specifically, caging services performed by ICS for fraudulent direct mail schemes.

[70] In July 2012, the VPD obtained a search warrant for ICS's mail processing centre located in Richmond, B.C. Further search warrants were obtained for various P.O. boxes through the Lower Mainland. The search warrants revealed, among other things, hundreds of thousands of pieces of mail responding to direct mail solicitations along with approximately $520,000 in various international currencies enclosed in those responses. Det. Mah refers to one example of the documents seized, being the typical "prize" offering in excess of $2.4 million to be claimed if the documentation is returned with a $25 "processing fee".

[71] ICS brought an application in this Court to quash the search warrants. On August 31, 2012, Madam Justice Bruce dismissed the application: (31 August 2012), Vancouver No. 26153. After reviewing the mailings received by one victim (Mr. Hiley, who was 95 years old), Bruce J. stated:

> [34] … An analysis of these letters from an objective and reasonable perspective could have led the justice to properly conclude that the content was deceitful, false, or otherwise fraudulent. …
>
> …
>
> [38] Based upon the applicable standard of reasonable probability, I find the letters provide some evidence of false and deceitful statements designed to deprive someone of funds. It would be unreasonable to conclude that for a mere $25 fee the recipient of the letter is entitled to receive millions of dollars. Moreover, the large number of these letters received by Mr. Hiley makes it ludicrous to conclude that they are genuine.

[72] Det. Mah also states that, during the search of the ICS facility in Richmond, the investigators discovered numerous copies of a document titled "Multi-Buyer List". These documents appeared to be well-used with tattered pages and markings in

pen. This list reflected a list of individuals who should not have their cheques processed for several reasons, including that their cheques were likely to bounce, causing the cost of the NSF fee to the processor. Another reason to be included on the Multi-Buyer List was that they were chronic buyers who might, due to their repetitive purchases, get on the radar of banks or family members.

[73] In the course of the ICS investigation, investigators learned that the Multi-Buyer List was a document created by PacNet, and that ICS routed all cheques, money orders and credit card payments received in response to the direct mail solicitations to PacNet for processing.

[74] The VPD interviewed Ms. Day as part of the ICS investigation. Det. Mah advises that during that interview, Ms. Day stated she was the Managing Director of PacNet and a 25% shareholder of the company. Ms. Day portrayed PacNet as a payment service provider for various companies all over the world, including the direct mail industry. She claimed that PacNet was not a client of ICS but that ICS was using the services of PacNet on the direction of the direct mail industry clients who requested that PacNet process their cheques.

**2013 – Glen E. Burke and Dayton Family Productions**

[75] In 1997, the FTC filed a civil lawsuit in the U.S. District Court (District of Nevada) against Glen E. Burke (“Burke”) and other defendants. In 1998, the U.S. District Court issued a permanent injunction that banned Burke from telemarketing and prohibited him from misrepresenting any fact material to a consumer’s decision to buy a good or service.

[76] In 2013, the U.S. District Court issued an order against Burke and one of his companies, American Health Associates, LLC, providing for a restraining order, asset freeze and delivery of various assets to a receiver who had been earlier appointed in January 2012.

[77] As with Rincon and Lovisa, PacNet was involved in this FTC investigation and civil prosecution. In May 2013, the FTC obtained a declaration from Ms. Day

stating that PacNet processed approximately US$17.5 million in payments for Burke's companies from 2007 to 2013.

[78] In June 2016, Ms. Day and Ms. Ferlow received an email from Barclays Bank in London, PacNet's banker in the U.K. In that email, Craig Parrett of Barclays expressed concern about Burke and his involvement in the U.S. litigation. Mr. Parrett asked for a response from PacNet explaining its involvement in Burke's schemes. Mr. Parrett stated in part:

> In terms of Pacnet's involvement, it appears to be undisputed that the payments were made through Pacnet as part of the scheme. Errol Seales [Burke claimed he was a consultant for this person] also claims that Pacnet's lawyers pre-approved the wording for the mailers, although it doesn't appear that Pacnet was a party to the case or had an opportunity to dispute this statement.

**2014 – CLGE, Inc. and the Psychic "Sandra Rochefort"**

[79] In 2014, the U.S. filed a civil lawsuit in the U.S. District Court (Eastern District of New York) against CLGE, Inc., I.D. Marketing Solutions, Christine Moussu and other defendants seeking an injunction to enjoin the ongoing commission of mail fraud.

