IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2019 BCSC 1658

Date: 20190930
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
(Set Aside/Continue Affleck IPO)

Counsel for Plaintiff:	H.A. Mickelson, Q.C. A.L. Doolittle A. Greer
Counsel for defendants PacNet Services Ltd., 672944 B.C. Ltd., Rosanne Day and Gordon Day:	R.J.R. Hordo, Q.C.
Counsel for defendants Peter Ferlow and Ruth Ferlow:	B.D. Vaze
Place and Date of Hearing:	Vancouver, B.C. July 9, 11-12, 2019
Place and Date of Judgment:	Vancouver, B.C. September 30, 2019

I. INTRODUCTION

[1] This civil forfeiture action began in early 2018.

[2] The plaintiff Director of Civil Forfeiture (the "Director") alleges that the defendant PacNet Services Ltd. ("PacNet"), led by the defendant Rosanne Day, was participating in predatory and unlawful direct mail schemes initiated by various fraudsters and that PacNet and the other related defendants have profited by PacNet's involvement.

[3] The Director alleges that amounts paid to PacNet through these schemes are "proceeds of unlawful activities". In addition, the Director alleges that these monies were used by all of the defendants to purchase and maintain certain properties and establish certain bank funds and these assets are also "proceeds". Finally, the Director alleges that the properties are "instruments of unlawful activity" and also subject to forfeiture.

[4] Since February 2018, as the case management judge, I have heard a number of highly contentious applications that have advanced this litigation only to a limited degree.

[5] On February 14, 2018, I granted an *ex parte* interim preservation order (the "February 2018 IPO") with respect to the "Properties" and "Bank Funds" held by the defendants: see *Director of Civil Forfeiture v. PacNet Services Ltd.,* 2018 BCSC 387 (the "IPO Reasons"). The February 2018 IPO was granted under s. 9 of the *Civil Forfeiture Act,* S.B.C. 2005, c. 29 (the "*Act*") and has been extended a number of times. An order under s. 9 may not be made for a time period of greater than 60 days. As of this date, the defendants have not applied to set aside the February 2018 IPO and the Director has not applied for a continuing IPO for this order under s. 8 of the *Act*.

[6] On April 17, 2019, the Director sought and obtained a further *ex parte* interim IPO under s. 9 of the *Act* relating to certain funds owned by PacNet that were in the hands of its accountants. For reasons I will discuss below, this IPO was granted by

Justice Affleck (the "Affleck IPO"). The Director was successful in seizing significant funds under the Affleck IPO, which I understand to be approximately $2.5 million.

[7] The parties have filed competing applications concerning whether the Affleck IPO should be set aside so as to allow for the release of the funds seized to PacNet. In addition, the Director seeks an order continuing the Affleck IPO under s. 8 of the *Act*.

II. ANONYMIZATION OF NAMES

[8] In my previous reasons addressing PacNet's request for a sealing order, I granted PacNet the right to anonymize the identity of its external accounting firm and the principal of that accounting firm: *Director of Civil Forfeiture v. PacNet Services Ltd.,* 2018 BCSC 2070 (the "Sealing Order Reasons") at paras. 52-53, 57 and 59-60.

[9] In accordance with the Sealing Order Reasons, counsel have agreed to designate the accounting firm as "ABC Accounting" and the principal of that firm as "John Doe #4". I have adopted those designations in these reasons.

III. THE APPLICATIONS

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

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

[11] Accordingly, in granting an IPO, the Court must first consider whether there is a serious question to be tried regarding whether or not the property is either an instrument of unlawful activity, proceeds of unlawful activity or both. If the first prong of the test is met, the Court must then consider whether the granting of the IPO

would be clearly not in the interests of justice. If the Director satisfies both aspects of the test, the Court *must* grant the IPO: IPO Reasons at para. 38.

[12] PacNet applies, with the support of the other defendants, to set aside the Affleck IPO on the basis of material omissions by the Director. Broadly speaking, they allege that this Court had no jurisdiction to grant that IPO (and that the Director failed to disclose this to the Court), that the Director misled the Court as to the scope of the IPO and that the Director failed to make full and frank disclosure with respect to certain alleged conflicts of interest.

[13] PacNet's application might be seen as somewhat moot in light of the fact that the Affleck IPO was granted on a temporary basis only, and has been subject to various extensions under s. 9 of the *Act*. In that respect, PacNet might simply have opposed any further extension application by the Director under s. 9 or a continuation of the IPO under s. 8 of the *Act*. However, PacNet now applies for an order that the Affleck IPO be set aside without leave to reapply.

[14] The Director applies to continue the Affleck IPO under s. 8 of the *Act* which would obviate any need to apply for further extensions.

[15] Both applications squarely raise the core issues under s. 8(5) of the *Act*, namely whether there is a serious question to be tried and whether it is in the interests of justice to continue the Affleck IPO.

[16] PacNet concedes on these applications that the Director has met his burden in establishing a serious question to be tried. As I stated in the IPO Reasons at para. 40, this threshold is a fairly low one.

[17] Accordingly, the central issue for determination is whether it is in the interests of justice to continue the Affleck IPO under s. 8 of the *Act*, whether on the basis of the jurisdictional and disclosure issues raised by PacNet in its own application, or otherwise. The burden to meet that test is on PacNet.

[18] I would reaffirm my view that, on an interim application for an IPO intended to simply preserve property pending trial, the defendant must show that the "interests of justice" exception is more than manifestly the case, and even more so than when considering the issue on an application for a final forfeiture order: IPO Reasons at para. 48, citing *British Columbia (Director of Civil Forfeiture) v. Fischer,* 2010 BCSC 568 at para. 12; and *British Columbia (Director of Civil Forfeiture) v. Nguy*, 2018 BCSC 1621 at para. 181.

IV. PROCEDURAL ISSUE

[19] I will briefly address the matter of procedure.

[20] PacNet took the position that its application to set aside the Affleck IPO should be heard and decided before the Director's application to continue the Affleck IPO. PacNet argued that, if it succeeded on its application, the Director's application would be moot. The Director opposed proceeding in that fashion and took the position that his application should be heard and decided first. The Director argued that if his application did not succeed, PacNet's application would be moot.

[21] This Court has previously considered the issue as to the appropriate procedure where there is an intersection of these two applications under the *Act*.

[22] In *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2009 BCSC 322 ("*Angel Acres #2*"), aff'd 2010 BCCA 539, Justice Davies addressed the issue this way:

> [26] I did, however, also rule against the Defendants' application to have their application to set aside the Original Interim Order heard and determined before I proceeded with the hearing of the Director's application for a new continuing preservation order. I did so because I concluded that the procedure suggested by the Defendants was unnecessarily complex and would not allow the efficacious consideration of all of the issues raised by these competing applications.

[23] Justice Davies concluded that the applications should not be considered sequentially and that they should be considered at a combined hearing, recognizing

the different evidentiary issues that apply to the respective applications: *Angel Acres #2* at para. 29.

[24] Justice Myers adopted the same approach when presiding over a combined hearing to address these types of applications under the *Act*: *Director of Civil Forfeiture v. Hobbs*, 2019 BCSC 1344 at para. 3.

