IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.,* 2019 BCSC 70

Date: 20190122
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 (Document Production)

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
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Counsel for defendants Peter Ferlow and Ruth Ferlow:	B.D. Vaze M. Greene
Place and Date of Hearing:	Vancouver, B.C. November 7-9, 13, 2018
Place and Date of Judgment:	Vancouver, B.C. January 22, 2019

INTRODUCTION

[1] This hearing was the latest in a number of pre-trial skirmishes between the plaintiff Director of Civil Forfeiture (the "Director") and the defendants.

[2] The background of these proceedings to date are found in my earlier decisions: *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"); and *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.,* 2018 BCSC 2251 ("Particulars Reasons").

[3] Having resolved the pleading issues to some extent in the Particulars Reasons, the next battleground is document production.

[4] The defendants PacNet Services Ltd. ("PacNet") and Rosanne Day, Gordon Day and 672944 B.C. Ltd. (the "Day Parties") have brought a number of applications concerning document production and specifically, the manner and timing of document production in this proceeding. The defendants Ruth and Peter Ferlow (the "Ferlows") support these applications and seek the same relief for themselves.

[5] Finally, the Director has also brought a cross application to deal with the timing of document production.

THE APPLICATIONS

[6] PacNet and the Day Parties (and essentially the Ferlows) set out the relief they seek in slightly different ways, which can be restated as five issues, as follows:

1. An order striking the Director's Further Amended Notice of Civil Claim and dismissing this proceeding in its entirety, pursuant to Rule 22-7(2) and (5) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*") as a result of the Director's failure to comply with the document disclosure obligations set out in Rule 7-1(1) of the *Rules*;
2. In the alternative to paragraph 1, an order that document and oral discovery of PacNet and the Day Parties in this proceeding be stayed or postponed, until further order of the Court, to permit the PacNet and the Day Parties to determine whether any issues arise under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and if so, whether they might bring an application for bifurcation of a trial on the issue in respect of alleged breaches of *Charter* rights

and possible remedies available to them pursuant to s. 24 of the *Charter*, in advance of and separately from the trial on the merits of the Director's claim;

3. In the alternative to paragraph 1, an order that the Director deliver to PacNet and the Day Parties' counsel, within 14 days of the date of this order, a list of documents listing all documents that are or have been in the Director's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and all other documents to which the Director intends to refer at trial, including without limitation the following:

   (1) the "Requested Documents", being various documents referenced in Det. Mah's affidavit #1 sworn February 13, 2018 which was filed by the Director in support of its application for the IPO;

   (2) all documents in the possession of the Vancouver Police Department (the "VPD") or any other law enforcement agency, in relation to any investigation of the defendants named in this proceeding that is in any way connected with the Director's claim, including all police notes, memoranda, reports and inter- or intra-office communications;

   (3) all reports to Crown counsel or other state prosecution agencies in any jurisdiction; and

   (4) all investigative files of Canadian or other state prosecution agencies in any jurisdiction, in relation to the defendants in these civil proceedings.

4. In the alternative to paragraph 2, an order extending the time set out in Rule 7-1(1) of the *Rules* to permit PacNet and the Day Parties to produce lists of documents to the Director on a rolling basis, at six month intervals; and

5. In the alternative to paragraph 1, declarations in relation to s. 35(1) of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 (the "*CFA*") that:

   (1) the Director has no claim against any interest in the Properties or Bank Funds (as defined in Schedules A and B of the Director's Amended Notice of Civil Claim) acquired by any defendant on or before February 13, 2008; and

   (2) the defendants are not obliged to produce documents or information to the Director in this action relating to any facts occurring on or before February 13, 2008.

[7] The Director cross-applies for an order that its obligation to list its documents is postponed until the defendants list their documents pursuant to Rule 7-1(1) or until further order of this Court.

APPLICATION TO STRIKE

[8] Firstly, the defendants seek an order pursuant to Rules 22-7(2) and (5) of the *Rules* striking the Director's Further Amended Notice of Civil Claim and dismissing this proceeding in its entirety. They say that this relief is justified because of the Director's refusal to comply with its document disclosure obligations under Rule 7-1(1) of the *Rules*.

[9] Rule 7-1(1) provides that all parties of record must, within 35 days after the end of the pleading period, prepare a list of documents and serve that list on all parties of record. The only exceptions arise if the parties consent or the Court otherwise orders.

[10] There is no doubt that the pleading period expired some time ago. None of the parties to this litigation prepared and served a list of documents within 35 days of the expiry of that period. That remains the case to this day such that all parties are presently in breach of the *Rules*.

[11] All parties recognize their disclosure obligation under the *Rules*. However, in this case, the dispute between the Director and the defendants has been brewing for months.

[12] By no later than June 2018, the Director proposed that each side produce their list of documents and exchange them in the ordinary course, a usual procedure in civil litigation. In reply, the defendants indicated that they would only be in a position to produce their list of documents once the Director had fully disclosed its documents in the first instance. The Director opposed what it considered was "asymmetrical" document production. The Director and the defendants have all continued to either ignore or refuse to agree to these demands by the other side for delivery of a list of documents.

[13] Thus, the issue was joined, leading to the filing of application materials by all parties in September 2018 to determine the issues now before me.