[80] It was alleged that, from at least 2002 to 2014, the operators of the scheme had collected millions of dollars from persons who received solicitations sent in the names of multiple purported psychics and clairvoyants, notably "Sandra Rochefort," "David Phild" and "Nicholas Chakan" (collectively, the "Sandra Rochefort Scheme"). One of the solicitations states that the psychic has "specific visions" and personal knowledge of the person and those persons are told of wealth and impending fortune. The recipients are asked to send in a small amount – US$25 or US$19.95, for example – to contribute to "shipping and administrative costs".

[81] In November 2014, the U.S. District Court found probable cause to believe that the perpetrators of the Sandra Rochefort Scheme were committing mail fraud and the court issued a temporary restraining order against the named defendants.

[82] In March 2016, the U.S. District Court entered judgment against all of the named defendants and issued a permanent injunction in respect of all their activities under the scheme.

[83] Det. Mah refers to various emails that he contends show a pattern of regular communication between PacNet and various individuals involved in operating the Sandra Rochefort Scheme during the above period. He refers to the following:

a) on February 4, 2011, a PacNet employee advised "Cassis Moussu" that PacNet had been processing "quite a lot" of USD cheques payable to "Sandra Rochefort" for CLGE. Det. Mah states that in order to process cheques written by U.S. residents, PacNet has had a relationship with at least one U.S. bank at all times. That PacNet employee asked for the "mailing piece" and Moussu arranged for the "current SR package" to be sent to PacNet on February 9, 2011;

b) in a very telling email as to what PacNet knew and was doing for its clients, at least in respect of the Sandra Rochefort Scheme, on April 7, 2011, Gabrielle Sherry, PacNet's Head of Technical Implementation, informed Moussu:

> Mr Paul Fabian contacted us yesterday to request the refund of the payments he issued for Sandra Rochefort. He informed us that he is 88 and completely broke.
>
> In order to avoid the risk of this person complaining to his bank, managers have decided to issue the refund Mr Fabian requested and place a block on his account so that we will no longer be able to accept his personal cheques.
>
> [Emphasis added.]

Later that same day, another person (presumably working with Moussu) advised Ms. Sherry that Mr. Fabian's accounts had been "flagged" as "DNS" so that he would not receive future mailings of "any CLGE brands"; and

c) another very telling email about PacNet's knowledge and assistance to its clients in operating these schemes in terms of avoiding any regulatory oversight is found in an email message dated March 14, 2012. There, Sheryl Storey, PacNet's Senior Client Liaison, wrote to Moussu about Canadian cheque processing for CLGE. Ms. Storey stated:

> I regret that we are no longer able to deposit your cheques directly with Canadian banks. There are only a handful of national banks, and they are increasingly diligent about refusing business that they consider to be high risk. Your promotion types do, unfortunately, fall into the high risk category. In order to support your ongoing Canadian business, we will deposit your Canadian cheques at a bank outside of Canada at a higher cost.
>
> [Emphasis added.]



**2014 - Infogest Direct Marketing and the Psychic Maria Duval**

[84] In 2014, the U.S. filed a civil lawsuit in the U.S. District Court (Eastern District of New York) against Infogest Direct Marketing ("Infogest"), Destiny Research Center, Ltd., Mary Thanos ("Thanos") and other defendants, seeking an injunction to enjoin the ongoing commission of mail fraud. It was alleged that from at least 2000 to 2014, the operators of the scheme collected more than US$180 million in response to solicitations sent in the names of purported psychics "Maria Duval" and "Patrick Guerin" (collectively, the "Maria Duval Scheme").

[85] Det. Mah states that, as of September 2014, the fraud complaint system operated by the U.S. Postal Inspection Service contained at least 700 complaints referencing "Maria Duval" or "Destiny Research Center" and the FTC's Consumer Sentinel Database contained at least 500 similar complaints as of the same date.

[86] In 2014, the U.S. District Court found probable cause to believe that the perpetrators of the Maria Duval Scheme were committing mail fraud and the court entered a temporary restraining order against the named defendants. In May 2016, the court entered a final judgment that prohibited the defendants from, among other provisions, using the mail to distribute Maria Duval-type solicitations and performing other activities on behalf of such schemes.

[87] Det. Mah states that PacNet was aware of the fraudulent nature of the Maria Duval Scheme even before 2014.

