COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. Day,* 2019 BCCA 160

Date: 20190510
Docket: CA45913; CA45915; CA45916

Docket: CA45913

Civil Forfeiture *in Rem* against various Lands and Structures and the Proceeds Thereof, and any Money held in various bank accounts in British Columbia (the "Accounts") and the Proceeds Thereof (collectively, the "Bank Funds")

Between:

Director of Civil Forfeiture

Respondent
(Plaintiff)

And

Rosanne Day, Gordon Day and 672944 B.C. Ltd.

Appellants
(Defendants)

And

The Owners and All Others Interested in the Properties and Bank Funds, in particular PacNet Services Ltd., Ruth Ferlow and Peter Ferlow

Respondents
(Defendants)

- and -

Docket: CA45915

Between:

Director of Civil Forfeiture

Respondent
(Plaintiff)

And

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

Respondents
(Defendants)

And

Ruth Ferlow and Peter Ferlow

Appellants
(Defendants)

- and -

Docket: CA45916

Between:

Director of Civil Forfeiture

Respondent
(Plaintiff)

And

PacNet Services Ltd.

Appellant
(Defendant)

And

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

Respondents
(Defendants)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 22, 2019 (*British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2019 BCSC 70, Vancouver Docket No. S182680).

Counsel for R. Day, G. Day and 672944 B.C. Ltd.:	P.J. Roberts, Q.C. L.L. Bevan
Counsel for R. Ferlow and P. Ferlow:	B.D. Vaze
Counsel for PacNet Services Ltd.:	M.P. Bolton, Q.C. A. Sehmbi
Counsel for the Respondent, Director of Civil Forfeiture:	H.A. Mickelson , Q.C. A.L. Doolittle
Place and Date of Hearing:	Vancouver, British Columbia April 15, 2019
Place and Date of Judgment:	Vancouver, British Columbia May 10, 2019

Summary:

The defendants in a civil forfeiture proceeding seek leave to appeal document production orders. If leave is granted, they seek stays pending the appeals. Held: Applications dismissed. There is no merit to the argument that in the circumstances of this case, criminal document production principles should be extended to a civil forfeiture proceeding. There is no arguable case that the judge erred in exercising her discretion to refuse an application for the defendants to postpone document discovery under Rule 7-1(22) of the Supreme Court Civil Rules, and to order all parties to exchange lists of documents within a specified period of time under Rule 7-1(1).

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The defendants in a civil forfeiture proceeding seek leave to appeal document production orders of a case management judge, and if leave is granted, a stay of the orders pending appeal.

[2] The respondent Director of Civil Forfeiture (the Director) opposes the leave and stay applications.

Background

[3] The proceedings below were brought by the Director under the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 [*CFA*] on February 14, 2018. In the action, the Director alleges that PacNet Services Ltd., which operated as a payment processor in Vancouver and elsewhere for many years, processed payments for individuals and companies it knew were engaged in unlawful predatory mail fraud schemes. The other defendants are Roseanne Day, her husband Gordon Day, and 672944 B.C. Ltd., a corporate entity for which Ms. Day is the sole director and shareholder (together, the Day parties); and Ruth Ferlow and her husband Peter Ferlow (the Ferlow parties). Ms. Day is the director of PacNet and Ms. Ferlow was an officer or employee of PacNet.

[4] The Director seeks the forfeiture of the interests held by PacNet and the other defendants in various properties and bank funds, and their proceeds.

[5] On March 13, 2018, Fitzpatrick J. granted the Director an interim preservation order (IPO) in an *ex parte* proceeding, reasons indexed as 2018 BCSC 387 (IPO reasons). Subsequently, on June 22, 2018, Fitzpatrick J. was appointed case management judge for these proceedings. Since then, she has held numerous case planning conferences and has issued three further sets of reasons:

- On November 23, 2018, dismissing applications by the defendants for a sealing order, indexed as 2018 BCSC 2070 (Sealing order reasons);
- On December 18, 2018, dismissing applications by the defendants for particulars, indexed as 2018 BCSC 2251 (Particulars reasons), under appeal in B.C.C.A. File Nos. 45858, 45859, 45860;
- On January 22, 2019, dismissing various applications by the defendants relating to document discovery and ordering all parties to file and serve a list of documents within 45 days, indexed as 2019 BCSC 70.