[25] Similarly, I concluded that these two applications were substantially intertwined and should be heard at a combined hearing to avoid the complicated and cumbersome procedure proposed by PacNet. I did, however, allow PacNet's counsel to proceed with his submissions in the first instance with respect to both applications, followed by the Director's counsel and then any reply by either party.

V. EVENTS LEADING TO AFFLECK IPO

[26] On April 5, 2019, the Director learned that a bank draft was about to be delivered from PacNet's account in the United Kingdom (the "UK") to ABC Accounting. ABC Accounting, and specifically, John Doe #4, have provided external accounting services to PacNet for many years.

[27] On April 16, 2019, the Director's counsel wrote to the Chief Justice, without notice to PacNet, seeking direction on a proposed *ex parte* application for an IPO pursuant to the *Act*. The Director made the following representations to the Chief Justice:

> Very recently the Director received information from foreign law enforcement that property belonging to or to be held for the benefit of one or more of the Defendants in this action will be arriving in British Columbia on or before the end of this week. As a result, the Director wishes to bring an *ex parte* application pursuant to s. 9 of the *Civil Forfeiture Act*, SBC chapter 29 (the "Act"), to expand the temporary interim preservation order currently in place. The Director wishes to bring this application *ex parte* due to a concern that if the Defendants receive notice of this application the property may be directed to a location outside of British Columbia.

Counsel sought direction from the Chief Justice as to whether the application should be brought before me, as the case management judge, or before another judge of this Court.

[28] According to the Director, the Registry advised that the Chief Justice directed that the application be heard in regular chambers.

[29] The Director's application for the IPO was filed and heard before Affleck J. on April 17, 2019. The focus of the application was the Director's understanding that ABC Accounting was about to receive funds belonging to, payable to, or held for the benefit of one or more of the defendants. The Director sought an IPO to prevent ABC Accounting from disposing or otherwise dealing with any funds held by ABC Accounting for or to the benefit of any of the defendants, including a specific amount that was thought to be imminently arriving from the UK in the form of a sterling bank draft. Specifically, the application related to:

> … any funds or accounts of … ABC Accounting … held for or to the benefit of PacNet Services Ltd., Rosanne Day, Gordon Day, 672944 B.C. Ltd., Ruth Ferlow or Peter Ferlow, including but not limited to the Canadian Dollar equivalent of 309,033.96 Pounds Sterling received from the United Kingdom.

[30] The Director's evidence on the application before Affleck J. as to the merits of his claim against the defendants was substantially what I had already considered and concluded was sufficient to establish a serious question to be tried: IPO Reasons at paras. 121-122. The Director's evidence on this point principally comes from the Affidavit #1 of Detective Mah sworn February 13, 2018.

[31] With respect to the potential transfer of funds to ABC Accounting, the Director submitted the Affidavit #1 of Alan Owen sworn on April 15, 2019.

[32] Mr. Owen is an Officer and Investigator in the Investigations Command of the UK's National Crime Agency (the "NCA") located in London, England. Mr. Owen's evidence on the application was:

> 2. The NCA has an ongoing money laundering investigation in the United Kingdom (the "UK"), which includes an investigation into PacNet Services Ltd. ("PacNet"). As part of that investigation, the NCA has preserved certain PacNet assets in the UK.
>
> 3. Pursuant to that investigation into PacNet, the NCA has received reliable intelligence (the "Intelligence") in relation to the anticipated movement of certain funds to PacNet (the "Funds"). Due to timing issues relating to the

> anticipated transfer of the Funds, the NCA will not be taking legal action to preserve the funds.
>
> 4. The Intelligence indicates that the Funds are to be sent from the UK to PacNet in the form of a Bank Draft in favour of [ABC Accounting] (in trust) … , and that [ABC Accounting] are understood to be accountants for PacNet and hold trust accounts in PacNet's name.
>
> 5. Accordingly, on April 5, 2019, I reached out to the Vancouver Police Department in relation to the anticipated transfer of the Funds to [ABC Accounting]. I did so as I knew there were ongoing investigations into PacNet in British Columbia, including an action for asset forfeiture brought by British Columbia's Director of Civil Forfeiture.
>
> 6. I can say with a high degree of certainty that the Funds will be transferred to [ABC Accounting] on or about April 15, 2019.
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> [Emphasis added.]

[33] Detective Constable Jassal of the Vancouver Police Department (the "VPD") swore that he was advised by Mr. Owen's office that the amount of the "Funds", as defined by Mr. Owen in his affidavit, to be sent by bank draft, was the Canadian dollar equivalent of £309,033.96.

[34] After hearing the Director's submissions, Affleck J. granted the IPO on the terms sought by the Director. The Affleck IPO provided:

> Pursuant to s. 8 and s. 9 of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29, [ABC Accounting] … shall hold and not dispose of, or otherwise deal with any funds or accounts in which funds are held for or to the benefit of PacNet Services Ltd., Rosanne Day, Gordon Day, 672944 B.C. Ltd., Ruth Ferlow or Peter Ferlow, including but not limited to the Canadian Dollar equivalent of 309,033.96 Pounds Sterling received from the United Kingdom, until May 17, 2019 or further order of this Court;

The Affleck IPO provided, in the usual course, that the defendants could apply to set aside the order.

[35] On May 7, 2019, PacNet, Ms. Day, Gordon Day and 672944 B.C. Ltd. ("672") filed applications seeking to set aside the Affleck IPO. On May 10, 2019, the parties agreed to extend the Affleck IPO to June 18, 2019. Since that time, the Affleck IPO has been extended from time to time, all in anticipation of these applications. All extensions have been without prejudice to any rights of the defendants in general,

and specifically, without prejudice to any application that may be brought by the defendants to set aside the Affleck IPO.

VI. BACKGROUND FACTS RELEVANT TO THE AFFLECK IPO

[36] It is helpful, if not necessary, at this stage to set out more background facts relevant to PacNet's funds generally and to the "Funds" described by Mr. Owen.

[37] The background facts are helpful in understanding PacNet's application to set aside the Affleck IPO and also in understanding the "interests of justice" issue in the Director's application.

[38] Some of these facts arise from affidavits filed by PacNet after the Affleck IPO. Some of these affidavits were filed only a few days before this hearing began.

[39] While this new information is helpful to a certain extent in understanding both applications, the evidence in these affidavits was not before Affleck J. and therefore cannot be considered in determining whether the Affleck IPO can be upheld in the circumstances. Facts in these affidavits do, however, include facts relevant to PacNet's allegations that the Director acted improperly in not disclosing certain matters to Affleck J. on the application.

[40] All of these facts were, of course, known to PacNet. ABC Accounting and John Doe #4 were also involved to some degree with respect to PacNet's funds. Finally, some, but not all, of these facts were known to the Director or his counsel at the time of the Affleck IPO.

[41] In the IPO Reasons, I recounted much of PacNet's background leading up my granting of the February 2018 IPO. The relevant aspects of that background are summarized below.

a) Doing Business with Fraudsters

[42] PacNet has been in business since 1994. PacNet and its affiliated companies around the world processed payments for various businesses. Ms. Day is PacNet's president and founder.