[14] The defendants' position is that, even if they have refused to comply with their obligation to produce a list of documents under the *Rules*, the Director is not in a position to use that as an excuse to do the same.

[15] This is a regrettable impasse between the parties. Nevertheless, I consider that the parties have all acted responsibly in bringing the matter forward as soon as possible for a determination. In addition, the Director's position is understandable. This is particularly so given that production by the Director of its list of documents and the documents themselves, in the face of the defendants having failed even to file an application to allow them to postpone having to do the same, would have effectively provided the defendants with the "asymmetrical" document production that the Director says is inappropriate.

[16] Rule 22-7(2) and (5) confer on the Court a discretion to dismiss a proceeding in its entirety based on non-compliance with the *Rules*.

[17] The parties have referred me to my earlier decision in *Schwarzinger v. Bramwell*, 2011 BCSC 304. In paras. 108-140, I reviewed five factors for consideration when a party seek a remedy under Rule 22-7(2) and (5). Those factors include: that striking a claim is a draconian measure; that generally speaking, the offending party should be granted a "second chance" to cure the default; that dismissal of a proceeding must be proportionate to the non-compliance; that the court should consider whether a lesser remedy would cure the default and inspire confidence that non-compliance will no longer occur; and, that the court must consider any explanations offered by the offending party for the default.

[18] A consideration of the above factors does not lead me, as the defendants suggest, to the conclusion that this is a "rare case" where the Director's pleading should be struck. The Director has provided an explanation. These reasons will give all of the parties, including the Director, a roadmap as to how document disclosure will take place in this proceeding in accordance with the *Rules*. A dismissal of the claim at this stage is a drastic and severe remedy and not one at all appropriate or proportionate in the circumstances: *Schwarzinger* at para. 118.

[19] I dismiss the defendants' applications to strike the Director's pleading.

POSTPONEMENT OF THE DEFENDANTS' DOCUMENT DISCLOSURE

[20] The second issue to be decided arises from the defendants' applications for an order that their document and oral discovery should be stayed or postponed, until further order of the Court, pending the consideration of potential *Charter* issues.

[21] The application for this relief is brought pursuant to Rule 7-1(22), which provides the Court with a discretion to postpone discovery if the Court is "satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery".

[22] The relief sought under the second issue is related to the relief sought under the third issue. Accordingly, the defendants seek postponement only for themselves, on the premise that the Director will still be required to list and produce its documents in relation to all issues in the proceeding (i.e. the third issue).

[23] In the Particulars Reasons at paras. 30-37, I addressed the nature of this *civil* litigation in relation to the requirement of particulars of the Director's claim. The Day Parties only grudgingly accept the analysis found in the cases I cite in the Particulars Reasons. They expressly state that they "do not seek to convert this civil proceeding into a criminal process". PacNet accepts these authorities even less so, stating that these civil proceedings "operate in an unusual spectrum, midway between criminal and civil proceedings".

[24] In any event, the defendants now take a similar tack with respect to document production. Their position is largely informed by the continued insistence that the nature of these civil forfeiture proceedings dictate a substantially different approach than is contemplated in civil litigation under the *Rules*.

[25] The Day Parties state in their argument:

> 2. The nature of this action – a claim for forfeiture of personal assets arising out of allegations of unlawful activity – differs in significant respects from other civil litigation, and other civil forfeiture proceedings, that have been advanced in this province. There is no direct analog in the jurisprudence that can assist the parties in resolving the key pre-trial issues in this case. As a result, the issues that have and will arise in this litigation require examination through the unique lens of civil forfeiture principles, as determined by this court in cases like *Lloydsmith*, and the interaction of those principles with the rules of civil litigation.

[26] The defendants continue to emphasize the jeopardy they face in respect of the Director's claim. In addition, the defendants assert that the Director has obtained evidence from the Vancouver Police Department ("VPD") using their special investigative authority, but without the case proceeding in the criminal stream and its attendant procedures and protections afforded to an accused.

[27] Although it is not clear at this time, the evidence proffered by the Director does suggest that the VPD has been involved in an investigation that has led to the Director commencing this action. In his affidavit, Det. Mah refers to his position in the Organized Crime Section (OSC) of the VPD. His primary responsibility within the OSC was to conduct investigations of offence related property and proceeds of crime.

[28] As noted in *British Columbia (Director of Civil Forfeiture) v. Huynh*, 2012 BCSC 740, this is not a surprising circumstance. There, Justice Schultes stated:

> 5. Ms. Huynh's counsel has raised concerns about this process. However, absent some constitutional deficiency being found in the legislation that empowers the Director, I can see nothing inherently improper about evidence that has been obtained by police forces but that turns out to be insufficient to support a prosecution being passed onto the Director. Indeed, unless there were parallel criminal and forfeiture investigations, something that might raise its own concerns, it is difficult to conceive of what other sources of information could form the basis of the Director's applications.