[88] On February 19, 2009, PacNet's Secretary, Ms. Ferlow, sent an email to Thanos stating that PacNet had received a complaint from the North Dakota Attorney General about a customer who, over several months, had written nine cheques totaling US$415 in response to solicitations from "Maria Duval". Ms. Ferlow indicated in the email that PacNet would like to refund this person "ASAP".

[89] Despite being contacted by the North Dakota Attorney General, nothing changed in PacNet's support for the Maria Duval Scheme and PacNet continued to process transactions for this scheme for another five years.

[90] Det. Mah also refers to further email records lawfully obtained in the U.S. through search warrants that he says reveal PacNet's knowledge that certain U.S. banks were expressing concerns and/or threatened to terminate processing payments, if they appeared related to any "Maria Duval" scheme.

[91] On January 6, 2009, Renée Frappier of PacNet wrote to Thanos about Destiny Research. The email was copied to Ms. Ferlow. Ms. Frappier stated,

> The New Year seems to be a good time to revisit an issue that we have discussed several times in the past, the ongoing use of Maria Duval as a "pay to" name. We have discussed moving away from the Maria Duval name on cheques and credit card statements altogether, using another name that is recognizable to Maria Duval customers instead.
>
> Have you had opportunity to discuss the Maria Duval name further with your colleagues and to establish a plan? It has become apparent to us that we cannot forstall the inevitable any longer. Unfortunately, while Maria Duval has many admirers, her detractors on the Internet have created considerable negative press. This is true for Canada, the United States, and other countries as well. The negative press combined with Maria Duval's healthy volumes is affecting our bank relationships and we are concerned about being penalized with higher fees, or worse, termination of service.

[92] It appears that the perpetrators of the Maria Duval Scheme took PacNet's concerns and recommendations to heart that they should move to use another name other than "Maria Duval" to avoid any problems with the banks.

[93] On January 7, 2009, Thanos sent the following email to her co-workers:

> It seems that one by one the US banks that Pacnet is using are beginning to complain about the bad press about Maria Duval on google. Banks are telling Pacnet that they are not comfortable clearing the Maria Duval cheques. Pacnet feels that if the payee name is not changed fairly quickly then there is a good chance that the banks will refuse the cheques as has happened in Canada. The present high volume of US cheques has drawn more of the bank's attention to this matter.
>
> Pacnet feels that if most of the payments are made out to [Destiny Research] then the banks won't have a problem processing the few that will still be made out to Maria Duval because it will be a significant lower volume.
>
> I think we have no choice but to change all the US promotions to request that payment is made to Destiny Research Centre as quickly as possible before any of the banks refuse to accept them.

[94] Det. Mah refers to evidence that PacNet stopped processing payments only if an individual wrote 61 cheques within 90 days. As referred to above, these "Multi-Buyers" were people who had written large numbers of cheques within a short period of time.

[95] PacNet's policy in regard to Multi-Buyers was set out in a January 20, 2009 email from Ms. Ferlow to Thanos (although there is no reason to think that this policy was specific to the Maria Duval Scheme). Ms. Ferlow stated,

> The chronic multi-buyer screen is designed not to interfere with enthusiastic responders. Rather, it catches those that can be considered to have a problem - the ones that too often result in a call placed by a son or daughter to an Attorney General. The definition of chronic multi-buyer is an individual that buys the same product more than 60 times within a 90 day period using the exact same bank account or credit card.
>
> In the chronic multi-buyer screening process, the 60$^{th}$ purchase of a particular product will go through (but may yet be returned unpaid for reason of insufficient funds). The 61$^{st}$ will be blocked. Any payment made for a completely different product will still be processed.
>
> Chronic Multi-buyers are often financially incompetent and have a very high NSF rate. Depending on the timing of our tests, we have noted return rates as high as 90% amongst chronic multi-buyers which ultimately costs you money rather than making you money. …

[96] Finally, another email discussion on November 11, 2013 between Thanos and Ms. Ferlow reveals discussions about how to avoid any concerns arising on the part of the banks in relation to the Maria Duval scheme. Thanos emailed Ms. Ferlow

requesting banking information for a transfer through PacNet, noting that there were "issues" in the past with JP Morgan Chase Bank refusing the transfer, after making reference to a "money laundering watch list". To avoid the problem, Ms. Ferlow instructed Thanos to wire money to an account in the name of "Indian River UK Ltd." at Barclays Bank in London.

