

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*,
2023 BCSC 1113

Date: 20230628
Docket: 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

- and -

Docket: S198131
Registry: Vancouver

Between:

Director of Civil Forfeiture

Plaintiff

And

The Owners and All Others Interested in the Properties, in particular Genevieve Renee Frappier, Miles Colville Kelly and Fiona Kelly

Defendants

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment (re VPD Documents)

Counsel for Plaintiff:

A. L. Doolittle
G. Boothroyd-Roberts

Counsel for the Defendants: K. Carteri
K. Strong

Counsel for the Vancouver Police Department: D.T. McKnight
N. Krueger

Place and Date of Hearing: Vancouver, B.C.
May 29-30 and June 1, 2023

Place and Date of Written Reasons: Vancouver, B.C.
June 28, 2023

INTRODUCTION

[1] These actions are significantly contested civil forfeiture proceedings arising from the business operations of the defendants PacNet Services Ltd. All of the defendants in both actions are represented by the same counsel and, for ease of reference, I will refer to them collectively as “PacNet”.

[2] There have already been a large number of interlocutory applications to resolve procedural issues and this application is yet another.

[3] PacNet applies for an order compelling the Vancouver Police Department (“VPD”), who is not a party, to disclose and produce documents in its possession, as may be relevant to the issues in this litigation, subject to any claims of solicitor-client privilege.

[4] Both the plaintiff, the Director of Civil Forfeiture (the “Director”), and the VPD are opposed to such relief.

BACKGROUND FACTS

[5] PacNet was in the business of processing payments for various businesses. Most of the individual defendants were part of the management or employee groups who operated PacNet, led by its president, Rosanne Day.

[6] In 2012, the VPD’s Financial Crime Unit (FCU) began investigations into fraudulent mail order schemes. Those investigations led them to interview PacNet personnel, including Ms. Day and Miles Kelly.

[7] In fall 2016, U.S. authorities took steps against PacNet to seize its assets in the U.S. Various search warrants were also issued in Canada.

[8] In September 2016, the U.S. authorities designated PacNet as a “significant transnational criminal organization” which has been described in these proceedings as the “OFAC” designation. These steps arose from the U.S. authorities’ investigations into PacNet’s activities over those prior years.

[9] In October 2016, the VPD's Asset Forfeiture Team began an investigation into PacNet and its potential involvement in various fraudulent mailing schemes in terms of potential money laundering and proceeds of crime. Around that same time and until June 2019, the FCU conducted a criminal investigation into PacNet and its principals. The U.S. authorities were also investigating PacNet at the same or time or parallel to the FCU criminal investigation.

[10] On August 25, 2017, the VPD, on behalf of the U.S. Department of Justice ("USDOJ"), referred potential civil forfeiture of PacNet's assets to the Director. The Director subsequently accepted the VPD's referral based on its June 1, 2007 "File Referral Acceptance Policy", which specifically refers to compliance with any information-sharing agreement in place with the referring agency (the "Policy").

[11] Pursuant to s. 22(4) of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 [CFA], the Director has the ability to enter into information-sharing agreements:

- (4) Subject to the regulations, the director may enter into information-sharing agreements that are reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act with the following:
 - (a) Canada, a province or another jurisdiction in or outside of Canada;
 - (b) a public body.
- (5) Subject to the regulations, the director is entitled to information that is
 - (a) in the custody or control of a public body prescribed by the Lieutenant Governor in Council, and
 - (b) reasonably required by the director in order to exercise his or her powers or perform his or her functions and duties under this Act.
- (6) A public body that has custody or control of information to which the director is entitled under subsection (5) must, on request, disclose that information to the director.
- (7) This section applies despite any other enactment, but is subject to a claim of privilege based on a solicitor-client relationship.

[12] The "public bodies" referred to in s. 22(4) of the *CFA* are prescribed in s. 8 of the *Civil Forfeiture Regulation*, B.C. Reg.164/2006 and include the "Ministry of Public Safety and Solicitor General".

[13] The Director has information-sharing agreements in place with both the VPD and the USDOJ. The VPD information-sharing agreement is dated August 25, 2006 and the USDOJ information-sharing agreement is dated April 13, 2015. Both agreements are similar and provide, in part:

- a) The VPD/USDOJ may disclose information to the Director on its own initiative or in response to a request from the Director (para. 4.1);
- b) Any disclosure of information to the Director is at the discretion of the VPD/USDOJ, taking into consideration the public interest and in consultation with the Director (para. 4.2);
- c) Prior to disclosing any records to the Director, the VPD/USDOJ will identify and/or sever information that, if disclosed during civil forfeiture proceedings would affect many matters, including that it would (a) harm a law enforcement matter (para. 4.4); and
- d) Where the VPD/USDOJ are conducting an ongoing investigation and the Director is conducting civil forfeiture proceedings at the same time, the Director and the VPD/USDOJ will consult and coordinate regarding communications (para. 6.1).

[14] In June 2019, the U.S. Attorney filed a criminal indictment in the State of Nevada against Ms. Day and other PacNet employees who are defendants, being Renee Frappier and Mr. Kelly, and another PacNet employee who is not named in these actions. The charges include conspiracy to commit mail and wire fraud, among others.

[15] Counsel advised that the U.S. indictment remains extant although the USDOJ has not yet undertaken any concrete steps to advance the prosecution of the charges.