[29] Indeed, s. 22 of the *CFA* expressly provides that the Director may obtain information from government authorities for the purpose of bringing proceedings:

> **22** (1) In this section, "**public body**" means public body as defined in the *Freedom of Information and Protection of Privacy Act*.
>
> …
>
> (4) Subject to the regulations, the director may enter into information-sharing agreements that are reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act with the following:
>
> (a) Canada, a province or another jurisdiction in or outside of Canada;
>
> (b) a public body.
>
> (5) Subject to the regulations, the director is entitled to information that is
>
> (a) in the custody or control of a public body prescribed by the Lieutenant Governor in Council, and

> (b) reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act.
>
> (6) A public body that has custody or control of information to which the director is entitled under subsection (5) must, on request, disclose that information to the director.
>
> (7) This section applies despite any other enactment, but is subject to a claim of privilege based on a solicitor-client relationship.

[30] In light of the fact that the Director often relies on evidence gathered by the police, it is not surprising that *Charter* issues have arisen in civil forfeiture proceedings.

[31] The parties have referred me to a number of cases where the Court has emphasized the procedural rights of defendants in civil forfeiture proceedings, including giving effect to *Charter* issues and procedural issues that arose in those cases as a result of the gathering of evidence that the Director intended to use in those proceedings. Those decisions establish that a *Charter* violation by the authorities can be a proper basis for exclusion of evidence in the civil forfeiture context.

[32] Pursuant to Rule 12-5(67), the Court may order that questions of fact or law be tried and determined before others. This is the basis upon which the Court may order that potential *Charter* issues be decided in the first instance in a civil forfeiture proceeding in order to determine what, if any, remedies may be appropriate if a breach if found. An appropriate remedy may be the exclusion of evidence that the Director intended to use in the civil forfeiture action.

[33] The defendants advise that *Huynh* was the first British Columbia case to consider whether it was appropriate to bifurcate the action to order to consider in the first instance the *Charter* issues that arose there.

[34] In *Huynh*, there was an RCMP investigation of a marihuana grow operation. A search warrant was subsequently issued and executed by the RCMP. *Charter* issues arose in relation to the search warrant and the manner of its execution. At para. 24, Schultes J. accepted that severance of the *Charter* issues may be appropriate if there are “extraordinary, exception or compelling reasons” or at the least, just compelling reasons to do so, such as a significant savings of time and

expense. The Court found that compelling reasons existed in that case. There were "potentially serious breaches" (paras. 26-29); any breaches found could well result in the exclusion of the evidence found during the search (paras. 35-38); and, the exclusion of the evidence had the real prospect of resolving the matter completely (paras. 41-42).

[35] In *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89, the court stated at para. 80 that "when taking the property of an individual, for good policy reasons, it is necessary to ensure that the power of the state is exercised recognizing the procedural rights of the individual".

[36] *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72 was also a bifurcation case. The matter began with a warrantless search of the defendant's property. Justice Saunders stated that bifurcation applications are commonly brought in civil forfeiture cases:

> 13. … Given these very high stakes for the individual and the power difference between the parties, it is not surprising that there has been an assortment of applications seeking to challenge the legitimacy of the evidence gathering actions of the police, seeking to postpone discovery until that legitimacy has been determined, and seeking avenues for just redress where such activities have been found to be in violation of a person's *Charter* rights.

[37] Similarly, issues relating to a search warrant and the execution of that warrant were raised in *British Columbia (Director of Civil Forfeiture) v. Johnson*, 2015 BCSC 1217. A marihuana grow operation had been found. The defendants applied for bifurcation of the potential *Charter* issues. At paras. 53-57, Justice Maisonville adopted the same reasoning from *Huynh* in agreeing that bifurcation was appropriate. At paras. 63-64, she also ordered that discovery would proceed but only in respect of the *Charter* issues, and not generally.

[38] Justice Duncan considered many of the above decisions in *British Columbia (Director of Civil Forfeiture) v. Cronin*, 2016 BCSC 284. As with many other cases, a warranted search of a residence had led to the discovery of a marihuana grow operation. Duncan J. stated:

> 14. There is a significant overlap between criminal law and civil forfeiture when it comes to the application of the *Charter*. When state action results in the acquisition of evidence, as with the execution of a search warrant, it is

> subject to scrutiny under the *Charter*, even though it is proffered in the civil context. It is this overlap that leads to bifurcation applications.

[39] In *British Columbia (Director of Civil Forfeiture) v. Thandi*, 2018 BCSC 215, the police had found money after a search of the defendant's vehicle after the police stopped and arrested him. The defendants alleged his Charter rights were violated by the search and seizure. At paras. 25-26 and 32, the Court found that the "obvious questions" relating to the *Charter* issues were sufficient to order bifurcation and that discovery should be postponed save as it related to the *Charter* issues.

[40] In *British Columbia (Director of Civil Forfeiture) v. Nguy*, 2018 BCSC 1621, the police entered a residence upon a report of domestic assault. They discovered marihuana. The police later entered the residence based on a subsequently issued search warrant. At para. 185, the Court referenced the comment of the court in *Crowley* in terms of ensuring that the procedural rights of an individual are recognized where the exercise of state powers are at play.

[41] In their pleadings, the Day Parties allege that the *CFA* is unconstitutional as treading on Parliament's criminal law powers. Further, the Day Parties and PacNet allege that certain provisions in the *CFA* are unconstitutional and of no force and effect because they infringe their *Charter* rights under ss. 7, 8, 11(a), (c), (d) and (g), 12 and 13. In the alternative, PacNet pleads that the *CFA* should be read down to require a criminal conviction or finding of specific unlawful activity on a criminal standard (i.e. beyond a reasonable doubt); the Day Parties say the *CFA* should be read down to be consistent with the *Charter*.