[97] Det. Mah states that it is his understanding that "Indian River UK Ltd." was incorporated by Robert Paul Davis and later Ms. Ferlow acted as director, and that it acted as a front for PacNet in cases where banks would refuse to conduct its business. He further states that "Indian River UK Ltd." was named by the U.S. Treasury in later proceedings against the PacNet Group, as I will discuss below.



**2014 – State of Iowa Subpoena**

[98] In October, 2014, the Iowa Attorney General served a civil subpoena by registered mail on PacNet in Canada. The face of the subpoena states that it was issued in relation to an investigation of:

> The victimization of elderly (and other) Iowans by supposed psychics and others, involving the writing of cheques by victims that are deposited by [PacNet].

**2016 - U.S. designates PacNet as a Transnational Criminal Organization**

[99] In July 2011, the then U.S. President, Barack Obama, issued Executive Order 13581, "Blocking Property of Transnational Criminal Organizations" in order to block the property and interests in property of "significant transnational criminal organizations" in the U.S. That phrase is defined to mean a group of persons that includes one or more foreign persons; that engages in an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states; and that threatens the national security, foreign policy, or economy of the United States.

[100] That phrase was immediately applied to some organizations, such as the Yakuza (a Japanese organized criminal organization) and Los Zetas (a Mexican cartel) and also, any other such organizations as might be designated in the future by the Secretary of the Treasury.

[101] On September 22, 2016, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") designated PacNet as a significant transnational criminal organization, along with its 24 affiliated companies and 12 individuals, including Ms. Day and Ms. Ferlow. The OFAC announcement stated:

> PacNet, an international payments processor and money services business, has 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. …

[102] In addition, an "Administrative Record" produced by OFAC referenced the following finding:

> The PacNet Group's international corporate and financial infrastructure allows it to launder and move money while obscuring the beneficial ownership of funds belonging to PacNet Group's clients from international and domestic law enforcement agencies and regulators, as well as from the due diligence of formal financial institutions. …

**2017 – PacNet's Response to OFAC Designations**

[103] In October 2017, PacNet filed an interpleader lawsuit in the U.S. District Court (Eastern District for New York). Not unexpectedly, and not unlike PacNet's responses to the myriad other investigations and prosecutions involving its clients, as set out above, PacNet took the position that it was innocent of wrongdoing and that the OFAC designation was "…ill-considered, incorrect, and contrary to law".

[104] That interpleader indicates that in May/June 2017, OFAC advised that it would rescind the designations remaining at that time only if the PacNet Group submitted funds owing to its clients into an interpleader action pending a determination as to any competing claims to those funds. After agreement was reached on that matter, the OFAC designation was lifted for Ms. Ferlow on August 22, 2017, for Ms. Day on October 4, 2017 and for PacNet on October 26, 2017.

[105] Even so, the interpleader states that the PacNet Group had "… little choice but to shutter its doors" and that in September 2016, the PacNet Group ceased active operations, save for minimal staff to wind down and dissolve the businesses.

[106] Many of the allegations in the interpleader contain assertions by PacNet as to the legitimacy, honesty and law-abiding nature of its business. In part, PacNet states that:

a) it was frequently and regularly audited by the Canadian government, financial institutions and independent auditors/accountants (para. 24);

b) it provided payment processing services for a number of businesses throughout the world, and had a client roster of more than 700 clients (para. 29);

c) a "minority" of its business pertained to merchants that distributed direct-mail promotions involving sweepstakes reports or astrological information (para. 29);

d) the "vast bulk" of its business and clients were "highly respected, legitimate businesses" and that the "higher risk" direct-mail clients accounted for a "small portion" of its total revenues (para. 29);

e) it established and implemented compliance programs, submitted to routine audits by regulators (such as FINTRAC) and financial institutions, and complied with its tax and reporting obligations. This was said to include submissions to FINTRAC of hundreds of "Suspicious Transaction Reports" (STRs) as required under Canadian law (para. 33(a)(i)) and also implementation of PacNet's "Multi-Buyer" measures, as described above (para. 33(a)(ii));

f) it required direct mail clients to furnish copies of the promotions for which PacNet would process payments (para. 33(a)(iii));

g) its internal records and financial accounts were subject to routine inspection and audit by FINTRAC (para. 33(b));

h) the PacNet Group was "entirely transparent" with its bankers, which themselves had "…legitimate, good faith compliance and due diligence programs" (para. 33(c)(ii));

i) the PacNet Group was well-known and respected within the payment processing community and direct-mail industry (para. 34); and

j) some clients "actively misled" the PacNet Group so that it would not close their accounts for fraudulent activity (para. 34(a)-(c)).