[16] From at least early 2022, PacNet's defence to the Director's claims have included an allegation that these actions constitute an abuse of process. PacNet

alleged that, since late 2016, the VPD had investigated it as a law enforcement agency for the purpose of making a referral to the Director and not in pursuit of a *bona fide* criminal investigation. Further, PacNet alleged that the Director had brought and prosecuted these actions based on evidence gathered by the VPD in its investigation.

[17] In its pleading, in addition to other relief sought, PacNet sought a declaration that s. 22 of the *CFA* was “invalid” on the basis that the sharing of information authorized by that provision would not provide it with sufficient, or any, protection against the dissemination of that information or any information disclosed or discovered in these proceedings.

[18] In late 2021, PacNet’s counsel began requesting that the Director produce a “complete copy of the VPD’s file relating to PacNet”. The Director took the position that it would consent to an order that the VPD file be produced as of the time of referral and not beyond that time. The Director took the position that any other documents held by the VPD were irrelevant and, in any event, presented as an improper attempt by PacNet to gain access to documents relating to a possible ongoing criminal investigation.

[19] Eventually, with input from the VPD, a consent form of order was negotiated, essentially as proposed by the Director but without prejudice to PacNet’s contention that all documents should be produced by the VPD and not just those which were time-limited as required by the Director to the date of referral.

[20] On April 26, 2022, the following consent order was granted (the “April 2022 Order”), by which the VPD was to find, examine and produce all records and documents:

1. ... relating to an investigation into [PacNet], including records containing in particular, but not limited to, any Report to Crown Counsel and all documents referred to therein, and all documents containing communications and/or communications between the VPD and/or any of its officers and other law enforcement or governmental offices, including but not limited to, communications with any branch or department or agent of the United States federal or state government (including but not limited to any office of a state

attorney general), the United States Office of Foreign Assets Control, the United States Postal Inspector, Canada Post, FINTRAC, the Canadian Competition Bureau, [the Director] or any other foreign law enforcement authorities, concerning the investigation into the Defendants, held in the VPD files as of the date of the VPD's referral of its investigation to [the Director], being August 21, 2017 (the "Documents").

[21] The April 2022 Order also provided in para. 2(a) that the VPD was not required to produce documents that were privileged. Further, para. 2(b) provided that the VPD was not required to produce documents where production would be contrary to the public interest, including where it would:

- (i) prejudice the conduct of a criminal prosecution... where the dominant purpose for the creation of the documents is that prosecution;
- ... [or]
- (v) harm international relations ...

[22] Paragraph 9 of the April 2022 Order provided liberty to the parties, the VPD and the Attorney General of BC ("AGBC") to apply to the Court to determine which, if any, "Documents" were required to be produced by the VPD.

[23] Between April–June 2022, the VPD disclosed documents pursuant to the April 2022 Order. These included various witness interview transcripts or summaries from the 2018/2019 timeframe.

[24] In May 2022, the Director disclosed substantial documents from the VPD (over 5,100), which were listed and produced in its list of documents. In other words, the Director has disclosed to PacNet all documents that it has received from the VPD, even those received after the April 2022 Order.

[25] On September 2022, PacNet filed its Amended Response to the Director's Fourth Further Amended Notice of Civil Claim. The pleadings, as relevant here, further engage and challenge the Director's interactions with the VPD, and the USDOJ and the documents received by the Director from those entities, as constituting an abuse of process:

- 32B2. The File Acceptance Policy does not, or in the alternative should not, permit the acceptance of a referral from law enforcement where

there is an ongoing criminal investigation or criminal proceedings. Referral to the Director reflects a choice made by police and/or the Crown not to pursue criminal charges or proceedings, or reflects the conclusion of criminal proceedings without criminal forfeiture. It is unlawful for the Director to accept a referral when there is an ongoing criminal investigation or criminal proceedings.

- 32B3. At all material times, and to the knowledge of the Director, the [USDOJ] has been engaged in a criminal investigation into one or more of the defendants using its police powers with the assistance and support of the VPD.
- 32B4. In or about August 2017, the VPD on its own and on behalf of the [USDOJ] referred this forfeiture matter to the Director (the "Referral"). The Director accepted the Referral contrary to its own File Acceptance Policy in or around September 2017 when, to the Director's knowledge, there was an ongoing criminal investigation of PacNet Services and its principals in both British Columbia and the United States, and the VPD had not decided whether to refer the matter to the Crown prosecutor.
- 32B5. After September 2017, the VPD and the [USDOJ] continued to exercise their police powers and shared information with the Director for the purpose of supporting the Director's position in this proceeding.
- 32B6. In or around December 2018, Mr. Mah retired from the VPD and became employed by the Director as a secondee with the VPD. To Mr. Mah's knowledge and that of the Director, the VPD and the [USDOJ] provided information to the Director both before and after the Referral that was obtained by the exercise of police powers. The Director accepted this information in furtherance of the prosecution of this action.
- ...
- 32C1. Further, or in the alternative, if parallel criminal proceedings and information sharing between law enforcement and the Director after a referral to the Director are lawful and do not constitute an abuse of process, the selective sharing of information was conducted in a manner prejudicial to the defendants as set out below.
- 32C2. Pursuant to s. 22(4) of the [CFA] the Director has entered into information sharing agreements with, *inter alia*, the VPD and [USDOJ]. Those information sharing agreements purport to empower both the law enforcement agency and the Director to share and request information for the purpose of the Director exercising his powers and performing his duties under the CFA.
- 32C3. In providing information together with the Referral, the VPD made selective disclosure of information and documents to the Director. The VPD made no effort to obtain from the [USDOJ] relevant information that was material to this proceeding.
- 32C4. The CFA empowers the Director to request information from public bodies that is required for the purpose of commencing and conducting

proceedings under the *CFA* (ss. 22(3), 22(4), 22(5) and 22(6)). In accepting the Referral and prosecuting this civil forfeiture proceeding, the Director has chosen not to exercise his power to request relevant information that is material to this proceeding from both the VPD and the [USDOJ], including information which could disclose whether there were *Charter* breaches by law enforcement. This conduct of the Director prejudices the ability of [PacNet] to defend this proceeding and to defend itself in the parallel criminal proceeding.