[42] The Ferlows do not advance similar general constitutional and *Charter* arguments in their pleadings. This may be understandable given the result in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 that upheld the constitutionality of Ontario's provincial civil forfeiture legislation that is similar to the *CFA*.

[43] In any event, these allegations are not the basis upon which the defendants seek to postpone their document discovery. I would note that Justice Davies rejected a bifurcation of more generalized constitutional arguments in *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corp.*, 2013 BCSC 2575 at

paras. 18-24, citing in particular the need for a full factual matrix and evidentiary record to determine those issues.

[44] The Ferlows specifically plead that the manner in which the VPD and any other police or law enforcement agencies have forwarded evidence to the Director for the purpose of this litigation was in violation of their *Charter* rights. This more particular focus on the *manner* in which the Director obtained information, as the basis for the Ferlow's claim of potential *Charter* breaches, is now emphasized by all of the defendants in relation to their applications to postpone their document production.

[45] The overall difficulty with the defendants' position is that it is entirely based on speculation and conjecture as to what may unfold in this proceeding.

[46] The defendants refer to "potential" *Charter* infringements. They suggest that the VPD, and now the Director, "may" be using improperly obtained information from other law enforcement agencies. As a result, they say that their *Charter* rights "may" have already been violated in this proceeding.

[47] The defendants have not brought any application forward that raises any *Charter* issue for determination. Even in their arguments, no specific potential *Charter* issue has been raised beyond this speculation.

[48] PacNet describes this proceeding as involving "exceptional circumstances". Those exceptional circumstances are said to, in part, arise because the VPD has seized various PacNet documents pursuant to search warrants issued by this court (see IPO Reasons at paras. 54-57; Sealing Order Reasons at paras. 29-32). The latest seizure was in 2016. PacNet continues to challenge the validity of the search warrants and seeks a return of the seized documents. Counsel for PacNet in these proceedings is involved in this other criminal litigation. However, despite that representation and full knowledge of the circumstances arising there, PacNet does not refer to any specific *Charter* breach arising from those circumstances and, if one exists, one that would be of relevance in this proceeding.

[49] Even assuming that a potential *Charter* issue exists (which has not been either alleged or shown here), the defendants have not brought any application in these proceedings for bifurcation of a *Charter* issue concurrent with their application to postpone their discovery on issues other than those relating to those *Charter* breaches.

[50] I have not been referred to any decision of this Court which has delayed or postponed discovery in the abstract. By "abstract", I mean where there was no corresponding bifurcation application and also, based on speculation that *Charter* issues may arise in the future. In the cases cited to me (*Lloydsmith*, *Huynh*, *Johnson*, *Cronin*, *Nguy*, *Thandi*), specific potential *Charter* issues had been identified and were the basis upon which the Court exercised its discretion to bifurcate the issues and postpone discovery generally. The *Charter* allegations in those cases were based on issues relating to search warrants and/or warrantless searches and seizures. None of those circumstances exist here.

[51] Nor it is apparent that any remedy to exclude evidence in the hands of the Director under s. 24(1) of the *Charter* might be a factor weighing heavily in favour of bifurcation and postponement of discovery. In all of the above bifurcation cases, one relevant factor was that exclusion of the evidence had the potential to limit, if not eliminate, the Director's evidence in support of its claim under the *CFA*. As such, a s. 24(2) *Charter* remedy had the potential to result in a complete resolution of the civil forfeiture proceedings.

[52] The relevance of this factor – the potential that exclusion of evidence would completely determine the issues – is also applicable when bifurcation is sought in civil litigation generally. In *Belzberg v. North American Trust Co.*, [1994] B.C.J. No. 3326 (S.C.), Master Joyce (as he then was) stated at para. 24 that circumstances which may justify severance include where "there is some evidence which makes it probable that the trial of the separate issue will put an end to the litigation".

[53] Here, as the Director notes, the vast majority of the evidence set forth in Det. Mah's affidavit is what the Director refers to as "open source," meaning documents

that are publicly filed and available to anyone with an Internet connection. Accordingly, there is no basis upon which to speculate, let alone consider, that exclusion of any other information in the hands of the Director would probably result in an end to these proceedings, such that this Court could conclude that a determination of the *Charter* issues would likely result in time and expense savings.

[54] The defendants' present arguments to delay their document production are entirely based on speculation that: there are *Charter* breaches; that they will plead breaches of *Charter* issues; that they will bring forward a bifurcation application to decide those *Charter* issues before other issues arising in this litigation; that these *Charter* issues may give rise to a *Charter* remedy or remedies; and, that those *Charter* remedies have the potential to end this litigation such that time and expense will be saved.

[55] Similar to what was argued in *Hells Angels* (para. 19) and *Huynh* (para. 14), the defendants argue that it is unfair that they will be subject to the civil litigation process before such issues are decided. Also, they argue that it is more efficient to decide these issues in the first instance. These arguments are not persuasive. Again, I will repeat that the defendants have yet to identify any specific "issues". Further, in civil proceedings, there is nothing inherently unfair with a party using evidence obtained on discovery to bolster its case: *Cronin* at paras. 13-14. It does not amount to, as the Ferlows argue, a subversion of their *Charter* rights.