[6] This latter order is the order for which leave to appeal is sought.

Leave to appeal

[7] The party seeking leave to appeal bears the burden of showing that leave should be granted: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11 (C.A.) (in Chambers). The criteria to be applied are well-established:

> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

See also *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10, *per* Saunders J.A. (in Chambers).

[8] A point on appeal will not be of significance to the practice where an area of law is well-settled: *Re Canadian Petcetera Limited Partnership*, 2009 BCCA 255 at

para. 19 (in Chambers); *Soprema Inc. v. Wolrige Mahon LLP*, 2014 BCCA 366 at para. 26 (in Chambers). In addition, the mere fact that there may be no decisions on precisely the point raised will not necessarily support granting leave to appeal. In *Stanway v. Wyeth Canada Inc.*, 2013 BCCA 256, Prowse J.A. (in Chambers) refused leave where the question concerned the scope of discovery in a class action and the practice in the Supreme Court seemed not to be problematic. She noted (at para. 15):

> ... While there are apparently no decisions in British Columbia dealing precisely with this point, there are countless decisions dealing with the scope of discovery generally …. While these rights have to be adapted to fit the nature of the proceedings, it does not appear that this has presented a problem in British Columbia that needs to be resolved.

[9] The merits threshold is relatively low. The standard of "*prima facie* meritorious" has been described as "whether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this court": *A.L.J. v. S.J.M*. (1994), 46 B.C.A.C. 158 at para. 10 (in Chambers); *Bartram v. Glaxosmithkline Inc*., 2011 BCCA 539 at para. 16 (in Chambers); *Maple Ridge (City) v. Copperthwaite*, 2019 BCCA 99 at para. 22 (in Chambers). Where there is no prospect of success on appeal, a justice in chambers performs a gatekeeper function in refusing to grant leave: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 at para. 27 (in Chambers).

[10] The discretionary nature of the document discovery order, made by an experienced case management judge, is important to keep in mind. Generally, an appellate court will not interfere with a discretionary order unless the judge erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to a serious injustice. This standard of review has been set out in many cases of this court, recently summarized in *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 at para. 19.

[11] On an application for leave to appeal a discretionary order, the applicant must present an arguable case that the judge erred in one of these ways: *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31 (in Chambers); *Maple*

Ridge (City) at para. 24. Moreover, this court has had a long-standing policy of non-intervention so as to avoid interrupting the pre-trial litigation process, especially where the order is made by a case management judge. As Donald J.A. held in *Roback Industries Ltd. v. Gardner*, 2006 BCCA 395 (in Chambers):

> [13] This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.

[12] See also: *Haida Nation* at paras. 19–21; *Director of Civil Forfeiture v. Lloydsmith*, 2014 BCCA 72 at paras. 25–26.

The case management judge's decision

[13] There were several applications before the case management judge, all stemming from disputes about document discovery and production. The applicable rule under the *Supreme Court Civil Rules* was Rule 7-1, more particularly Rules 7-1(1) and 7-1(22).

[14] Rule 7-1(1) requires "each party of record" to prepare and serve a list of documents within 35 days following the end of the pleading period, unless the court otherwise orders. In this case, the pleading period ended on May 16, 2018.

[15] Rule 7-1(22) allows a judge to order that an issue be determined before document discovery "if 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".