32D. In these circumstances, it would bring the administration of justice into disrepute if the Director's claim were not dismissed or stayed as an abuse of process as a result of the parallel criminal proceedings or, in the alternative, the selective provision of information by the Director to [PacNet].

...

33A. ...

e. this case has been brought and prosecuted in a manner that contravenes the Director's internal policies and constitutes an abuse of process.

[26] Arising from his examination for discovery in June 2022, the Director, Phil Tawtel, confirmed to PacNet that, contrary to his earlier understanding, he had later learned that the VPD did have an ongoing investigation into Ms. Day as of June 2019, although he was not aware of the current status of that investigation.

[27] In late 2022/early 2023, PacNet's counsel sought a further consent order to expand the VPD's production to the time post-referral (August 2017). Unfortunately, later discussions between all counsel, including for the VPD, did not lead to any consensus as to further production.

[28] In March 2023, PacNet served a Notice of Constitutional Question (the "Notice") challenging the validity of s. 22 of the *CFA*. Specifically, PacNet asserts that parallel criminal proceedings (both in Canada and the U.S.) in respect of the same unlawful activity asserted in the civil forfeiture proceedings constitutes a violation of their rights under ss. 7-8, 11 and/or 13 of the *Charter*. PacNet further asserts that the information-sharing agreements under s. 22 of the *CFA* and the Director's "selective disclosure" are inconsistent with their s. 7 *Charter* rights. In its Notice, PacNet seeks a *Charter* remedy, including a permanent stay or alternatively, a temporary stay, of the actions.

[29] To date, no criminal charges have been laid against any of the defendants in BC.

[30] I am not aware of the exact procedures that apply in respect of the Nevada prosecution in the U.S. PacNet has been making efforts to seek information and documentation from various U.S. agencies in relation to their investigations, which I will discuss below.

[31] Finally, the U.S. authorities have instigated extradition proceedings with the Canadian government, which involved the RCMP, not the VPD. None of the parties had any further information about the status of that process.

PACNET'S POSITION / RELIEF SOUGHT

[32] The order sought by PacNet has evolved over time based on continuing discussions between counsel, including after the filing of its notice of application. The iteration of the relief presented by PacNet at this hearing would require the VPD to:

- a) Paragraph 1:

... disclose all records ... and documents as defined in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], in the possession or control of the VPD (including communications between VPD and third parties) acquired or created after April 25, 2017 that (a) contain or refer to any evidence relating to the allegations in this action; and/or (b) refer to whether the evidence was either sought or obtained for the purpose of this action (the "Documents").
- b) Paragraph 2: specify any claims of solicitor-client privilege or any other ground against production in writing to PacNet's counsel; and
- c) Paragraph 5: prepare a list of documents that were not produced under the April 2022 Order, identifying the date, author and recipient of the documents and the reason for non-disclosure.

[33] PacNet takes the position that:

- a) The “Documents” are relevant to the issues in these actions, including in relation to the Director’s allegations of unlawful activity, the defendants’ allegation of *Charter* breaches and abuse of process;
- b) PacNet has no ability to obtain documents material to their defence in these actions from the Director or other parties and the Director has refused to request production from law enforcement agencies using its powers under the *CFA*; and
- c) As such, PacNet seeks the complete “fruits of investigation” held by the VPD as it relates to PacNet.

CASE SPLITTING

[34] On March 23, 2023, PacNet filed and served its application materials, being its notice of application and a supporting affidavit.

[35] Shortly thereafter, the Director and VPD filed their own responses and affidavit materials. In substance, both contended that PacNet had failed to provide a sufficient evidentiary record to support the relief sought.

[36] In response, and just before this hearing, PacNet served further affidavits in support of its arguments. This included a previous affidavit that had been served on the Director for another application and a completely new affidavit.

[37] The Director objects to the introduction of much of what is contained in these two affidavits, contending that PacNet has delivered inappropriate reply or rebuttal evidence contrary to R. 8-1(14) of the *Supreme Court Civil Rules [Rules]*. The Director argues that PacNet is attempting to split their case, resulting in unfairness to it in responding to the application, citing *Century Group Lands Corp. v. Galitos Investments Inc. (c.o.b. Tsawwassen Athletic Club)*, 2022 BCSC 1313.

[38] During the hearing, I indicated to the Director that I would allow his counsel some leeway in terms of responding to and in providing sur-rebuttal evidence in

relation to this new evidence. As a result, an affidavit was sworn on May 30, 2023 and filed by the Director.

[39] The objections to PacNet's first newly filed affidavit refer to various public filings in the U.S. in relation to prosecutions, of which the Director is well aware. Despite the late notice, the Director has made submissions regarding these documents which I have considered.