[56] Contrary to their arguments, even in this civil litigation, the defendants will not be "deprived" of the opportunity to seek relief as this litigation proceeds. They may raise *Charter* issues and seek bifurcation at any stage of the litigation.

[57] In addition, it would be open to the defendants to consider applying to set aside the IPO once document disclosure has been made. In fact, there does not appear to be any reason advanced as to why the defendants have not already brought such an application based on what the defendants already know and the substantial disclosure found particularly in Det. Mah's affidavit. The defendants continue to assert that such an application will be brought although, curiously, no such application has emerged.

[58] There is a complete absence of any basis to allege *Charter* violations or any basis upon which the defendants might seek bifurcation and postponement of discovery. The Day Parties argue that the issue is "how the *Rules* can be properly used to fairly and effectively manage a civil forfeiture of this nature". In those circumstances, in my view, the defendants' proposition substantially amounts to the argument that document production in civil forfeiture proceedings *generally* should be subject to a completely different paradigm than in normal civil proceedings. In short, based on these pleadings and in the face of pure speculation about *Charter* breaches and issues, there would be nothing to distinguish the "nature" of this case from the many other civil forfeiture actions in terms of how defendants conduct document production in accordance with the *Rules*.

[59] I see nothing unique about the particular circumstances here that would justify such an extraordinary abdication or disregard of the normal conduct of civil litigation under the *Rules* in favour of what essentially amounts to a criminal disclosure process.

[60] The defendants' arguments are strikingly similar to those found in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 where the Court held that the Crown is required to make full disclosure to the defence prior to the defence deciding how to make full answer and defence by responding, if at all. There is no justification to import such an approach into civil litigation proceedings.

[61] In summary, the *Rules* apply and can accommodate the types of issues that the defendants assert that they *might* raise in the future in terms of affording them procedural fairness, including any that may arise from the *Charter*. However, the defendants have not yet raised, and may never raise, any such "issue or question" that should be given priority determination. In addition, they have also not identified any "issue or question" to be first determined that would justify postponing their document production under Rule 7-1(22) save in respect of that "issue or question".

DOCUMENT PRODUCTION

[62] This leads me to the defendants' third and fourth issues, as set out above, and the Director's cross application, relating to the manner and timing in which document production should proceed.

[63] In my view, document listing and production should proceed by all parties as soon as possible.

[64] On the third issue, the defendants seek a order that the Director provide its documentation, as required by the *Rules*, including the "Requested Documents" which arise from their reading of Det. Mah's affidavit. In my view, it is not necessary or efficient at this time to order that the Director produce specific documentation. Many or all of the documents may be listed by the Director and will therefore be available to the defendants. In other words, no issue may arise in that respect. Further, some documents may not be in the possession or control of the Director at all and may not be producible.

[65] In those circumstances, once all of the parties have completed document production, it is likely that there will be more focus on what, if anything, remains disputed between the parties and an appropriate application can be brought before the Court to determine the issues.

[66] Timing of document production remains an issue, particularly from the defendants' point of view. They refer to their document production as being "complex". The Director's allegations refer to the processing of fraudulent mail schemes going back to 1997, a time span of some 20 years.

[67] The defendants, particularly PacNet, say that the volume of documents that must be processed and reviewed for relevance and privilege is "enormous". They refer to some 82 and 364 boxes of PacNet's documents having been seized and held by the authorities. PacNet refers to the MLAT seizure of various documents by the VPD as having "compromised" their ability to produce those documents. However, PacNet has received DVDs that contain copies of some of the seized documents. PacNet says that a bailiff seized its computers and hard drives in September 2018 such that PacNet alleges that the data is no longer available to it.

However, the bailiff's evidence is that he understood that PacNet transferred data from the computers prior to their removal from PacNet's premises. In addition, the bailiff's evidence is that the hard drives remain available to PacNet at this time. Finally, PacNet refers to the significant cost of reviewing the volume of documentation for the purposes of preparing a list of documents.

[68] The concerns regarding document production of a business operation such as PacNet's are not insignificant; however, they are not entirely unusual in cases involving such businesses. This is particularly so in todays age of electronic document storage where enormous amounts of data are potentially available. However, I do not, at least at this stage, view these as obstacles that should limit document production. It is no answer for PacNet to throw up issues in respect of document production as an excuse not to produce any documents at all. As the Director notes, PacNet does not put forward any particular plan for their document production, save for the vague suggestion that it produce lists ever six months.

[69] In my view, counsel must at least initially embark on discussions that address these issues to bring focus to the document production exercise in a reasonable and efficient manner. I would note that the Director's counsel has already made efforts in this regard and was going to continue to engage the defendants' counsel as to how document production would be handled.