[16] The defendants sought an order striking the Director's Notice of Civil Claim and dismissing the proceeding for his failure to comply with his document disclosure obligations under Rule 7-1(1). Alternatively, they sought an order postponing their document discovery under Rule 7-1(22) to permit them to determine whether any issues arose under the *Canadian Charter of Rights and Freedoms*, or an order extending time for them to produce lists of documents on a "rolling basis" at six-month intervals; and an order that the Director deliver a list of documents within 14

days. They also sought declarations concerning the interpretation and application of the limitation period under s. 35(1) of the *CFA*.

[17] The Director cross-applied for an order that his obligation to list his documents be postponed until the defendants listed their documents, or until a further order of the court.

[18] The case management judge dismissed all of the defendants' applications, allowed the Director's postponement application, and ordered that all parties produce a list of documents within 45 days. It is only the latter order that is the subject of the leave application before me.

[19] With respect to the application for postponement of document discovery, the judge found that the defendants had not yet established any basis to allege a *Charter* violation and noted that they had not brought any application for bifurcation of a *Charter* issue concurrent with their application to postpone their discovery. She considered numerous decisions where the court had exercised its discretion to postpone discovery, and stated:

> [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.

[20] The judge considered the arguments of the defendants to delay their document production to be based entirely on speculation that there were *Charter* breaches, they would plead *Charter* breaches, they would apply for bifurcation to decide the *Charter* issues before other issues, and the *Charter* issues may give rise to *Charter* remedies that had the potential to end the litigation.

[21] The judge rejected what she considered to be the defendants' argument that document production in civil forfeiture proceedings generally "should be subject to a

completely different paradigm than in normal civil proceedings". She saw nothing unique in the circumstances to 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". She summarized her conclusion at para. 61:

> [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".
>
> [Emphasis in original.]

[22] The judge concluded that document listing and production should proceed by all parties as soon as possible. She appreciated PacNet's concerns about the volume of document production but considered this volume "not entirely unusual" in cases involving businesses like this. She did not view these as obstacles that should limit document production, "at least at this stage". Given that there had been substantial delay in the proceedings, she ordered that all parties exchange lists of documents within 45 days and resolve outstanding document-production issues in discussions.

Analysis

[23] The submissions of all parties focused primarily on the merits criterion. I have assessed the submissions within the context of the criteria required for leave, but the foregoing discussion demonstrates that the lack of merit permeates the analysis.

1. Significance to the practice

[24] The defendants submit that the appeal is important to the practice because it engages for the first time the question of the Director's disclosure obligations in civil proceedings in the absence of a criminal charge that would have triggered disclosure under the principles established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Although they accept that civil forfeiture proceedings are subject to the

Supreme Court Civil Rules, they say that the nature of these proceedings requires a substantially different approach to their application. They submit that *Stinchcombe*-like disclosure principles should apply in civil forfeiture proceedings. More particularly, they contend that the Director should be required to list and produce his documents before they are required to list and produce theirs. The only authority they cite to support their position is *Stinchcombe*.

[25] Counter to this are the Director's submissions that there is nothing significant or even unusual about a corporate entity having an obligation to disclose a large number of documents in a civil proceeding, that the order was routine, and that the law on the exercise of a judge's discretion under document production rules is well-settled.

[26] I appreciate the concerns expressed by the defendant parties regarding the interplay between a civil forfeiture proceeding and the criminal law. However, there is no dispute that a civil forfeiture proceeding is a civil, not a criminal, matter, and the *Supreme Court Civil Rules* govern the procedures of such proceedings.