[107] In fact, the PacNet Group states in its interpleader at para. 36 that in August 2016, nearly a month before the OFAC designation and "…*without notification or knowledge*…" of the impending OFAC designations, the PacNet Group determined to discontinue processing payments on behalf of clients in the direct mail industry involving sales of certain astrology and sweepstakes reports promotions due to its internal compliance concerns. There is an allegation that a notice of PacNet's discontinuance of this business went out to such clients on August 31, 2016.

[108] PacNet does not refer to any particular reasons why it would make that decision at that time, rather than in response to the myriad notices of illegal behavior on the part of some of its direct mail clients over the last 20 odd years.

**2018 – Other Relevant Evidence re PacNet**

[109] Needless to say, PacNet's assertions, as set out in its interpleader, that it was an unwitting participant in these direct mail scams, remain to be tested. In any event, the Director refers to further evidence which may stand as refuting those claims, including PacNet's assertion that only a minority of its business pertained to direct mail solicitations of the type investigated by the various agencies and that those direct mail clients only accounted for a small portion of PacNet's total revenues.

[110] I have already referred to the numerous investigations and civil prosecutions which indirectly involved PacNet. Those include the Maria Duval and Sandra Rochefort Schemes from 2014.

[111] The PacNet Group itself identified at para. 34 of the interpleader that, in 2015, John Leon was indicted in the U.S. on charges of money laundering and mail fraud. Mr. Leon used PacNet's service in his direct mail schemes. Mr. Leon is said to have told the investigators that he only provided "clean promotions" to PacNet and that he hid the fraudulent nature of his schemes from PacNet. In June 2016, Mr. Leon entered a guilty plea.

[112] In addition, Det. Mah is aware that, beginning in 2012, PacNet had also co-sponsored a networking event called "Networking DM" in Whistler, B.C. According to a PacNet news release, this event was "…born out of a perceived void in the annual tradeshow schedule for the international DM [direct mail] community".

[113] However, in October 2016, investigative journalists at the Daily Mail, a U.K. newspaper, published a number of articles on direct mail fraud, including a report about the Networking DM event in Whistler. The article titled "Exposed: Postal fraud mafia" specifically references PacNet. The upshot of the article was an exposé of what the writers of the article described as con men gloating over their champagne and lobster about how they can rip off elderly people through the mail.

[114] These Daily Mail articles were followed by a further exposé published by CNN just after the OFAC designation on September 22, 2016. CNN reported on the global crackdown on direct mail fraud. Again, PacNet is the central focus of the CNN piece entitled "Exposed: The secret powerhouse processing millions in global fraud".

[115] Finally, Det. Mah counters PacNet's assertions in its interpleader, particularly by reference to a FINTRAC report dated February 8, 2017 which examined PacNet business records for the period February 2015 to July 2015 (the "FINTRAC Report"). That analysis reveals:

a) FINTRAC identified substantial issues relating to PacNet's compliance with the *PCML Act* and its Regulations. These related to PacNet's reporting of STRs and application of its compliance program. The level of

non-compliance was described as “very significant”. Needless to say, PacNet’s interpleader said nothing about the FINTRAC Report;

b) contrary to PacNet’s statement that it had 700 clients with only a “small portion” or “minority” being high risk or contributing to revenues, the FINTRAC Report found 193 clients (36.59%) rated by PacNet as high risk of being vulnerable to money laundering. The Director asserts that the statements made in the interpleader can only be described as “exaggerated”;

c) FINTRAC found that PacNet had failed to apply special measures to high-risk clients even by PacNet’s own compliance regime;

d) only 47 STRs were reported to FINTRAC in the relevant time frame and the vast majority only related to a failure to complete a cross-border currency form. FINTRAC states that this would be “…inconsistent with PacNet’s business model, size, client base, transaction volume and activities”. Other deficiencies were identified in all of these 47 STRs;

e) in contrast to its assertion that it was transparent with its bankers, PacNet failed to mention that it helped a Maria Duval Scheme to switch to a U.K. account in order to refund cheques and avoid any bank scrutiny;