[70] For example, the Director's allegations mainly focus on fraudulent mail schemes such that no production may be necessary relating to other business activity of PacNet. There may be keyword searches of documents that can, perhaps at least initially, limit production on the understanding that it can be expanded later, if necessary. The Director is already aware of certain individuals and companies who were PacNet clients and who have been implicated or found guilty or liable in these fraudulent schemes. PacNet is of course aware of their customers who were named in the OFAC interpleader (see Particulars Reasons at para. 64). The Director has already made listings of specific documents that could conceivably be the basis for the defendants' document production. The relevance of the categories of documents referred to by the Director are not surprising. I agree with the Director that, given PacNet's involvement in many other criminal and civil investigations of their clients

relating to mail fraud schemes and the disclosure already made in this litigation, it would be hard to conceive that the defendants would be surprised by the identification of these categories of documents.

[71] If PacNet is not in possession of certain of its seized documents, it is difficult to see how they can be listed. However, if there are reasonable means to obtain copies of other seized documents, this can be explored.

[72] Given the already substantial delay in these proceedings, I order that all parties exchange their list of documents within 45 days of these reasons. Further delivery of the documents themselves is to be governed by the *Rules*, as may be modified by agreement between the parties or by court order.

THE *CFA*, s. 35(1) ISSUE

[73] The fifth and final issue concerns a limitation provision found in s. 35(1) of the *CFA* which provides:

> 35 (1) The time limit for the director commencing an action, a petition proceeding or a requisition proceeding under this Act is 10 years from the date on which the unlawful activity occurred.
>
> [Emphasis added]

[74] The Director filed its claim in this action on February 14, 2018.

[75] PacNet and the Day Parties seek two declarations:

a) the Director has no claim against any interest in the Properties or Bank Funds (as defined in Schedules A and B of the Amended Notice of Civil Claim) acquired by any defendant on or before February 13, 2008; and

b) the defendants are not obliged to produce documents or information to the Director in this action relating to any facts occurring on or before February 13, 2008.

[76] The first matter to be considered is the basis under the *Rules* for granting the declarations sought. The application is untethered to any particular type of pre-trial application where such relief may be granted. For example, the application is not brought for: a determination of a question or fact or law as a special case (Rule 9-3);

a proceeding on a point of law (Rule 9-4); a striking of pleadings (Rule 9-5); a summary judgment (Rule 9-6); or, a summary trial (Rule 9-7).

[77] The defendants' application is entirely based on the pleadings, and does not refer to any evidence. As Master Taylor noted in *British Columbia (Director of Civil Forfeiture) v. Sanghera*, 2017 BCSC 863 at paras. 20-23, a limitation defence is not available on an application to strike pleadings under Rule 9-5, where evidence is required to determine the issue. In essence, this is what the first declaration seeks to determine.

[78] There is no basis in the *Rules* to grant either declaration. However, the Day Parties assert that their application is properly brought as a question of statutory interpretation and application of s. 35(1) of the *CFA*. Rule 1-2(2)(b) of the *Rules* states that the *Rules* govern every proceeding in the Supreme Court unless an enactment provides otherwise. The question, then, is whether s. 35(1) otherwise provides a proper basis upon which the defendants' declarations can be ordered.

[79] I am advised by the parties that they are not aware of any judicial interpretation to date of s. 35(1) or any limitation provision found in other Canadian provincial civil forfeiture legislation.

[80] The modern principle of statutory interpretation requires that s. 35(1) be read in the context of the entire *CFA*, and in its grammatical and ordinary sense, harmoniously with the scheme of the *CFA*, the object of the legislation, and the intent of the Legislature: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at 7. In addition, the *Interpretation Act*, R.S.B.C. 1996, c. 238 provides:

> 8. Every enactment is to be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as ensures the attainment of its objects.

[81] The defendants also contend that s. 35(1) must be interpreted strictly based on their argument that forfeiture is essentially an "expropriation" of their property. In my view, it is not necessary to determine that issue given my conclusion on this issue.

[82] There is no dispute between the parties that a plain reading of s. 35(1) is that the Director is statute-barred from seeking forfeiture of any properties arising before 10 years from the date on which the "unlawful activity occurred". In addition, it is agreed that this limitation period is not affected by other provisions, such as postponement and discoverability: see the *Limitation Act*, S.B.C. 2012, c. 13, s. 3(2).

[83] That said, I agree with the Director that the defendants misstate the effect of this provision in the context of the *CFA*.

[84] The Director's claim seeks forfeiture of five parcels of real property (defined in the pleadings as the "Properties"). The Director specifically alleges in its Further Amended Notice of Civil Claim that:

a) each of the Properties is proceeds of unlawful activity (paras. 25-26);

b) each of the Properties, including the PacNet Property, were used as instruments of unlawful activity by the conversion of the proceeds of the unlawful activity into the Properties (paras. 33-34). Essentially, the claim is that the proceeds from the unlawful activity was used in relation to the Properties as money laundering;

c) proceeds from unlawful activity were used to increase the value of, and PacNet's equity in, the PacNet Property (acquired in 2014) by paying property tax and contributing to improvements and maintenance (paras. 35-37);

d) proceeds from unlawful activity were used to increase the value of, and the Day's equity in, the Vancouver Property (acquired in 2005) by paying the mortgage and property tax and contributing to improvements and maintenance (paras. 38-41);

e) proceeds from unlawful activity were used to increase the value of, and the Day's equity in, the Gibsons Property (acquired in 2010) by paying the property tax and contributing to improvements and maintenance (paras. 42-44);

f) proceeds from unlawful activity were used to increase the value of, and Ms. Day's equity in, the Keats Property (acquired in 2003) by paying the

mortgage and property tax and contributing to improvements and maintenance (paras. 45-48); and

g) proceeds from unlawful activity were used to increase the value of, and the Ferlow's equity in, the West Vancouver Property (acquired in 1999) by paying the mortgage and property tax and contributing to improvements and maintenance (paras. 49-52).