[40] The objections to PacNet's second affidavit, just recently delivered, refer to documents received by PacNet from the VPD which are dated in the 2016/2017 timeframe and include communications between the VPD and other law enforcement agencies.

[41] I share the Director's concerns about the potential unfairness of this further documentation, which was clearly in PacNet's hands when this application was filed. I do not accept that this further material was allowable based on PacNet's alleged belated realization that the Director and VPD would contend that the application was a "fishing expedition" and that the previous documents under the April 2022 Order did not evidence any abuse of process. PacNet was, or should have been, fully cognizant of the requirement to present the necessary evidence to support the proposed order when the application was filed.

[42] I do not condone the late filing by PacNet of this material on the eve of the application. Nevertheless, this further material was known to the Director and the VPD, and I have allowed some accommodation through counsel's submissions and further evidence to alleviate any unfairness or perceived unfairness. The Director and VPD's counsel have specifically addressed some or all of this evidence in their respective submissions.

[43] In the result, I will allow this further evidence to be included and considered on its merits.

LEGAL CONTEXT AND AUTHORITIES

[44] The VPD is not a party to either proceeding. Accordingly, PacNet seeks production of documents from the VPD based on the third-party production rule in R. 7-1(18):

- (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
 - (a) production, inspection and copying of the document;
 - (b) preparation of a certified copy that may be used instead of the original.

[45] The third-party production rule engages the Court’s discretion given the use of the word “may” in R. 7-1(18). This is in contrast to the mandatory requirements of documents production by *parties* under R. 7-1.

[46] For example, R. 7-1(1) mandates the production by parties of all documents that are or have been in the possession or control of that party that could be used to prove or disprove a material fact or other documents that will be referred to at trial. Further, the Rule mandates the listing of documents that are to be produced, with a brief description of the document (R. 7-1(2)). With respect to any claims of privilege, a party must provide a statement in its list of documents as to the grounds of the privilege and a description sufficient to allow the other parties to assess that claim of privilege (R. 7-1(6) and (7)).

[47] The case authorities demonstrate that the Court’s consideration of production by a third-party requires a nuanced approach that seeks to balance the interests of disclosure as between the truth-seeking function of a court proceeding and the rights of non-parties, who are strangers to the litigation and who have no interest or stake in the outcome of these proceedings.

[48] In *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 (S.C.) at para. 25, Justice Huddart emphasized that the court would not allow “wholesale discovery” of a third party or what I would describe as a non-party:

[25] That view of R. 26(11) must be considered in light of the fact that it was an application for the production of hospital records relating to the injuries and health of a party, and that the court did not allow wholesale discovery of the third party. The rule is not to be used for the sole purpose of obtaining discovery from a stranger to the action. Fishing expeditions to discover whether or not a person is in possession of a document, the production of which might be compellable at trial, are not allowed: *Rhoades v. Occidental Life Ins. Co. of California*, [1973] 3 W.W.R 625 (B.C.C.A.).

[26] Because the court will not lightly tamper with the rights of third parties who are not parties to the litigation, there are several preconditions to be met by an applicant under R. 26(11).

[27] The applicant must show that the document or documents sought are in the possession or control of the person from whom they are sought and are not in the possession or control of any of the parties to the litigation: *Bachmann v. Sandoz (Can.) Ltd.* (1978), 6 B.C.L.R. 57 (S.C.).

...

[30] Moreover, there is insufficient specificity in the application. The petitioner must show what documents she needs, and why.

...

[32] In my view this lack of specificity is fatal to the application. To order what the petitioner requests would put a third party in the awkward position of having to comply with an order which does not indicate precisely what is required. To order production of the documents requested would be to authorize a "fishing" expedition into a third party's affairs.

[Emphasis added.]

[49] The decision in *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939, involved third-party production, but, like *Lacker*, was considered under the older version of the *Rules*, specifically, R. 26(1). As here, a party sought production from a non-party who had no interest in the litigation. In relation to that request, the Court stated that it must be satisfied that the documents have "real relevance" or are "necessary" (para. 15).

[50] Following *Lacker*, the Court in *Centura Building Systems* noted that one consideration in granting such an order should be the impact on that non-party, including the difficulty and expense of compliance. Consistent with the comments in *Lacker*, this will usually dictate that the request for documents be specific, rather than seeking broad categories of documents (paras. 16–19).

[51] In *Centura Building Systems*, Justice N. Smith rejected the broad and non-specific aspects of the document request, stating:

[22] A similarly realistic and practical approach is called for in this case. The order sought by the plaintiff erases any distinction between the production required of a party and the production that can be demanded of a non-party. It would literally require Four Seasons to search all of its files and produce all documents relevant or potentially relevant to the litigation. In my view, that goes far beyond what can or should be asked of a non-party. Reasonable limits must be placed on what anyone must do to accommodate other people's litigation. Although the specificity requirement in Rule 26(11) must be applied with some flexibility, it can not be completely ignored.

[52] In *Kaladjian v. Jose*, 2012 BCSC 357, Justice Davies was considering production of medical records in relation to a litigation involving a motor vehicle accident. His decision was an early discussion of the third-party production rule after the revamping of the *Rules*, which emphasized proportionality under R. 1-3.