f) there was no indication to FINTRAC that the “Multi-Buyer” measure was not only concerned with regulatory compliance; rather, this appears to have been undertaken at least in part to avoid raising concerns and complaints by family members of the victims of the frauds. In addition, the FINTRAC Report noted that indicators of concern were that there were many payments of $19.90, which is just under the reporting requirements. In at least one instance, some 20 transactions in this small amount were received by PacNet from one individual, as listed in a CBC News article that PacNet was aware of; and

g) as for PacNet's assertion that it required that copies of the mailings be reviewed by it, it is hard to imagine how PacNet could not have been alerted and alarmed by the Maria Duval mailings (which they knew were being investigated and prosecuted), and also by the ICS mailings to Mr. Hiley that Bruce J. described as well-supporting the conclusion that they were "deceitful, false or otherwise fraudulent".

[116] The FINTRAC Report concludes:

> … your organization was aware of sufficient relevant information and the presence of indicators of suspicious activity necessary to establish reasonable grounds to suspect the transaction that was brought to your organization's attention on February 20, 2015 was related to the commission or attempted commission of a money laundering offence and for which an STR was required to be submitted to FINTRAC.

**THE PROPERTIES / THE BANK FUNDS**

[117] Although not the subject of this application, Det. Mah has identified the real properties set out in Schedule "A" of the notice of civil claim and contends that these were purchased with and/or maintained by the proceeds of PacNet's illegal activities. These include properties in the name of PacNet, Mr. and/or Ms. Day, Mr. and Ms. Ferlow and Mr. and Ms. Ripplinger.

[118] Similarly, Det. Mah contends that based on his investigation and FINTRAC documents, the Bank Funds held by the various defendants notionally contain funds which are the proceeds of PacNet's involvement in illegal direct mail fraud. Det. Mah states that, based on his extensive investigation and review of documentation:

> …I am unaware of any other substantial source of income for these individuals other than through PacNet or the PacNet Group.

[119] In the case of the Bank Funds in the accounts of Mr. and Ms. Ripplinger, Det. Mah states that the FINTRAC documents reveal that Mr. Ripplinger is an indirect owner of PacNet and that money has moved from Ms. Day or PacNet to his account. Det. Mah, however, concedes that Mr. Ripplinger may also have other sources of income.

**DISCUSSION**

[120] The first part of the two pronged s. 8(5) test under the *Act* requires that I determine whether the Director has shown a "serious question to be tried".

[121] I am satisfied that the substantial evidence adduced on this application is more than sufficient to satisfy the low threshold under the *Act*. In particular, the long-standing involvement of PacNet in the fraudulent direct mail activities of its clients, and the emails and FINTRAC Report which point to the level of knowledge and assistance provided by PacNet, support that the Director's allegations go well beyond any suggestion of frivolity.

[122] There is also sufficient evidence to suggest that the Bank Funds are proceeds of unlawful activity on the part of PacNet, as known to the individual defendants, and that those individuals have benefitted from those unlawful activities by the receipt of those Bank Funds: *British Columbia (Director, Civil Forfeiture Act) v. Wong,* 2014 BCSC 359 at para. 27. I agree with the Director that it has met the necessary burden on this application as to this aspect of the test.

[123] I now turn to the second question—whether the relief sought in relation to the Bank Funds would clearly be contrary to the interests of justice?

[124] As for this aspect of the test, the Director states that it knows of no reason why the order being sought should not be granted. It is the Director's submission that the issuing of an IPO in the manner sought would not be clearly contrary to the interests of justice.

[125] As stated in *Fischer* at paras. 20-22, the focus at this stage of the proceeding, where an IPO is sought, will often be the purposes of the *Act*, which is concerned with preservation of property pending a final determination as to forfeiture. Similarly, the same interests of justice factors discussed by Davies J. in *Angel Acres #2* at paras. 219-223 can be identified in this case.

[126] The Director has an interest in the Bank Funds, contingent on the Director being successful in this action. To that extent, the Director wishes to prevent any dealing with the Bank Funds until that time so that the current bank balances can be preserved. As noted by the Director, one of the primary purposes of an IPO is to prevent the direct or indirect reduction of the amount of money that would otherwise arise from the disposition of the property on its forfeiture: s. 8(8) of the *Act*.