[43] Since at least as early as 1997, PacNet and Ms. Day have been involved, to some extent, in various legal proceedings around the world in relation to the nefarious activities of fraudsters. These fraudsters are alleged to have initiated mass-mailings to people around the world with false promises of lottery winnings or other benefits, such as beneficial physic readings, that can only be "claimed" if some small amount of money is sent in. Indeed, some of these fraudsters have been found guilty or liable in that respect in some criminal and civil proceedings.

[44] PacNet was the payment processor of choice for many of these fraudsters or alleged fraudsters. PacNet processed millions of dollars received from the victims of these scams. PacNet itself was very well compensated for its services.

b) OFAC Designation

[45] Despite being drawn into these legal proceedings, PacNet and Ms. Day were not initially directly implicated in these crimes; however, in September 2016 PacNet was designated by the U.S. Department of the Treasury Office of Foreign Assets Control ("OFAC") as a "significant transnational criminal organization" arising from its involvement in these fraudulent mailings. As a result of this designation, PacNet's U.S. assets were seized.

[46] In October 2016, the VPD began an investigation into PacNet and its involvement in these fraudulent mailing schemes. Det. Mah is part of the investigation team.

[47] Since the OFAC designation, other jurisdictions around the world have commenced investigations or proceedings against PacNet.

c) Fallout from OFAC Designation

[48] In a U.S. interpleader brought by PacNet in 2017, PacNet contended that it had ceased doing business in August 2016, one month before the OFAC designation.

[49] Recent evidence from William Leong, PacNet's internal accountant, is that after the OFAC designation, PacNet ceased providing payment services and began winding down its worldwide operations. More particularly, Mr. Leong says that, after the OFAC designations, Canadian Imperial Bank of Commerce ("CIBC") and Vancouver City Savings Credit Union ("VanCity") froze all of PacNet's bank accounts held at those institutions. This resulted in PacNet not being able to pay its operational expenses.

d) Court Action, Direction to Pay and Protocol

[50] To remedy the lack of funds to pay its expenses, PacNet entered into discussions with John Doe #4. PacNet sought to have ABC Accounting receive PacNet's funds at CIBC/VanCity, hold them in trust and later disburse those funds as directed.

[51] Understandably, ABC Accounting and John Doe #4 were agreeable to doing so only after receiving legal advice. ABC Accounting hired David Wende of Gudmundseth Mickelson LLP ("GM Law") to give them that advice, giving rise to the conflict of interest arguments on this application.

[52] On October 27, 2016, PacNet filed a court proceeding in this Court in the Chilliwack Registry to obtain a release of the funds held by CIBC/VanCity (the "Chilliwack Action"). This was done by Peter Roberts, Q.C. of Lawson Lundell LLP, the lawyer and law firm who were representing the Days and 672 in this action until just recently. PacNet and ABC Accounting then entered an agreement so that the Court could be advised of those arrangements before PacNet sought a court order in the Chilliwack Action for the release of the CIBC/VanCity funds.

[53] It appears that Mr. Wende was involved in drafting a direction to pay to be signed by PacNet. Mr. Leong provided a draft authorization and direction to pay. It is unclear if Mr. Wende drafted that document; however, his email suggests some involvement. By that draft direction to pay, PacNet directed ABC Accounting to open an account and, after receipt of the CIBC/VanCity funds, use those funds to pay for

certain (unspecified) PacNet expenses or as directed by PacNet. The direction could only be revoked or modified with the consent of ABC Accounting.

[54] There is no evidence that Mr. Wende was aware of any final and executed direction, nor has such a document been produced on this application if it exists.

[55] On October 31, 2016, PacNet obtained an order from Justice N. Brown allowing a release of the CIBC/VanCity funds to PacNet (the "Chilliwack Order"). At that time, the Court was told that ABC Accounting had agreed to accept the balances held by CIBC/VanCity.

[56] PacNet has also produced an account for services from GM Law to ABC Accounting from November 2016. That account indicates Mr. Wende's involvement in the matter over three days in late October 2016. The account describes that Mr. Wende provided legal advice to ABC Accounting regarding PacNet's court application to obtain the CIBC/VanCity funds and the preparation of the direction to pay.

[57] Mr. Leong also indicates that, in October 2016, ABC Accounting put a protocol in place for the disbursement of the CIBC/VanCity funds from the account intended to be set up as part of these arrangements. In addition, he says that other funds owned by PacNet were deposited at ABC Accounting and have since been disbursed by ABC Accounting in accordance with this protocol.

[58] There is no evidence as to what monies were, in total, received by, and disbursed by ABC Accounting in respect of the funds from CIBC/VanCity and other sources from October 2016-April 2019. In an October 2016 email, PacNet's counsel refers to the amount held by CIBC being just shy of $420,000. Mr. Leong only now very generally states that over $1 million was disbursed in the April 2018-April 2019 time frame.

[59] In addition, there is no evidence that Mr. Wende was aware of the disbursement protocol or the receipt of specific funds by ABC Accounting; nor is there any evidence that Mr. Wende knew that ABC Accounting was to receive, at

that time, or later, funds other than what CIBC/VanCity had on deposit; nor is there any evidence that Mr. Wende was aware as to how funds received by ABC Accounting were disbursed in fall 2016 or later.

[60] In June 2018, Mr. Wende retired from GM Law.

[61] In June 2019, following the granting of the Affleck IPO, GM Law instituted an "ethical wall" restricting all lawyers working on matters for the Director from accessing Mr. Wende's files with respect to his former retainer for ABC Accounting.

e) February 2018 IPO

[62] Upon the filing of this action in February 2018, the Director was able to secure the Properties on an interim basis by filing certificates of pending litigation. The granting of the February 2018 IPO was, however, necessary to secure the Bank Funds, which represented the balances held in bank accounts known to the Director in the name of the defendants other than PacNet.

[63] Based on common sense and the Director's theory of this case, it seems apparent that, if the Director had known in February 2018 that other funds were being held by or on behalf of PacNet by ABC Accounting here in British Columbia, those funds would similarly have been addressed at the time of the application for the February 2018 IPO.

[64] Indeed, at the February 2018 application, the Director's counsel confirmed to the Court that the Director's theory was that PacNet's bank balances had been dissipated after the apparent closing of its business. The Bank Funds seized under the February 2018 IPO were only in the names of the defendants other than PacNet. Counsel indicated to me at that time that he was aware of the Chilliwack Action that allowed the movement of certain PacNet funds to ABC Accounting; however, counsel indicated that after speaking to Det. Mah, he thought it was unlikely that there was any money left in PacNet's accounts.

[65] Accordingly, I accept that on April 5, 2019, when the Director learned of the UK bank draft, this was the first time since February 2018 that the Director strongly suspected that ABC Accounting was indeed continuing to hold funds for PacNet or the other defendants.

f) PacNet and the Funds/Other Funds

[66] Contrary to the Director's belief, PacNet still had substantial funds on hand in the 2018/2019 timeframe. Recent evidence from Mr. Leong describes the following:

a) As of June 2018, Barclays held monies in the UK for PacNet in both U.S. dollars and pound sterling;

b) In June 2018, Ms. Day attempted to direct the sterling funds to a former client, Northway Financial ("Northway"). She was told by Barclays that they would only deposit or send monies directly to PacNet or into a trust account held by PacNet's accountant. Ultimately, she directed that a Canadian cheque be issued to ABC Accounting for the funds;

c) In November 2018, Barclays advised PacNet that the NCA was making an application for an account freezing order and they were unable to pay the monies to or on behalf of PacNet. Ms. Day then confirmed to Barclays that the NCA's application only related to the U.S. funds (confirmed by Mr. Owen in his affidavit) and that PacNet still wished to receive the sterling funds; and

d) In March 2019, Barclays confirmed that they still held approximately US$2.4 million and £308,500, the latter being to cover the claims of Northway and two miscellaneous matters (and which corresponds to the amount of the Funds that Mr. Owen believed was on hand and about to be transferred by bank draft).