[85] Accordingly, the Director has clearly set out that it claims forfeiture of the Properties as both proceeds and instruments of unlawful activity in relation to events that have been ongoing within the last 10 years.

[86] Regarding the first declaration sought, the defendants state that, even if the Director was entirely successful in this action, it can have no claim, as matter of law, to the forfeiture of any property interest *acquired* by the defendants prior to February 13, 2008. They further say that this is so regardless of whether the property interest was derived from the proceeds or used as an instrument of unlawful activity. They assert that any property interest acquired by the defendants prior to February 13, 2008 is beyond the reach of the Director's forfeiture claim. This would include three of the Properties, being the Days' Vancouver Property acquired in 2005, Ms. Day's Keats Property acquired in 2003 and the Ferlows' West Vancouver Property acquired in 1999.

[87] However, the focus of s. 35(1) is not when the Properties were *acquired*, but when the "unlawful activity" *occurred*.

[88] I agree with the Director that the scheme of the *CFA* contemplates the forfeiture of properties that were acquired, either lawfully or unlawfully outside of the 10-year limitation period, but subsequently become tainted by unlawful activity within the 10-year period. Support for this conclusion is found in s. 19 of the *CFA* which provides that already acquired property may later represent proceeds of subsequent unlawful activity:

> **19** In proceedings under section 3 or 14.11, proof that a person
>
> (a) participated in an unlawful activity that resulted in or is likely to have resulted in the person receiving a financial benefit, and
>
> (b) <u>subsequently</u> did one or more of the following:

> > (i) acquired the whole or the portion of an interest in property that is the subject of the proceedings;
> >
> > (ii) caused an increase in the value of the interest or the portion of the interest in property that is the subject of the proceedings;
> >
> > (iii) caused a decrease of a debt obligation secured against the interest or the portion of the interest in property that is the subject of the proceedings,
>
> is proof, in absence of evidence to the contrary, that the whole or the portion of the interest in property that is the subject of the proceedings is proceeds of unlawful activity as a result of the unlawful activity referred to in paragraph (a).
>
> [Emphasis added]

[89] The Director also argues, correctly I think, that the objects and purpose of the *CFA* are furthered by allowing the Director to forfeit property interests that may have been lawfully acquired but later became tainted by crime. Justice Newbury referred to the purposes of the *CFA* in *British Columbia (Director of Civil Forfeiture) v. Wolff*, 2012 BCCA 473 at para. 16, citing *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402:

> The purpose of the Act is threefold:
>
> (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.

[90] The Director's interpretation of s. 35(1) is further supported by reference to British Columbia, Legislative Assembly, *Hansard*, 38th Parl., 1st Sess., Vol. 2, No. 9 (19 October 2005) at 948. At that time, it was stated in the Legislature:

> When it came to the definition of "instrument of unlawful activity," we modified it to include forfeiture for past illegal use as well as the future likelihood that the property would be used for unlawful activity. We also changed the definition of "proceeds of unlawful activity" to ensure that it includes situations where the value of an interest in property has increased through use of illegal proceeds such as the paying down of a mortgage or other secured debt with proceeds of unlawful activity.
>
> [Emphasis added]

[91] Section 3 of the *CFA* provides that the Director may seek forfeiture of the whole or a portion of an interest in property that is "proceeds of unlawful activity" or

property that is an “instrument of unlawful activity”. The definitions found in s. 1 of the *CFA* also provide support for the Director’s position:

> **"instrument of unlawful activity"** means any of the following:
>
> (a) property that has been used to engage in unlawful activity that, in turn,
>
> (i) resulted in or was likely to result in the acquisition of property or an interest in property, or
>
> (ii) caused or was likely to cause serious bodily harm to a person;
>
> (b) property that is likely to be used to engage in unlawful activity that may
>
> (i) result in the acquisition of property or an interest in property, or
>
> (ii) cause serious bodily harm to a person;
>
> (c) property that is realized from the disposition of property described in paragraph (a) or (b) under an order of the court under section 8 (3) (d) *[interim preservation order]*;
>
> "**proceeds of unlawful activity**" means any of the following:
>
> (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;
>
> (b) the whole or a portion of an interest in property that is equivalent in value to the amount of an increase in value of the whole or the portion of the interest in property if the increase in value results directly or indirectly from unlawful activity;
>
> (c) the whole or a portion of an interest in property that is equivalent in value to the amount of a decrease in a debt obligation secured against the interest or the portion of the interest in property, if the decrease in debt obligation results directly or indirectly from unlawful activity;
>
> (d) property that is realized from the disposition of the whole or a portion of an interest in property described in paragraph (a), (b) or (c) under an order of the court under section 8 (3) (d) *[interim preservation order]*;

[92] Accordingly, the above definitions tie both proceeds and instruments claims to the “unlawful activity” which, as required by s. 35(1), must have occurred within the 10-year period prior to the filing of the claim. The reference is not only to the acquisition of property arising from the use of “proceeds of unlawful activity”, but also to the increase in value of property or decrease in indebtedness of property already held. Neither definition is tied to when the properties were acquired.