[27] Recent jurisprudence demonstrates that the *Rules* provide considerable flexibility to enable trial judges to effectively manage civil forfeiture proceedings and address the kinds of issues raised by the defendant parties here: see *British Columbia (Director of Civil Forfeiture) v. Huynh,* 2012 BCSC 740; *Lloydsmith*; *Civil Forfeiture (Director) v. Johnson,* 2015 BCSC 1217; *British Columbia (Director of Civil Forfeiture) v. Cronin,* 2016 BCSC 284; *British Columbia (Director of Civil Forfeiture) v. Thandi*, 2018 BCSC 215; and *British Columbia (Director of Civil Forfeiture) v. Nguy*, 2018 BCSC 1621. As Saunders J.A. observed in *Lloydsmith*, civil forfeiture proceedings have been instituted against persons who have been neither charged nor convicted of criminal offences, where they face risks not only of losing property but also of being labelled for criminal behaviour:

> [13] … This jeopardy arises from evidence gained by police using their special authority but without the case ever having fed into the criminal proceedings stream, with the defendant now caught in a proceeding that requires presentation for cross-examination at an examination for discovery. All of this is allowed by the legislation. 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.
>
> [Emphasis added.]

[28] In my view, this passage demonstrates a recognition by this court that the *CFA* allows these matters to proceed as civil proceedings but that the *Rules* have provided an avenue for defendants to challenge state action and seek *Charter* remedies.

[29] Relevant to this case, Rule 7-1 provides discretion to judges to make orders relating to the discovery and inspection of documents. The case management judge rejected the defendants' proposition that document production in civil forfeiture proceedings generally should be subject to a completely different paradigm than in normal civil proceedings. I do not disagree with the defendants that the question of whether the judge was right to do so would be of significance to the practice in civil forfeiture proceedings. However, their articulation of how case management and trial judges would be required to consider *Stinchcombe*-like obligations in this context lacks precision, and as I discuss below, their broad proposition is bound to fail in the circumstances here.

2. Significance to the action

[30] The defendants submit that the appeal is significant to the action because they are unable to make out a *prima facie* case on bifurcation without the Director's documents. Therefore, the judge's refusal to postpone their document discovery impedes their ability to seek *Charter* remedies, and risks incurring the damage a bifurcation application is intended to protect against.

[31] The Director submits that the appeal is of no significance to the action, as the defendants can apply for bifurcation or a sealing order when the issue is ripe, and in any case, they are protected by the implied undertaking not to use disclosed

materials for another purpose. He also submits that the defendants know the case they have to meet from other proceedings in which they have been involved.

[32] These issues are of course important to the defendants, but I find no merit in their submissions. The case management judge considered but rejected the defendants' argument that by not postponing their document discovery, they would be deprived of the opportunity to seek *Charter* relief as the litigation proceeds. She noted (at para. 56) that they may raise *Charter* issues and seek bifurcation at any stage. I see no basis on which this court could disagree with this conclusion. If the defendants later decide to raise issues of *Charter* violations, the focus will be on the state's conduct. Whether or not the remedy of excluding evidence would be available is a question that is too speculative to consider in the context of this application.

[33] Moreover, as discussed further below, this is not a case where the defendants have no knowledge of the case against them, including the manner in which the authorities have gathered evidence. PacNet has been the subject of investigation in numerous jurisdictions relating to the processing of payments for fraudsters and has been the subject of search warrants executed as recently as 2016. In the materials filed in this application, PacNet confirms that it is challenging the validity of search warrants granted in September 2016 under the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.), and the *Mutual Legal Assistance Treaty* (MLAT) and executed by the Canadian Competition Bureau (CCB) and the Vancouver Police. On this point, the judge observed:

> [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.

[34] Given the extent of the information known to PacNet, the claim that the defendants cannot properly make out a *prima facie* case on bifurcation without the Director's documents is simply a bare assertion.

3. Merits

[35] The defendants submit that the appeal is meritorious because the case management judge failed to apply *Stinchcombe*-like obligations to the Director, improperly imposed a requirement that document production be "symmetrical", and failed to consider that the speculative nature of the defendants' *Charter* issues itself stemmed from the need to consider the Director's documents in advance of bringing a bifurcation application. They also submit that the judge failed to give any weight to the evidence about the enormous scope of document production for PacNet and the Day parties.