[53] In *Vlasic v. Fleming*, 2019 BCSC 1735, Master Elwood, as he then was, helpfully summarized the principles from *Kaladjian*, as follows:

[27] In *Kaladjian v. Jose*, 2012 BCSC 357, Mr. Justice Davies held that Rule 7-1(18) must be procedurally and substantively interpreted and applied in a manner consistent with Rules 7-1(10) to (14), with necessary modification to ensure protection of the independent interests of third parties whose records are sought (para. 53). Pleadings determine relevance, but some evidence will be required to support an application for additional documents when the application is brought under this Rule (para. 62). Orders requiring document production from third parties must also comply with the objective of proportionality (para. 65).

[54] *Kaladjian* was also discussed and applied in *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673. In that case, Justice Weatherill overturned a Master's "broad" production order, stating:

[77] In *Kaladjian*, like in the case at bar, the plaintiff was in possession of the specifically identified documents in respect of which production was sought from the non-party under Rule 7-1(18).

[78] Although Davies J. concluded at para. 53 that Rule 7-1(18) should be "substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14)", he also concluded that, with respect to Rule 7-1(18), there should be "necessary modification to ensure protection of the independent interests of third parties whose records are sought".

[79] That “necessary modification” includes a requirement that the applicant provide some evidence to support an application for documents from a non-party (see *Kaladjian*, para. 62) in order to prevent against “unwarranted “fishing expeditions” based solely upon *pro forma* pleadings” (see *Kaladjian*, para. 64).

...

[81] *It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action.* With the exception of the specific documents ordered to be produced at paras. 1(b), (c) and (d) of the Order, evidence supporting the application was lacking. Master Baker did not consider the need for such evidence.

[Underline emphasis in original; italic emphasis added.]

[55] All of the above authorities—*Kaladjian*, *Northwest Organics* and *Vlasic*—confirm the need for “some evidence” in support of a production order against a non-party.

[56] Also consistent with the above authorities, in *Mann v. Jagpal*, 2020 BCSC 1919 at para. 48, Justice Giaschi stated that the wording of R. 7-1(18) suggested that a “higher level of specificity” is required when seeking documents from a non-party.

[57] Facts similar to those presented here arose in *Yen v. Ghahramani*, 2023 BCSC 229. One defendant sought production from its former employee (Mr. Chan) who was implicated in the alleged misconduct. Mr. Chan had provided some documents but the party alleged that he had been “selective” in that respect. The document request was that Mr. Chan review the entirety of the documents in his possession or control and list them for inspection.

[58] In *Yen* at para. 65, Master Bilawich described this type of document request as framed in “exceptionally broad terms”. He rejected that such an approach was appropriate in relation to Mr. Chan, a non-party, and dismissed the application with liberty to apply based on a request for specific documents. He stated:

[67] In my view, the form of this demand is still unacceptably broad, keeping in mind that it is directed towards a non-party. It would require

Mr. Chan to review broadly framed categories of documents, including ones not only in his possession or control but also in his power. It would also require him to review and analyze the pleadings so he can assess whether each document he reviews relates to matters in question in the action. It also appears to seek [to] apply a very broad “Peruvian Guano” standard of relevance to this review.

[68] It appears that airG seeks to impose on a non-party a proactive discovery burden which is consistent with what one might expect of a party to the action. Counsel did not refer me to any authority for the proposition that a higher standard of production can or should be imposed on a non-party based on allegations that they participated in alleged misconduct which underlies the litigation. As noted in *Northwest Organics*, sub-rule (18) permits access to specific documents or classes of documents when it has been demonstrated they are in the possession or control of a non-party and are relevant to an action. The demand in this instance is not specific.

[Emphasis in original.]

[59] Given the VPD’s status as a law enforcement agency, the parties have sought to provide case authorities that discuss document production targeted at a law enforcement agency’s file.

[60] PacNet refers to *Huang v. Sadler et al.*, 2006 BCSC 559. *Huang* involved a motor vehicle accident. The VPD investigated the accident and later charged the defendants with various offences. The AGBC produced some documents in the VPD’s possession but opposed other documents prepared for the criminal proceedings. However, almost all of the documents had already been provided to the defendants’ criminal counsel through the usual *Stinchcombe* disclosure in the criminal prosecution, with an express undertaking that they would not be “used for any other purpose” (para. 7). Criminal counsel then provided all of the documents to the defendants’ civil counsel who sought permission from the AGBC to use them, which was refused.

[61] In *Huang*, the Court accepted that the documents were relevant to the issues arising from the motor vehicle accident, particularly relating to the facts of the accident (para. 17).

[62] I take the central proposition from *Huang* to be that, in the interests of fairness and justice, the Crown cannot limit disclosure of relevant documents by a party who

has been provided with those documents pursuant to a criminal prosecution and who is under a legal obligation to produce them in a civil proceeding. However, such production must consider third-party interests and the protection of those interests, such as by engaging the civil implied undertaking rule or confidentiality conditions, if necessary: para. 16.

[63] *Huang* can be distinguished from this case, however, on the basis that the Director has produced all documents that it has received from the VPD. What PacNet seeks via this application is an order that the VPD produce what the Director *does not have*.

[64] The Director and the VPD place significance on the decision in *Wong v. Antunes*, 2009 BCCA 278 [*Antunes*]; reversing this court's decision indexed at 2008 BCSC 1739.