[67] John Doe #4 confirms that, on April 29, 2019, ABC Accounting received a bank draft from Barclays. That bank draft was dated April 25, 2019 and in the amount of $532,465.51 (equivalent to £312,241.55).

[68] Since the receipt of further information from PacNet as to the intended use of the monies in the bank draft sent to ABC Accounting, the Director reasonably consented to an order releasing those funds from the Affleck IPO.

[69] Mr. Leong now confirms that the amounts frozen under the Affleck IPO in the amount of approximately $2.5 million were other monies held by ABC Accounting on behalf of PacNet at the time of service of the Affleck IPO. These monies presumably were derived from the CIBC/VanCity funds and/or other sources; however, PacNet and Mr. Leong have chosen not to provide any details in that respect.

VII. PACNET – SET ASIDE AFFLECK IPO

[70] As briefly noted above, PacNet seeks to set aside the Affleck IPO on the following bases:

a) The Director failed to disclose that the Court had no jurisdiction over a substantial portion of the monies, being the “Funds” in the bank draft, that were the subject of the Director’s application;

b) The Director failed to make full and frank disclosure of material facts that ought to have been brought to the Court’s attention; namely, that in late 2016, GM Law, now the Director’s counsel, acted as legal counsel for ABC Accounting in respect of funds to be held and disbursed by ABC Accounting on PacNet’s behalf; and

c) In seeking an order in respect of any funds held by ABC Accounting for defendants other than PacNet, the Director misrepresented the evidence before the Court; for this reason too, the court had no jurisdiction to grant the Affleck IPO on the terms sought by the Director.

[71] There is no dispute concerning the Director's substantial disclosure obligations when bringing an *ex parte* application for an IPO. The Director is required to make full and frank disclosure to the Court of all material facts, including those facts that would detract from or negate the Director's right to the relief sought.

[72] The principles were summarized by Justice DeWitt-Van Oosten (as she then was) in *Nguy*:

> [80] When the Director applies for an IPO on an *ex-parte* and without notice basis, he has an obligation to make full and frank disclosure. The nature of this obligation was discussed in *Angel Acres #2*:
>
> > [52] I have accordingly concluded that when making without notice applications for interim preservation orders under ss. 8 and 9 of the *Act*, the Director must, in good faith, make full and fair disclosure of material facts, including those facts that would tend to diminish the Director's right to the relief sought. The Director must also not misstate or exaggerate the strength of the Director's case or the evidence adduced to obtain the relief sought.
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> [81] In *Ontario (Attorney General) v. $787,940 in Canadian Currency (In Rem)* (2014), 2014 ONSC 3069, 120 O.R. (3d) 300 (O.N. S.C.), the Court helpfully provided the following articulation of "materiality":
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> > 45 The materiality of the facts that need to be disclosed on an *ex-parte* application must be interpreted broadly … "any fact that would have been weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material". …
>
> [82] The duty to make full and frank disclosure in an *ex-parte* proceeding, irrespective of the context in which it arises, was restated by the Court of Appeal for British Columbia in *Kriegman v. Dill*, 2018 BCCA 86:
>
> > [43] … Little is to be gained by trying to formulate the standard in different ways to meet different contexts. The duty is to make full and frank disclosure of all *material* facts -- meaning facts that might be expected to influence the granting or rejection *of the application in question*. Materiality is ultimately to be determined by the court in each particular case; where a lawyer is in doubt, he or she should obviously err on the side of disclosure …
>
> [Emphasis in original.]

[73] The Court's comments in *Nguy* represent what might be described as the "classic" requirements on *ex parte* applications generally, including for IPOs under the *Act*.

[74] However, as the Director argues, not every failure to make disclosure is fatal to supporting an injunction and it is not necessary to refer the judge to every detail in the evidence: see for example, *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator of) v. Akbar,* 2001 BCCA 204 at para. 39-40; *Neumeyer v. Neumeyer*, 2005 BCSC 1259 at paras. 8-15; and *Regal Ideas Inc. v. Haus Innovations Inc*., 2018 BCSC 136 at paras. 30-31.

[75] Moreover, Davie J.'s discussion in *Angel Acres #2* provides a more contextual discussion of the disclosure obligations required of the Director for an interim IPO. Justice Davies considers the relatively brief duration of an IPO and the statutory purposes under the *Act*, finding that other than "fastidious" disclosure is required:

> [50] After considering the submissions of the parties, I have determined that the disclosure obligations upon the Director in the making of without notice applications are, as with any without notice application, very high. However, I also find that those obligations must be assessed against both the statutory property preservation regime established by the ***Act*** and the relatively low threshold evidentiary requirements that the Director must meet to obtain such orders.
>
> [51] I am satisfied that given the very interim nature and short duration of without notice orders that have been statutorily authorized for public interest purposes (which I will later address at some length) it would be wrong to hold the Director to the fastidious disclosure standards that govern the actions of a plaintiff seeking to invoke the Court's equitable jurisdiction to obtain relief that may often amount to pre-judgment execution.
>
> [Bold emphasis in original]

[76] Justice Davies' contextual approach to the disclosure obligations for *ex parte* IPOs in *Angel Acres #2* was expressly adopted by the Court of Appeal at para. 26. In addition, this Court in *Nguy* made this same point in para. 181 in stating that any failure to disclose must be considered within the context of a strong public interest in preserving impugned assets pending trial.

[77] Having considered the matter of disclosure more generally, I will now address PacNet's individual arguments.

a) Did the Court have jurisdiction to grant the Affleck IPO?

[78] PacNet argues that the Director failed to disclose that the Court had no jurisdiction over a substantial portion of the "Funds" that were the subject of the Director's application. PacNet places considerable emphasis on the bank draft, suggesting that it was the "Trojan horse" that allowed the Director to create urgency in justifying the Affleck IPO.

[79] Section 8(6) of the *Act* provides that an application for an IPO "applies only with respect to property or an interest in property located in British Columbia". Here, the bank draft was not located in BC on April 17, 2019 and in fact was not even issued until April 25, 2019, arriving in BC on April 29, 2019.

[80] In regards to the issue of jurisdiction, PacNet argues that the Director's counsel fell far short of meeting his duty of full and frank disclosure in his submissions before Affleck J. in three ways:

a) by failing to clearly articulate the limits on the Court's jurisdiction to grant an IPO under the *Act*;

b) by failing to give the Court a clear picture of evidence concerning the status and whereabouts of the Barclays bank draft; and

c) by failing to make sufficient inquiries to ascertain the actual status and whereabouts of the UK funds in question.