[36] In the Director's submission, the proposed appeals have no merit, as the judge properly exercised her discretion under Rule 7-1(22), and decisions about document production by a case management judge are entitled to great deference. He emphasizes that the defendants failed to provide any basis on which the judge could properly exercise her discretion to postpone document production.

[37] As I will explain, it is my view that the defendants have not identified "a good arguable case of sufficient merit to warrant scrutiny by a division of this court".

Stinchcombe-like disclosure obligations

[38] The defendants' articulation of how *Stinchcombe*-like obligations should be considered in the context of document production in civil forfeiture proceedings is simply that the Director should be required to list and produce his documents before they are required to list and produce theirs. They have provided no authority or tenable principle to support such a broad proposition. Importantly, this proposition ignores the fundamental difference between the Crown's disclosure obligations in criminal proceedings, and the disclosure obligations of parties in a civil proceeding.

[39] *Stinchcombe* established the Crown's obligation to disclose all relevant information to the defence for the purpose of enabling accused persons to know the case against them and make full answer and defence. Conversely, accused persons have no corresponding disclosure obligation because they are not required to participate in a prosecution against themselves.

[40] This is not a case about the Director's obligation to disclose. His obligations as a plaintiff to submit to document discovery are clearly provided for in Rule 7-1. *Stinchcombe* obligations have no bearing on the obligations of a defendant in a civil proceeding to also submit to document discovery. Concerns about self-incrimination are addressed in different ways in civil proceedings, most notably by the implied undertaking rule that prevents the Director from using compelled evidence for any purpose other than prosecuting this action. While the implied undertaking does not address the defendants' concerns about incriminating themselves in this proceeding, the jurisprudence recognizes that the actions of the state that result in evidence being used in a civil forfeiture proceeding are subject to the requirements of the *Charter*.

[41] The defendants sought to distinguish this case from *Huynh, Lloydsmith, Johnson, Cronin* and *Thandi* on the basis that no criminal charges were ever laid against them, with the consequence that they never received *Stinchcombe* disclosure, and that most of the cases involved discrete challenges to search warrants. However, as already noted, this is not a case where the defendants have no knowledge of the case against them. In her reasons, the case management judge referred to the background as described in her Sealing order reasons, which set out in some detail the court proceedings faced by PacNet in various jurisdictions, starting in 2007. These included significant litigation in the United States and civil forfeiture proceedings in Ireland. PacNet confirms some of this in its materials filed in support of this application and provides some detail about investigations in the United States, aided by the MLAT search warrants referenced above. It also describes sanctions imposed by the U.S. Office of Foreign Assets Control (OFAC) in September 2016 and later rescinded in October 2017.

[42] In the Particulars reasons at paras. 108–10, the case management judge stated:

> [108] As the saying goes, this is not PacNet's "first rodeo" in relation to allegations as to its involvement in fraudulent direct-mail schemes.
>
> [109] The evidence adduced in this litigation to date is that PacNet and Ms. Day have been well aware for the past two decades that PacNet has processed payments for fraudsters. PacNet has been ensnared in litigation around the world involving its clients. PacNet has had substantial legal representation in respect of extracting themselves from those proceedings.
>
> [110] A cursory review of documents filed in those other legal proceedings would not leave any doubt in a reasonable person's mind as to the general nature and circumstances of the schemes that were the subject of the proceedings against the fraudster PacNet clients. When these schemes, as described in Det. Mah's affidavit, are laid bare, no one, let alone the defendants, suggests that they are anything but fraudulent and predatory schemes meant to defraud victims of their money.

[43] The defendants go further, however, and assert that they have no way to assess whether the information relied on by the Director was properly obtained. In this regard, they seek information as to the sources of the Director's information and whether there was any improper communication between the Director and police agencies. This argument is based on information contained in an affidavit of Detective Dwain Mah, filed by the Director in support of his application for an IPO, but not before the court in this application. In my view, these are speculative concerns that go beyond the purview of this application.