[65] Similar to *Huang*, *Antunes* involved a motor vehicle accident and one of the central issues in the action was the identity of the driver. The VPD investigation led to criminal charges against the defendant in the civil trial. *Stinchcombe* disclosure was provided to the defendant, which included witness statements and DNA testing, although he did not disclose any of the documents he had received from the VPD in the civil action. This Court ordered broad production by the VPD in relation to issues in the civil action, and also ordered that the VPD provide a list of the documents it objected to producing and to set out the reason supporting that position.

[66] On appeal, the court in *Antunes* agreed with the granting of an order for document production, but made significant changes to the requirements placed on the VPD. Its comments as to the basis for the production and the procedures to be followed are instructive here.

[67] The court in *Antunes* stated that factors to be considered include relevance, necessity (availability by other means) and the public interest:

[10] The chambers judge considered three factors in deciding whether the implied undertaking that attaches to Crown disclosure should be modified to permit disclosure to the plaintiff in a related civil action: relevance, availability

of the documents from other sources, and the public interest. The balance of convenience implicit in the third factor was described as follows (at para. 43):

The public interest in ensuring the conduct of a prosecution in a manner that is fair from the perspective of both the Crown and the defence must be balanced against the private interest of ensuring the capacity of a plaintiff to advance a *bona fide* and meritorious claim in a civil action. In other words, the balance of convenience must favour disclosure. As the Ontario Court of Appeal said in *D.P. v. Wagg* (2004), 239 D.L.R. (4th) 501, 71 O.R. (3d) 229, [2004] O.J. No. 2053, at para. 53:

53. ... Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court. The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.

[68] The court in *Antunes* accepted the potential mischief identified by the AGBC that arose from this Court's order for broad production and the listing process, in the face of an ongoing criminal prosecution:

[23] The Attorney General identifies a number of practical problems created by the impugned order. The *Stinchcombe* package is assembled by the Crown, not the VPD. The order, as it currently reads, requires the VPD to produce documents, despite the fact that it will not know whether these documents were part of the *Stinchcombe* package. More importantly, the Attorney General maintains it is cumbersome in that it contemplates all documents being produced, subject to the police or Crown specifying why a particular document is not required to be produced. Further, the order contemplates that the Crown must assert public interest immunity on a document by document basis. The difficulty posed by effectively ordering disclosure of the *Stinchcombe* package is that it fails to recognize that the disclosure under *Stinchcombe* serves a different purpose than disclosure in the civil context, and that to meld the two is an unfortunate development in the law. Further, by failing to incorporate the public interest immunity claimed by the Crown in the order, it creates opportunities for unforeseen negative consequences.

[69] At paras. 25–26, the court in *Antunes* accepted that the changes to the document production suggested by the AGBC “balances the plaintiff’s need to obtain information in the police file with the Crown’s need to preserve the integrity of the criminal prosecution” and permits, as appropriate, “full debate on the various privilege issues that may arise”. The form of order granted (detailed in para. 25)

required the VPD to produce documents, including all handwritten notes of all investigating officers, in its possession or control relating to the motor vehicle accident.

[70] The form of order endorsed by the court in *Antunes* stood as the template for the April 2022 Order. Specifically, both orders: 1) required production of certain defined “Documents”, and 2) allowed the VPD to refuse production on certain grounds, including privilege and where disclosure would not be in the public interest.

DISCUSSION

[71] As described above, the production order sought by PacNet departs significantly from what the Director and the VPD describe as the “*Antunes* approach” and expands on what was previously sought, both substantively and temporally.

[72] Nevertheless, PacNet contends that the documents they seek—broadly described as any document containing or referring to any evidence relating to the allegations in these actions—are relevant to their defences against the Director’s substantive allegations and also relevant to their abuse of process and constitutional defences. PacNet asserts that these documents have the same relevance in the extended time range (August 2017–present) as in the original range (to August 2017).

[73] In addition, as PacNet’s pleading makes clear (para. 32C4), it seeks these further documents from the VPD to also “defend itself in the parallel criminal proceeding” which, as of this time, is the Nevada prosecution against Ms. Day, Mr. Kelly, Ms. Frappier and another person.

[74] The arguments of the Director and VPD essentially align and can be summarized as follows:

- a) The documents are not relevant or necessary to the resolution of the issues in these actions and are in the nature of a “fishing expedition”. The Director asserts that its case against PacNet is founded on

PacNet's own substantial disclosure and publicly available documents and not on materials that it has received from the VPD;

- b) Evidence purported to be in the possession of the VPD, such as witness statements of PacNet's former employees or customers are equally assessible to PacNet on their own initiative and, as such, are not necessary;
- c) The proposed order treats the VPD *as if it were a party*, in terms of (i) requiring broad and non-specific disclosure, and (ii) calling for a list of documents in Form 22, Part 4, which is akin to the requirements of a party under R. 7-1(1) (to specify why they object to disclosing certain documents);
- d) PacNet is really seeking to obtain the evidence gathered by the U.S. authorities to defend the Nevada prosecution and any extradition proceedings, which is a collateral purpose. This also engages the requirement for necessity in that PacNet is currently seeking documents from the U.S. authorities through normal channels and this "back door" effort to gain disclosure outside of the U.S. rules allows mischief that could potentially harm law enforcement proceedings;
- e) In any event, the broad discovery sought from the VPD—including further disclosure relating to the pre-August 2017 disclosure already made—puts a disproportionate burden on the VPD, a non-party, contrary to the "*Antunes* approach"; and
- f) The VPD and the Civil Forfeiture Office (CFO) will also likely suffer harm by any such disclosure. Specifically, the CFO will suffer harm in fulfilling its statutory mandate as the precedent would create a chilling effect on law enforcement's willingness to refer matters to it, including complex multi-jurisdictional white collar criminal cases, such as this.