[81] In my view, none of the above arguments have any merit.

[82] As for the first and second arguments, it seems evident enough that the Director was very aware of the jurisdictional requirements under the *Act* and sought to come within those requirements.

[83] Mr. Owen stated that there was a high degree of certainty that the bank draft would enter BC by on or about April 15, 2019. Relying on that evidence, the Director brought his application two days later on April 17, 2019. I agree that the Director

reasonably believed that, as of the date of the hearing before Affleck J., the bank draft had arrived in BC and was therefore, subject to the Court's jurisdiction.

[84] Mr. Owen's evidence was clearly reviewed with the Court during submissions before Affleck J. in terms of what Mr. Owen knew, and as a result, what the Director knew. There was no evidence then, or suggestion even now, that the NCA, the Director or the Director's counsel had any knowledge other than what was stated in Mr. Owen's affidavit.

[85] It is nonsensical to suggest, as PacNet does, that the Director should have told the Court that the bank draft had not arrived in BC. To the point, the Director did not know that.

[86] Having reviewed the transcript of the hearing before Affleck J. in full, I am more than satisfied that the Director's counsel outlined the extent of the evidence at hand and candidly advised the Court that there was, understandably, some uncertainly as to the exact status of the bank draft.

[87] More importantly, the Director's counsel specifically brought the jurisdictional requirement to the attention of the Court and did not assert or mislead the Court into assuming that the Court had jurisdiction over the monies before they entered BC. At p. 14 of the transcript, the Director's counsel stated:

> [I]f what we make out is true and these funds are connected to that activity, then they'd be captured by the definition of unlawful activity, and these would therefore be proceeds. In the same way, to put probably a bad analogy, but if a party who is a subject of a civil forfeiture claim was operating a crystal meth lab in Thailand and obtained $2 million and had that in a bank in Thailand and then was delivering that money to a bank in British Columbia, this *Act* would apply to that property once it enters our jurisdiction. And there's no fine point to be made between it coming into a bank or coming into the accounts, trust account or accounts, however they are holding PacNet -- the proceeds. So that's -- that's the structure.
>
> [Emphasis added.]

[88] I do not accept PacNet's narrow focus that this was only a reference in relation to a discussion of the definition of "unlawful activity" under s. 1 of the *Act*.

Also, I do not accept that there was material non-disclosure by the Director's counsel by not specifically referring to s. 8(6) of the *Act* in the course of his submissions.

[89] Again, based on the evidence at hand, the Director took steps to obtain the Affleck IPO *after* the date on which he believed the "Funds" would be in the jurisdiction, clearly signalling to the Court that, for obvious reasons, there was no certainty that the bank draft had indeed arrived in this province.

[90] As the Director notes, it is an open question as to whether assets which may not yet be in BC, but are expected to later arrive in BC can be the subject of an IPO that preserves those assets once they arrive in the province. It is not, however, a question that can or should be determined on this interlocutory application dealing with allegations of material non-disclosure and without proper legal argument.

[91] As stated above, PacNet's third argument with respect to jurisdiction is that the Director failed to make further inquiries to ascertain the status of the bank draft. PacNet argues that Mr. Owen first contacted the VPD on April 5, 2019, ten days before he swore his affidavit and 12 days before the application was made. PacNet then argues that the Director had both the opportunity and the obligation to inquire further of Mr. Owen, or if necessary Barclays, in order to confirm that the bank draft was even in existence on the date of the application.

[92] In my view, this argument fails to recognize the realities of the situation. Firstly, there is no suggestion that Mr. Owen knew more details regarding the bank draft beyond what is in his affidavit or that he could have even discovered further details by further enquiries. Secondly, it strains common sense to suggest that either the Director or Mr. Owen should have been required to conduct more due diligence concerning the bank draft, including contacting Barclays, before applying for the IPO. Leaving aside issues of bank/customer confidentiality, there was a real risk that PacNet might have been alerted to any inquiries and then taken measures to transfer the funds somewhere else or not transfer them out of the UK at all.

[93] It would be a rare case indeed to require an applicant for an IPO to broadcast in advance its intention to secure funds so as to allow, or even potentially allow, the owner of those funds to take steps to avoid the order by moving these very liquid assets otherwise than as the owner of those funds originally intended.

[94] In any event, PacNet's focus on the bank draft is misplaced and missing the broader context.

[95] The Director's application and the evidence that led to the Affleck IPO was more broadly cast than just in reference to the bank draft. Both the notice of application and draft order sought related to *all* funds held by ABC Accounting, including any arising from receipt of the UK bank draft. This arose from the renewed idea on the part of the Director in April 2019 that perhaps ABC Accounting was indeed still in possession of funds owned by PacNet and/or the other defendants, contrary to the assumption made when the February 2018 IPO was granted.

[96] The Director's counsel made express submissions to Affleck J. to that effect:

> This is an application by the Director for an interim preservation order under the *Civil Forfeiture Act* in relation to funds held in an accounting firm in Vancouver, but <u>in particular</u> funds that my client learned were en route to Vancouver from England and -- and so that's the subject of the order being sought. …
>
> …
>
> So the point is in relation to these – we don't know -- <u>we now believe that there's a basis to say that [ABC Accounting] is holding funds for PacNet above and beyond these monies coming from England</u> …
>
> [Emphasis added.]

[97] I agree that the application before Affleck J. could just have easily been made before me in February 2018 if the Director had been aware then that ABC Accounting was continuing to hold and disburse funds on behalf of PacNet (assuming of course that ABC Accounting was holding funds at that time). In that sense, the overall theory of the Director and the evidentiary basis for the Affleck IPO in terms of alleging that *any money* held by ABC Accounting for PacNet was proceeds of crime, were the same as was before me in February 2018.

[98] The fact that this new inkling by the Director – which in the fullness of time proved to be a prescient one - arose by reason of the UK bank draft does not detract from that reality.

[99] In addition, as stated above, the Affleck IPO was later continued on a temporary basis with the exception of the bank draft. The funds from the bank draft were allowed to be paid to Northway in circumstances where the Director was satisfied that Northway was entitled to the monies. As a result, issues with respect to the bank draft have fallen away.

[100] In summary, I reject PacNet's arguments on jurisdiction.

b) Did the Director fail to disclose a potential material conflict of interest?

[101] PacNet also seeks to set aside the Affleck IPO based on what it says was the Director's failure to disclose a "potential" material conflict of interest. PacNet argues that the role of Mr. Wende at GM Law as counsel for ABC Accounting either:

a) created a disqualifying conflict, because of the professional services that GM Law provided to ABC Accounting (and its role in respect of PacNet); or

b) if it did not give rise to a disqualifying conflict, it gave rise to a duty on the part of the Director to bring to Affleck J.'s attention the information available to GM Law concerning ABC Accounting's role in receiving and managing PacNet's funds.

[102] The matter of Mr. Wende's direct representation of ABC Accounting in October 2016 can be addressed succinctly.