[93] The crux of the Director's claim is that the unlawful activity of the defendants has been ongoing over the last 20 years and certainly within the last 10 years, as required by s. 35(1). In that respect, the Director does not seek forfeiture of any property that was the subject of a discrete and completed unlawful act, where that subject property was *not* subsequently used as an instrument or had its value increased through alleged illegal proceeds arising from unlawful activity in the last 10 years.

[94] The competing interpretations of the parties are difficult, if not impossible, to determine conclusively on this pre-trial application given the lack of a factual context in which to properly consider these issues in relation to the Properties and their circumstances. For example, the defendants raise interpretation issues in relation to the s. 19 presumption in terms of the application of s. 35(1). Given these difficulties, I am expressly not determining any limitation issue in relation to the forfeiture of the Properties in these reasons. These limitation issues should be considered after the full evidentiary record is before the Court and the parties have had an opportunity to advance their arguments.

[95] The second declaration, which seeks to limit the date range of the defendants' document production, is also unsupported by s. 35(1). The full extent of what may be proven in relation to the defendants' activities even outside of the 10-year period may be relevant to many issues in this litigation. For example, such evidence may be relevant to a consideration of the applicability of s. 6 of the *CFA* where the Court is required to consider whether relief from forfeiture should be granted where it is clearly not in the interests of justice to order forfeiture.

[96] It will suffice at this time to state that I agree with the Director that there is a basis upon to argue that facts and circumstances of the defendants arising pre-February 2008 can be considered relevant and discoverable in this litigation in that they may be used at trial to prove or disprove a material fact: Rule 7-1(1).

[97] The defendants further argue that documentation and other evidence in respect of alleged unlawful activities prior to February 2008 are not admissible in this proceeding. In support, the defendants cite *Persaud v. Royal Bank of Canada,* [1994] O.J. No. 1140 (Ont. S.C.J.). This case is distinguishable. That case

concerned a limitation period provision in the *Bank Act*, R.S.O. 1985, c. B-1 which expressly made documents arising outside of the limitation period inadmissible (para. 5). There is no equivalent provision in the *CFA*; nor can any such restriction be read into s. 35(1).

[98] In any event, I fail to see how the admissibility of the Director's evidence is an issue at this very preliminary stage of the proceedings.

[99] Accordingly, I conclude that s. 35(1) cannot be invoked at the document discovery phase of this litigation to block production of relevant documents bearing on, among other things, the defendants' knowledge, and/or facilitation of mail solicitation schemes even prior to the 10-year period commencing February 2008. To do so would hamstring the Director in terms of its allegations of the development of the fraudulent mail schemes even outside of the 10-year period as relevant to its further allegations that PacNet continued to be involved in those schemes (and the occurrence of unlawful activity) within the 10-year period. In addition, it would unfairly restrict the Director's discovery in terms of linking the Properties or any increase in value of the Properties to the alleged unlawful activity within that 10-year period, even if the Properties were acquired at an earlier time.

[100] The defendants allege that they will suffer prejudice if they are unfairly required to produce documentation and information that is clearly outside of the limitation period in s. 35(1). However, at this time, it is not clear that documents arising before February 2008 are irrelevant. In those circumstances, I have concluded that it is best to let the document discovery process unfold, as I have generally described above, with the parties attempting to work together to focus the discovery process in some reasonable manner that manages what might be substantial documentation to be produced by PacNet.

[101] If any specific issues arise, those can be addressed at a later case management hearing and with specific application materials.

[102] I see little residual merit in the defendants' position regarding either declaration. While the Court has inherent jurisdiction in respect of the conduct of litigation, the *Rules* provide the general framework as to that matter and provide

structure in respect of the requirements of meeting any particular pre-trial application. In addition, the considerable jurisprudence from British Columbia courts provide valuable guidance as to the principles to be applied on any particular application. In addition, identifying the applicable Rule in the *Rules* allows a responding party (such as the Director) to fully understand the basis for the relief sought and defend the application accordingly.

[103] At bottom, the defendants have failed to identify any relevant provision under the *Rules*, any basis for the exercise of this Court's inherent jurisdiction, any basis for the relief under statute, such as the *CFA*, or any basis whatsoever, in respect of the two declarations sought.

[104] In my view, there is no basis upon which to grant the declarations sought, particularly as they involve a determination of substantive issues arising in this litigation.

CONCLUSION

[105] In summary, the defendants' applications and the Director's application in relation to the timing and manner of document production by all parties are disposed of as set out above. In particular, the defendants' applications for orders (a) striking the Director's claim; (b) postponing their document production; (c) requiring the Director to produce certain documents; (d) allowing their document production on a "rolling basis"; and (e) granting declarations relating to s. 35(1) of the *CFA* are dismissed. Finally, document production and the delivery of documentation by the parties will proceed as set out above.

"Fitzpatrick J."