[75] The Director and VPD's objections follow from the various factors discussed in the case authorities outlined above. I will address each in turn, although many of the topics overlap and are not watertight considerations.

Relevance/"Fishing Expedition"

[76] The parties agree that relevance is based on the pleadings, not evidence: *Kaladjian* at para. 61.

[77] The substantive issues in these actions are whether PacNet's business operations included knowingly engaging in assisting fraudulent direct mail schemes, and also whether the PacNet defendants engaged in unlawful activity themselves. Further, the Director alleges that, as a result of PacNet's involvement in these schemes, it received large amounts of funds which are now traced to assets in the hands of the individual defendants, and represent either proceeds of unlawful activity and/or instruments of crime.

[78] As the Director notes, PacNet has produced substantial documentation regarding its activities, including its business activities. Approximately 300,000 documents have been produced. This production is supplemented by the various publicly available documents regarding prosecutions against PacNet clients in various jurisdictions, principally the U.S. In contrast, the Director has produced approximately 650 documents, and those documents received from the VPD to the time of the August 2017 referral.

[79] Since it must be presumed that PacNet has access to its own substantial documentation, it is difficult to see that anything more in the VPD's files would be relevant to the central issue that revolves around PacNet's own activities. In other words, PacNet already has access to its own documents to "prove or disprove a material fact" in that respect, within the meaning of R. 7-1(1).

[80] I accept PacNet's counsel's submission that PacNet is not restricted to its own documents in seeking to defend itself. PacNet may seek out other evidence to defend the allegations: *British Columbia (Director of Civil Forfeiture) v. PacNet*

Services Ltd., 2023 BCSC 692 at para. 28. However, it is not evident from the evidence presented on this application that the VPD has any documents that might assist PacNet in its defence in the sense of it having documents that are not already in their hands or readily could be.

[81] I also accept that PacNet is entitled to seek documents as relevant to its affirmative defences, such as its challenge to s. 22 of the *CFA* under the *Charter*.

[82] PacNet alleges that greater scrutiny is appropriate here in relation to the Director's role as a "state actor" whose conduct is subject to *Charter* scrutiny, citing Justice Duncan's comment in *British Columbia (Director of Civil Forfeiture) v. Cronin*, 2016 BCSC 284 at para. 14.

[83] Previously, PacNet raised the concern of potential *Charter* issues arising from the Director's use of information and documentation received from law enforcement agencies as a basis upon which to seek a postponement of their document production: *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2019 BCSC 70 at paras. 20–44. At paras. 45–55, I rejected such arguments as based on speculation and conjecture, particularly where no specific *Charter* breaches were alleged and no bifurcation application had been brought. In *Cronin*, Duncan J.'s comment was made in the context of the Court's consideration of alleged *Charter* breaches and a bifurcation application.

[84] In its most recent pleading, PacNet seeks *Charter* remedies, arising from their challenge to s. 22 of the *CFA* in the context of parallel criminal investigations/proceedings and this civil forfeiture proceeding. However those allegations, as set out in the Notice, do not relate to any specific actions of either the Director or the VPD in this matter. Rather, they are based on the structure of the *CFA* in these circumstances.

[85] Hence, in its pleading at para. 32C4, PacNet complains that the Director did not seek information or documentation from the VPD after the referral which "could disclose whether there were *Charter* breaches by law enforcement". Again, this

indicates that PacNet's contention of potential *Charter* breaches is entirely speculative.

[86] On closer examination, PacNet's pleadings challenge the legislative regime under the *CFA* while there are parallel ongoing criminal proceedings or criminal investigations. PacNet alleges that the Director breached the Policy in accepting the referral from the VPD when the criminal investigation was ongoing. However, to make arguments to that effect, PacNet does not require full disclosure of those law enforcement investigations or proceedings.

[87] Further, PacNet's challenge to the information-sharing process and what it describes as the Director's "selective disclosure" does not make documents, which the Director *does not have* (as they are in the possession of the VPD), relevant.

[88] I agree with the Director that PacNet's request for the VPD's files is more akin to seeking the *Peruvian Guano* or "chair of enquiry" standard that has been abandoned and now narrowed under the current Rule.

[89] At bottom, the relevance of what the VPD's files *might* contain is highly questionable and largely relies on speculation as to what *might be* in the VPD's files. I agree with the Director and the VPD that PacNet's request is more accurately described as a "fishing expedition" seeking document production that is even beyond what would be required of a party.

Necessity

[90] In *Centura Building Systems*, the Court stated at para. 15 that in relation to non-party production, the court must be cautious and ensure that the documents have "real relevance" or are "necessary".

[91] Some of the information already collected by the VPD, which was provided to the Director and then disclosed to PacNet, include various interviews with former employees of PacNet.

[92] Yet, the possibility that the VPD has talked to other such potential witnesses does not mean that PacNet requires the VPD to disclose this information to PacNet in order to allow PacNet to defend this proceeding. Clearly, PacNet is aware of its own former employees and can equally contact those persons and gather whatever evidence those persons have for these actions.