[103] Just as I was told in February 2018, Affleck J. was advised of the Chilliwack Action and specifically, ABC Accounting's involvement in that proceeding toward accepting PacNet funds held by CIBC/VanCity. The Court was referred to the pleadings filed in that action. The Director's counsel advised Affleck J.:

> … My Lord, the significance of [ABC Accounting], if we now go … Ms. Swadron's affidavit number 7 … because there's a certain symmetry to the fact that their intelligence in the UK is saying [ABC Accounting's] receiving this money, and that is because -- I think it was in relation to OFAC, but as a result some banks, I think, in Canada froze funds of PacNet even though they weren't directly subject to OFAC. So PacNet brought a petition … to order that certain banks -- so if you go to paragraph 1 at VanCity, which had these accounts for PacNet and DeepCove and others, that they deliver the funds … to [ABC Accounting].

[104] As set out above, the evidence establishes that Mr. Wende was retained by ABC Accounting and that his involvement was limited to spending some three-and-a half hours advising ABC Accounting in relation to the Chilliwack Action brought by PacNet and the direction to pay.

[105] Again, if the Director had believed that the bank funds that were transferred as a result of the Chilliwack Order were still held by ABC Accounting for the benefit of PacNet in February 2018, I have no doubt that the Director would have sought, and likely obtained, an IPO to seize those funds. In that respect, even assuming that the Director or his counsel at the hearing were aware of Mr. Wende's involvement, I cannot conceive how the failure to disclose Mr. Wende's previous involvement with ABC Accounting was in anyway material to the granting of the February 2018 IPO.

[106] The same can be said for the application before Affleck J. With the new information received from the NCA in April 2019, ABC Accounting's involvement or potential involvement in holding funds for PacNet arose. I fail to see how Mr. Wende's representation of ABC Accounting some two-and-a-half years earlier in 2016 could have been at all material to the issue.

[107] Mr. Wende and GM Law were retained to provide independent legal advice for ABC Accounting. They did not act for PacNet and indeed, the separate retainer can be seen as necessary given ABC Accounting's obvious need to protect its own interests, rather than those of PacNet. Further, the Affleck IPO was with respect to PacNet's funds, not ABC Accounting's funds.

[108] There is no linkage between Mr. Wende's involvement in drafting the direction to pay in 2016 and the reality that, in April 2019, the possibility existed that ABC Accounting was still in possession of PacNet's funds that the Director alleges are proceeds of crime.

[109] ABC Accounting does not allege any conflict on the part of GM Law as a result of Mr. Wende's earlier representation and GM Law's current retainer on behalf of the Director. John Doe #4's very brief evidence on this application is simply to the effect that ABC Accounting retained Mr. Wende to provide advice concerning the Chilliwack Action. He does not allege that GM Law was somehow acting inappropriately as between those two retainers, or for example, that GM Law was using ABC Accounting's confidential information in breach of its professional obligations.

[110] In short, I reject that Mr. Wende's earlier representation of ABC Accounting gave rise to any conflict of interest, let alone any material conflict of interest bearing on the issues considered by Affleck J.

[111] In the alternative, PacNet argues that a conflict arose in that GM Law was in a "near-client" relationship with PacNet. PacNet refers to authorities that discuss potential conflict issues that may arise where there is a "near-client" relationship.

[112] The seminal case on lawyer's conflict of interest is, of course, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. There, the Court stated at p. 1260:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

[113] In *Milverton Capital Corp. v. Thermo Tech Technologies Inc.*, 2002 BCSC 773, Justice Neilson (as she then was) dealt with an application by a former director of a company who sought to remove Clark Wilson from acting as legal counsel for the company and related parties in a conspiracy action, in which the applicants were defendants, and a debt action, in which the applicants were plaintiffs. Previously, the

former director had provided instruction to Clark Wilson on numerous matters before the actions were commenced.

[114] In *Milverton*, the Court discussed the nature of the relationship between Clark Wilson and the applicants. In considering whether a “near client” relationship arose involving expectations of confidentiality that justified prohibiting counsel from acting, Neilson J. stated:

> [50] Cases decided since *MacDonald Estate v. Martin* show that the application of its principles has not been limited strictly to solicitor/client relationships. Restraining orders have also been made against solicitors based on what have been termed "near client" relationships. Where an individual has a commonality of interest or a close association with a client of a solicitor, the same protection has been extended to that person, even if he or she is not, strictly speaking, a client of the solicitor …
>
> [51] That protection is based on the confidential character of the relationship between the lawyer and the applicant. In *Manville Canada Inc. v. Ladner Downs*, [1992] 2 W.W.R. 323 (BCSC), Esson C.J.S.C., as he then was, noted at para. 12:
>
> If the applicant has reposed confidence in a lawyer in circumstances which properly give rise to an expectation of confidentiality, that applicant has an interest in protecting that confidence even if it was not, in the strict sense, a client of the lawyer.

[115] The former director argued that he had shared personal and confidential information with the law firm: para. 62. At para. 68, Neilson J. found that, in the corporate context, the former director’s involvement with Clark Wilson was not a basis for the law firm’s removal.

[116] In *Lutoborska v. Nyquvest*, 2014 BCSC 2541, Justice Gropper at para. 20 stated that where the issue is whether there is a “near client” relationship, it “must be such that a reasonably informed member of the public would conclude that confidential information could be transmitted” (citing Justice McKinnon in *Starr v. Starr*, 2001 BCSC 1132 at para. 11).

[117] The onus remains on PacNet to establish that a solicitor/client relationship or “near-client” relationship existed as a basis for the alleged conflict: *Milverton* at para. 60.

[118] Strangely, PacNet's arguments center on the idea that it has been stymied in its efforts to prove this "potential" conflict. PacNet argues that because Mr. Wende's files have not been produced, it cannot consider the extent of his retainer.

[119] There is absolutely no evidence from John Doe #4 or anyone at PacNet to the effect that GM Law was somehow imbued with confidential information from PacNet or that ABC Accounting was "functionally" acting on behalf of PacNet, so as to give rise to any "near client" relationship. In *Richard Zokol Enterprises Ltd. v. Sagebrush Golf & Sporting Club Ltd.,* 2014 BCSC 1666 at para. 32, this Court held that a bald assertion of a "near client" relationship is insufficient.

[120] No one at PacNet, including Ms. Day or Mr. Leong, has stated that they were relying on legal advice from Mr. Wende. Ms. Day has not sworn any affidavit at all. Mr. Leong does not state in his affidavit that he even spoke at all to Mr. Wende in fall 2016.

[121] There is no evidence from Mr. Roberts, PacNet's now former counsel, that a relationship arose in fall 2016 whereby Mr. Wende assumed duties of confidentiality in relation to PacNet or gave legal advice to PacNet. This is understandable since PacNet was then separately represented by Mr. Roberts.

[122] It is evident enough that John Doe #4 maintains a relationship with PacNet and that he has taken steps to support its position in this litigation both on this application and on an earlier one. As stated above, all John Doe #4 says is that Mr. Wende was acting for ABC Accounting in respect of the Chilliwack Action and the direction to pay. It is strange that ABC Accounting has clearly co-operated in providing Mr. Wende's legal account to PacNet which has been produced on this application; however, PacNet has not produced any other documentation or other evidence from ABC Accounting on this application in respect of the accounting firm's dealings with Mr. Wende. John Doe #4 is strangely silent on this entire issue.