[127] Therefore, a reduction of the value of property that is the subject of a forfeiture action is inconsistent with the *Act*. As common sense tells us, bank balances are extremely fungible and can be easily disposed of beyond the jurisdiction of this Court. The Court noted in *British Columbia (Civil Forfeiture, Director) v. Mirza*, (19 April 2013), Victoria 13-1441 (B.C.S.C.) at para. 2 that bank accounts are "…extremely liquid and moveable assets…". That factor weighed heavily in the Court's decision in that case to grant the IPO on a without-notice basis.

[128] It is beyond argument that, if the Director does not secure the Bank Funds, the balances may well be transferred or liquidated and any claim for final forfeiture of that property in this litigation will be rendered moot. In support of what I consider an inarguable point, the Director refers to previous transactions involving some of these defendants.

[129] On September 25, 2016, one business day after PacNet, Ms. Day and others were designated by OFAC as part of a significant transnational criminal organization, Ms. Day issued a $425,000 bank draft to her husband, Mr. Day, from a TD Canada Trust account. The next day, on September 26, 2016, Mr. Day deposited that draft into one of two new Bank of Nova Scotia ("BNS") accounts that he had opened that day. TD Canada Trust considered this a suspicious transaction and accordingly filed a report with the FINTRAC.

[130] According to further FINTRAC disclosures, on September 27, 2016, a cheque was drawn by Mr. Ripplinger on his Bank of Montreal ("BMO") account for $200,000 payable to "P. Michael Bolton Law Corp. in Trust" with the memo line reading "Loan

to Pacnet Rosanne Day". This was deemed by BMO to be suspicious given the OFAC designations just days earlier.

[131] Further FINTRAC disclosures indicated that, after Mr. Day opened his two new BNS accounts in September 2016, he deposited multiple large drafts and cheques, including the $425,000 bank draft referred to above. In addition, on October 20, 2016, Mr. Day deposited two cheques totalling $271,992 into one account. This included a $191,992 cheque from "P. Michael Bolton Personal Law Corporation" and a TD draft for $80,000.

[132] Needless to say, there might be perfectly legitimate reasons for these transfers, although the timing of them suggests that they might be related to the OFAC designations having been made. One inference that arises is that the defendants were moving money around so as to avoid potential attempts by the authorities to seize the funds at the behest of OFAC.

[133] I have no doubt that the defendants wish to have access to the Bank Funds now and into the future. However, what is also relevant is that the IPO will only be effective for a maximum period of 30 days. Even in that interim period, the defendants will have the opportunity to quickly bring any applications forward to set aside or amend the IPO. This could include a consideration as to whether the funds are required for normal living expenses, such as is regularly done in relation to *Mareva* orders. Accordingly, the *Act* contemplates that there are substantial safeguards in place to allow the defendants to challenge the IPO quickly and also require the Director to bring the matter back before the court within a short period of time.

[134] Further, when this matter is next brought before the Court, the defendants will have the opportunity to argue that other matters, perhaps even known to the Director, should be considered in terms of whether the IPO should have been granted or should be continued and if so, on what terms.

[135] Just as in *Angel Acres #2*, societal interests are engaged by this dispute: the right of the defendants to hold the Bank Funds and use them without the interference of the state; and conversely, the state's position that no one has the right to use the Bank Funds if they are proceeds of unlawful activity.

[136] Accordingly, I agree that the best way to preserve the Court's jurisdiction over the Bank Funds pending a trial on the merits is to grant the IPO, which temporarily restrains the various financial institutions holding the Bank Funds from disposing of or dealing with the Bank Funds.



## CONCLUSION

[137] I am satisfied that the Director has met the statutory test in s. 8(5) of the *Act* in seeking an *ex parte* interim preservation order or IPO. In particular, I am satisfied that there is a serious question to be tried as to whether the Bank Funds are proceeds from unlawful activity. In addition, I am unable to find that it would clearly not be in the interests of justice to grant the IPO.

[138] Accordingly, I grant an IPO prohibiting any dealing with the Bank Funds in the names of the defendants until March 14, 2018, or further order of the Court. It is my understanding that the Director intends to take immediate action to serve the IPO on the various financial institutions holding the Bank Funds.

[139] My order further provides that any party who claims an interest in the Bank Funds is at liberty to apply to vary the order on at least two (2) business days' notice to the Director and his counsel. Finally, my order grants leave to any person not named in this application who claims an interest in the Bank Funds to apply to vary the IPO on at least eight (8) business days' notice to the Director and his counsel.

"Fitzpatrick J."