[44] Given all of this, the defendants' argument that the Director should be subject to *Stinchcombe*-like disclosure obligations in the circumstances here is bound to fail.

Symmetrical document production

[45] Related to this is the defendants' submission that the judge improperly imposed a requirement that document production be "symmetrical". In my view, this argument is also bound to fail.

[46] The judge's reference to symmetry, which reflected the Director's position, was made in the context of the defendants' application to strike the Notice of Civil Claim and dismiss the proceeding because of the Director's failure to comply with

Rule 7-1(1) by not filing and serving his list of documents within the 35-day time requirement. Noting that none of the parties had prepared and served a list of documents within the time limit, the judge described what became a "regrettable impasse between the parties":

> [12] … 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.
>
> [Emphasis added.]

[47] Despite this impasse, the judge considered that the parties had all acted reasonably in bringing this dispute forward and found the Director's position to be understandable:

> [15] 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.

[48] I do not read these comments as requiring document production to be "symmetrical". In my view, the judge's reasons show only that she was not prepared to dismiss the proceedings given the director's explanation, recognizing that the document production obligations under Rule 7-1 are independent obligations of each party. Moreover, the reasons also show that the judge recognized the possibility that document discovery for a party could be postponed in certain circumstances, thus eliminating a requirement for "symmetry".

Dismissal of the defendants' postponement application

[49] The problem complained of, as expressed by PacNet, is that by refusing postponement, "PacNet risks incurring the damage that the bifurcation application is intended to protect against". However, the defendants have not identified any error in principle in the case management judge's exercise of discretion in dismissing their

application under Rule 7-1(22), other than a failure to apply *Stinchcombe*-like disclosure obligations.

[50] The case management judge recognized that a *Charter* violation by the authorities can be a proper basis for excluding evidence in the civil forfeiture context. She reviewed the jurisprudence relevant to applications to bifurcate *Charter* issues and postpone discovery: *Huynh, Lloydsmith, Johnson, Cronin, Thandi* and *Nguy*. The problem she identified is that the defendants were seeking a postponement, not on the basis of an issue that justified bifurcation, but rather on the basis that *Charter* issues may arise in the future. She considered this to be speculative, constituting postponement of document discovery "in the abstract". Moreover, she did not accept the defendants' assertion that they were unable to make out a *prima facie* case on bifurcation without the Director's documents, and as discussed above, the defendants' submission to the contrary lacks merit.

[51] The jurisprudence on bifurcation and postponement of discovery, relied on by the defendants both before the case management judge and in this court, does not assist them. The applications in those cases were made under Rule 12-5(67), which permits a trial judge to "order that one or more questions of fact or law arising in an action be tried and determined before the others". In *Lloydsmith*, the procedures employed below had been unclear, and Saunders J.A. determined that the bifurcation order was made under the case planning Rule 5-3(1)(p), which permits the judge to authorize or direct the parties "to try one or more issues in the action independently of others". Either way, in all of the cases, an ancillary order was made to limit examination for discovery and in *Huynh* and *Thandi*, the same limit was placed on document discovery. It is important in my view that the limits on discovery *followed* the bifurcation order. As the case management judge recognized, any limits on document discovery were to be defined by the issue that was to be determined first. In this case, the defendants' approach foreclosed a proper basis on which the judge could exercise her discretion. They were simply seeking to postpone document discovery until they were able to determine if the Director's documents disclosed any *Charter* breaches.

[52] As this court noted in *Lloydsmith* (at paras. 22–26), the criteria on bifurcation (or severance) have been established for some time, and such decisions engage the discretion of the judge in the management of the trial process, to whom deference must be shown. Since *Lloydsmith*, the law on bifurcation to accommodate *Charter* issues in civil forfeiture proceedings has become quite developed: see *Johnson, Cronin, Thandi*. I am unable to accept the argument of the Ferlow parties that the judge's reasons on postponement effectively "gut" this well-developed law.