[123] In my view, PacNet has abjectly failed to meet its burden in establishing any "near client" relationship between PacNet and Mr. Wende/GM Law.

[124] The best argument that PacNet can muster is that because of the "functional relationship" between GM Law's client ABC Accounting and PacNet, some of the protections of the solicitor/client relationship *may* extend to PacNet. Again, Mr. Wende's retainer was limited to the Chilliwack Action and the direction to pay. There is no suggestion that Mr. Wende was even aware of the ongoing dealings between ABC Accounting and PacNet, let alone that he continued to give legal advice to ABC Accounting in that respect.

[125] Needless to say, this bald assertion does not amount to an evidentiary basis for establishing any conflict of interest.

[126] As for the material non-disclosure, I fail to see how the Director's counsel could even have guessed that PacNet could advance such a "near client" conflict argument, let alone that it was material to the application for the Affleck IPO. Certainly, the Director and GM Law were not even aware of any such suggestion on the part of PacNet, assuming for the sake of argument that GM Law was aware in April 2019 of the extent of Mr. Wende's retainer for ABC Accounting.

[127] Finally, the matter of Mr. Wende's limited retainer years ago cannot be considered material to the matter of the Affleck IPO. The limited retainer did not materially advance the Director's case; nor did it stand as a potential defence or argument on the part of PacNet. Simply put, not mentioning that historical fact did not allow the Director to advance his arguments for the Affleck IPO. This is particularly so since PacNet's evidence does not even establish that the $2.5 million now frozen even arose from the circumstances of the earlier retainer and the funds transferred to ABC Accounting from CIBC/VanCity in fall 2016.

[128] Accordingly, I reject PacNet's argument that the Director ought to have brought the issue of GM Law having acted for ABC Accounting in fall 2016 to the Court's attention on the *ex parte* application to permit Affleck J. to consider the significance of this "potential" conflict of interest. There was no conflict of interest and no material non-disclosure.

c) Did the Director misrepresent evidence concerning the other defendants?

[129] PacNet also argues that the Director's counsel misrepresented the evidence before Affleck J. in terms of casting the application for the IPO more broadly to not only PacNet, but the other defendants.

[130] The notice of application and the Affleck IPO sought to and did freeze funds held by ABC Accounting for both PacNet and all other defendants.

[131] PacNet argues that, to meet the test for an IPO, in particular the "serious question to be tried" requirement under s. 8(5) of the *Act*, the Director was required to present evidence as to the existence of the property the Director sought to seize. PacNet then argues that, in respect of all of the defendants *other than PacNet*, the Director failed to meet this minimum threshold on the evidence adduced before Affleck J.

[132] PacNet points out that Mr. Owen's evidence was only to the effect that the Funds to be transferred via bank draft were for the account of PacNet. In addition, the evidence before Affleck J. with respect to the Chilliwack Action only referred to PacNet funds being transferred to ABC Accounting, not funds belonging to any of the other defendants.

[133] I fail to see how the Court could be said to have been misled on this issue.

[134] Mr. Owen's evidence and the material relating to the Chilliwack Action were specifically raised before the Court. I cannot conclude that the Director's counsel acted inappropriately in setting forth that evidence to the point of being misleading. Despite the evidence that the Funds were held by PacNet, neither the Director nor his counsel could have known to whose benefit that bank draft would be payable or if there were other funds at ABC Accounting held for the benefit of one or more of the other defendants. Nor did the Director's counsel state that the funds to be seized *were* held for the benefit of the defendants other than PacNet.

[135] In addition, the broader realization in April 2019 arising from the intelligence received by the Director from the NCA – that ABC Accounting may still be involved in holding monies for PacNet – also reasonably gave rise to the suspicion that these funds might be held for not only PacNet, but some of the other defendants. This is somewhat reasonably supported by the information coming from PacNet that it had ceased doing business some years earlier.

[136] The Director named the other defendants in this action, alleging that the sole source of all of their incomes was PacNet. In that sense, the broad net cast by the Director in this action has its origins in the theory that, while PacNet was technically the initial recipient of the funds from the fraudsters, those funds were disbursed to some degree to the other defendants.

[137] I accept the Director's submissions that, in respect of the Affleck IPO, this wide net was cast by referring to "any funds or accounts" held by ABC Accounting for PacNet or any of the other defendants in order to prevent any technical argument that certain funds were not frozen by the IPO because, for example, they beneficially belonged to one or more of the other defendants. Although in hindsight, given the highly circumscribed evidence of Mr. Leong on that point, there is considerable uncertainty as to how ABC Accounting was disbursing the funds it held. It is entirely possible that these funds were being distributed to other defendants, including Ms. Day, or held for their benefit by ABC Accounting.

[138] Moreover, this action is an *in rem* action against the impugned funds based on alleged unlawful activity: *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940 at paras. 35-36. The funds were and are the target of the Affleck IPO. The action does not include any *in personam* claims against PacNet or the other defendants. They are required to be named as parties if they claim an interest in that property: See the *Act*, s. 4. In that sense, the Director's counsel's reference to the funds being held by PacNet, and/or the other defendants, was simply to flag these potential claimants to the funds.

[139] Having now obtained evidence as to the source of the Funds, and with no suggestion by any other defendant that the $2.5 million was owned by any other defendant, the IPO extension granted on July 12, 2019 now only refers to PacNet, as agreed by the Director.

[140] I fail to see how casting the Affleck IPO more broadly than was necessary, only now determined in hindsight and only very recently disclosed by PacNet just days before this hearing, can be a basis upon which to set aside the IPO. I would reiterate at this time the broad public policy purposes under the *Act* in preserving disputed property pending trial and a final determination of the issues in this litigation: *Nguy* at para. 181.

d) Summary re Set Aside Application

[141] Could the evidence on the application have been more fulsome? Could the submissions have been more detailed with reference to s. 8(6) of the *Act*? Could the submissions have included a reference to Mr. Wende's representation of ABC Accounting? Could the submissions have confirmed more directly to the Court that there was no direct evidence that the bank draft was payable to anyone other than PacNet?

[142] Clearly, yes. However, perfection is not required on such an application, particularly when counsel are moving quickly to secure relief that might be fleeting: *Neumeyer* at para. 14. While the matter is considered in hindsight, the high disclosure expectations on the part of the Director must be considered in context with a view to the strong public interest in preserving impugned funds pending trial.

[143] Here, even accepting some mild criticism of the Director's submissions (which I do not), this case does not in any way reach the level of criticism considered by this Court in *Nguy*. There, the material non-disclosures were highly relevant to whether the IPO should be granted. At paras. 182-183, DeWitt-Van Oosten J. concluded that, in the "unique circumstances" of that case, continuing the IPO would not accord with the community's sense of fairness. Implicitly, she decided that it was "clearly" not in the interests of justice to continue the IPO.

[144] I see absolutely no parallel between the circumstances considered in *Nguy* and those here.

[145] In summary, I reject all of PacNet's arguments in support of setting aside the Affleck IPO. In that event, it is unnecessary to address PacNet's argument that the Affleck IPO should be set aside without leave to reapply.

e) Receiver Manager

[146] Based on the materials delivered by PacNet's counsel on July 5, 2019, including Mr. Leong's affidavit, PacNet now argues that, in the alternative, ABC Accounting could be appointed by the Court to continue managing and disbursing funds as a receiver manager. PacNet argues that, since October 2016, ABC Accounting has managed and disbursed funds on behalf of PacNet in facilitating the orderly wind-down of PacNet's multi-national operations.

[147] I am also advised that the potential issue of allowing certain payments from the frozen funds has been discussed between counsel from time to time following the granting of the Affleck IPO.

[148] There are considerable difficulties in addressing such a suggestion within the context of these applications.

[149] Firstly, there is no specific application brought by PacNet on proper notice and with proper evidence. In the highly contentious nature of these proceedings, it would be very unusual to proceed in that fashion, without the consent of the Director, which is not forthcoming.

[150] Secondly, the *Act* provides the Court with jurisdiction to appoint a receiver manager in the context of an application for an IPO. Section 8(3)(c) provides that the Court may grant:

> (c) an order appointing a person to act as a receiver manager for property or the whole or a portion of an interest in property;

[151] Section 8(3)(i) of the *Act* also allows:

> (i) subject to subsection (8), any other order that the court considers appropriate in the circumstances.

[152] Section 8(8) of the *Act* is directed at s. 8(3)(i) and provides:

> (8) The court must not make any order under subsection (3) (i) that would directly or indirectly reduce the amount of money that would otherwise result from the disposition of the property or the whole or a portion of the interest in property on its forfeiture under this Act.

[153] The Director argues that allowing PacNet to further dissipate these funds, even for what one may argue is a legitimate corporate purpose, would be entirely contrary of the intent of the *Act* and particularly, s. 8(8). PacNet argues that, since s. 8(8) does not refer to s. 8(3)(c), there is no restraint in respect of appointing a receiver manager who could disburse or reduce the amount of money held.

[154] Generally speaking, I consider that the relief granted under s. 8 of the *Act* must be dictated by the statutory purposes of the *Act* which include preserving property pending a final determination. In *Fischer*, this Court stated:

> 22 … The clear intent of s. 8 if to ensure that defendants cannot dispose of or otherwise affect the subject property so that its value is diminished and the forfeiture action becomes moot or not viable.

In *Fischer*, the Court at paras. 22-25 was considering the defendant's request to mortgage the subject property to fund his legal fees. Justice Punnett found that a mortgage would diminish the value of the property and was, therefore, contrary to the intent under the *Act*.

[155] Accordingly, it is far from clear whether a receiver manager appointment under the *Act* is intended to allow disbursements of funds held, as opposed to simply management of those funds, and if such disbursements were allowed, to what extent. In my view, it would be inappropriate to consider such relief in the absence of proper materials, including a specific proposed form of order outlining the contours of the receivership, and more fulsome arguments on the issues.

[156] Thirdly, as I mentioned to PacNet's counsel during argument, Mr. Leong's evidence falls short of what the Court would require on an application to appoint a receiver manager in ordinary circumstances, let alone these unique ones.

[157] Here, PacNet's unformed and impromptu suggestion is that Mr. Leong/ABC Accounting should be allowed to continue doing what they were doing before. The difficulty is that what ABC Accounting was doing with the funds at PacNet's direction to this point is far from clear, a vagueness that I can only conclude was deliberate. For example, there is a reference to PacNet/ABC Accounting having paid $351,223 for "employee salaries" and $426,153 in "fees for professional services, including accounting and legal" over the last year. Who received these salaries and for what services? Who was paid these fees and for what services? We do not know.

[158] If PacNet is proposing to use these funds to pay legal costs to defend this action, the issue is squarely raised as to whether that is a proper use of funds seized under the *Act*, particularly in light of s. 8(8). Arguably, the circumstances are analogous to those discussed in *Fischer* where the mortgage, which was refused, was intended to fund legal fees to defend the action.

[159] Furthermore, PacNet did not advise this Court what it intended to do with the $2.5 million held by ABC Accounting, either specifically or generally. It would clearly be inappropriate to accede to PacNet simply being allowed to deal with the funds, through ABC Accounting, as it sees fit, if that is what is being proposed.

[160] In summary, I make no determinations on any issues relating to a possible receivership relating to the funds held by ABC Accounting at this time. PacNet is of course at liberty to apply in that respect again based on proper notice and proper materials to be served on the Director.

VIII. DIRECTOR – CONTINUE THE AFFLECK IPO

[161] The Director seeks to continue the Affleck IPO under s. 8 of the *Act*.

[162] As stated above, there are two prongs to the test under s. 8(5) of the *Act*. First, the Director must satisfy the court that there is a serious question to be tried. If the Director meets this low threshold, under the second prong of the test, the Court must grant the order unless the defendant proves that it is "clearly not in the interests of justice". There is no residual discretion for the Court to do otherwise: *Nguy* at para. 86.

[163] As stated above, PacNet does not dispute that the Director has satisfied that there is a serious question to be tried. This was my earlier determination in the February 2018 IPO Reasons. The first prong of the test under s. 8(5) of the *Act* is met in this case.

[164] In addition, as to the merits, the Director has put further evidence before the Court in support of his claim. The most recent affidavits filed refer to further legal proceedings against various alleged fraudsters, including some already identified in Det. Mah's affidavit #1. Also of particular note is that, on June 20, 2019, the U.S. Department of Justice filed a criminal indictment against a number of persons, including Ms. Day. The allegation in the indictment is that PacNet has processed payments for mass-mail clients and that its management, including Ms. Day, knew that these payment had been induced by fraudulent mailings designed to mislead victims.

[165] With respect to the second prong, the approach of the Court regarding the "interests of justice" factors in the context of granting an IPO was considered by Davies J. in *Angel Acres #2* at paras. 219-229. He stated that these factors include not only the interests of the parties to the litigation, but other broader societal interests.

[166] I agree with the comments of Punnett J. in *Fischer* at paras. 21-22, following *Angel Acres #2*, that this issue is to be decided on a case-by-case basis and based on all relevant factors, including:

a. the plaintiff's interest in preserving the property;
b. the defendant's interests in possessing and using the property;

c. the interests of any uninvolved interest holders in ensuring that their interests in the property are protected;

d. society's interest in protecting individual property rights;

e. the purposes of the *Act*; and

f. the nature and effect of the order requested.

[167] Here, PacNet has failed to establish any basis upon which to conclude that continuing the Affleck IPO is clearly not in the interests of justice, including on the basis of its allegations, which I have rejected, concerning the scope and extent of the Director's evidence and submissions before Affleck J.

[168] I conclude that the second prong of the test under s. 8(5) of the *Act* has been satisfied. In my view, it is appropriate to continue the Affleck IPO given the purposes under the *Act* in preserving impugned property pending a final determination on the merits. This order recognizes the competing interests with respect to the funds seized under the Affleck IPO and simply maintains the status *quo* until that time.

IX. CONCLUSIONS AND ORDERS

[169] The applications of PacNet, the Days and 672 to set aside the Affleck IPO are dismissed. In addition, their application dated July 5, 2019 to adjourn the Director's application is also dismissed.

[170] The Director's application to continue the Affleck IPO under s. 8 of the *Act* is granted on the terms sought.

"Fitzpatrick J."