[53] Within this context, the defendants' argument that the judge erred in failing to apply *Stinchcombe*-like disclosure obligations is bound to fail. I see no basis on which this court could interfere with the case management judge's exercise of discretion in refusing to postpone document discovery on such a broad basis.

Order that all parties produce lists of documents

[54] In ordering the parties to exchange documents within 45 days, PacNet and the Day parties submit that the judge failed to give any weight to the evidence adduced by PacNet about the scope of its document production and the time and cost associated with it. They refer in particular to evidence that the Vancouver Police, pursuant to the MLAT search warrants, seized 82 boxes from their premises, three of which were subject to claims of solicitor-client privilege, and transported 79 of those to the CCB office in Vancouver. They also refer to the seizure of an additional 364 boxes of historical documents that remain in the custody of the CCB. Of these documents, PacNet received DVD copies of the 79 boxes but no copies of the 364 boxes.

[55] The case management judge was aware of these difficulties but concluded that these obstacles should not limit document production "at least at this stage":

> [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[y] six months.

[56] She expressed the view that "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" (at para. 69) and provided some helpful suggestions:

> [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.

[57] The judge also recognized that if PacNet were not in possession of its seized documents (such as the 364 boxes of historical documents), it would be unable to list them, subject to whether there were reasonable means to obtain copies.

[58] The judge expressed the view that document listing and production should proceed by all parties as soon as possible, but her order was limited to the exchange of lists of documents within 45 days.

[59] Again, the defendants have not established any basis upon which this court could interfere with the case management judge's exercise of discretion.

4. Will the appeal unduly hinder the progress of the action?

[60] The defendants submit that an appeal will not unduly hinder the progress of the action in that no trial date has been set and an interim preservation order is in place until at least May 13, 2019. The Director is concerned that allowing leave in

the context here will effectively hinder progress in an action that has already been considerably delayed, as recognized by the case management judge.

[61] While the Director's concerns are justified, I would not consider this factor to militate strongly against the defendants.

Conclusion

[62] It cannot be forgotten that the order for which leave to appeal is sought is a discretionary order made by an experienced case management judge in the management of a complex civil forfeiture proceeding. It is a document discovery order that contemplates a further refinement of the issues by the parties.

[63] While I appreciate the concerns of the defendants about the power difference between the parties in a civil forfeiture proceeding, I am not satisfied that they have met their burden of showing that leave should be granted. In the context of this proceeding, where the defendants have a considerable amount of information about the case against them, the proposition that *Stinchcombe*-like obligations should be imposed to require the Director to produce his documents before the defendants produce theirs has no prospect of success.

[64] I add two comments.

[65] The defendants have appealed the case management judge's refusal to order particulars, which is an appeal as of right. I understand that a similar issue of principle will be raised in that appeal, as to whether a novel or unique approach under the *Supreme Court Civil Rules* is required in civil forfeiture proceedings given the matters at stake. The defendants suggested that these issues are "intertwined" and if leave is granted here, the two appeals should be heard together. The Director expressed serious concern that the defendants were attempting to "bootstrap" this application with the particulars appeal. This was an issue I raised with the parties, but upon considering their suggestions and concerns, I have concluded that the particulars appeal is not a factor that should properly be considered in my analysis of

whether leave to appeal should be granted in this application, and I have not done so.

[66] Finally, counsel for the Day parties advised me that since the last hearing before the case management judge, Ms. Day was diagnosed with cancer and has been unavailable to instruct counsel as a result of her surgeries and recovery. What effect this has on the defendants' ability to comply with the orders already made, if any, is a matter that should be brought before the case management judge if necessary.

Disposition

[67] For all of the foregoing reasons, the application for leave to appeal is dismissed. It follows that the application for a stay of proceedings is also dismissed.

[68] I wish to thank all counsel for their most helpful submissions.

"The Honourable Madam Justice Fisher"