[93] The same comment applies to PacNet's former clients. For example, PacNet refers to a February 2016 plea agreement between John Leon, a former PacNet client, and the USDOJ in Florida by which Mr. Leon admitted guilt to mail fraud. In the publicly filed plea agreement, Mr. Leon confirmed that he hid the fraudulent nature of his scheme from PacNet. If that is so, PacNet is able to contact Mr. Leon and secure his evidence, if it wishes, for the purpose of the trial in this action. PacNet does not need the VPD's files to do so. Similarly, if PacNet believes that any of its other clients have evidence in support of its defence, PacNet may contact them and, if necessary, subpoena them to attend the trial.

[94] PacNet also refers to evidence that the Director has received photographs of certain boxes of documents from the VPD relating to an investigation into International Caging Services. The Director does not know what is contained in those boxes/documents depicted in the photographs, but the suggestion is that they refer to direct mail promotions, since some materials in the photographs refer to "Winners" or "Winners Publishing Group Inc." Again, if these are promotions in which PacNet was involved—as relevant to this proceeding—such materials would likely also be found in its own files. In addition, neither the Director nor the VPD appear to even be aware as to whether such boxes of documents still exist and, if so, who has them.

[95] Finally, in May 2020, the Director received over 5,100 disclosed documents from the VPD. However, all of these documents were PacNet emails which, again, are equally available to PacNet, along with their other emails and documents. In 2022, PacNet requested that the Director provide certain details about the

numbering sequence and the meaning of certain designations in the VPD materials, which the Director did not know.

[96] In its application, PacNet states that it has not received a “substantial portion of the fruits of investigations from law enforcement” in Canada and in the U.S. PacNet speculates that the VPD files will provide them with materials that “they have no ability to obtain ... [which are relevant] to their defence in this proceeding from the Director or other parties”.

[97] As I discuss below under “Collateral Purpose”, this is not true in that PacNet has sought documentation from the U.S. authorities and, presumably, they will receive that documentation to the extent that they are entitled to it.

[98] Finally, specifically in relation to the VPD, PacNet has apparently sought disclosure from it under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*] and the VPD’s response remains to be determined.

Broad and Non-Specific Disclosure

[99] The case authorities are to the effect that, with respect to non-parties, a party seeking document disclosure must be specific and targeted in terms of what is sought: *Centura Building Systems* at para. 15; *Northwest Organics* at para. 81; *Mann* at para. 48; *Yen* at para. 68.

[100] As I have recounted above, the documents requested by PacNet cover a broad swath and are very broadly framed. I agree with the VPD that, while PacNet’s counsel has revised the relief sought from the original notice of application, the breadth of the requested has not changed. They include all documents created by not only the VPD but other persons. They include all documents that may have been acquired by the VPD that “contain or refer to any evidence relating to the allegations” in the actions or that refer to whether the evidence was sought or obtained for the purpose of the actions.

[101] PacNet frames its request as simply extending the temporal aspect of the April 2022 Order beyond August 2017. I would first point out that the proposed order is not drafted in the same form as the April 2022 Order in terms of what is requested. The Director says that he agreed to production under the April 2022 Order, despite considering that the request was overbroad and burdensome on the VPD. That concession was made with reference to the abuse of process claims and the Director's wish to lay those concerns to rest by that production. The VPD agreed also.

[102] In my view, the present application is not assisted by the cooperation of the Director and VPD in relation to the April 2022 Order.

[103] Here, the lack of specificity is, as stated in *Lacker*, fatal to this application. In addition, such a broadly framed demand for production is consistent with this being a "fishing expedition", as noted above.

Collateral Purpose

[104] Both the Director and the VPD also allege that the substantive purpose for seeking these documents is to discern what evidence the VPD may have received from the U.S. authorities that Ms. Day and the others may use to their advantage in relation to the Nevada prosecution or any extradition proceedings.

[105] As mentioned above, PacNet has been making efforts to secure information and documentation from various U.S. agencies.

[106] PacNet's efforts in that regard were only undertaken after the Director took the position that PacNet's amended pleading appeared to be toward the objective of using these proceedings as a means of obtaining documentation for use in the Nevada prosecution. In fall 2022, the Director advised that, if Ms. Day and the others had that objective, they had remedies to do so, including seeking a Letter of Request from this Court to any foreign court.

[107] It appears that PacNet took up that suggestion. In January 2023, PacNet's counsel wrote to various agencies, such as the USDOJ, the U.S. Department of Treasury and the U.S. Postal Inspection Service. Interestingly, the enclosed request includes a great deal more specificity than is set out in PacNet's current request. The Director took issue with PacNet's reference in the request to the effect that *the Director* was seeking a response to the request, which was not true and clearly misleading. The Director was required to write to the U.S. agencies to confirm that it had not advanced any such request.

[108] One response received from the USDOJ on March 1, 2023 refers to being unable to provide the requested assistance since any request must be made through diplomatic channels. I am advised that PacNet is continuing its efforts to engage with the various agencies and to take whatever steps are necessary to further their information gathering efforts from the U.S. agencies.

[109] I am not aware as to what, if any, information has been given to Ms. Day through the Nevada prosecution. I am also not aware of what disclosure process is even required by the U.S. prosecution and which has been implemented or may be implemented in that proceeding.

[110] I agree with the Director and VPD that, to the extent that PacNet seeks information in the VPD files from other law enforcement agencies, it is improper to use that objective as a basis for the document disclosure sought here.

Proportionality/*Antunes*

[111] In considering this request, the court must be mindful of the burden on a non-party in satisfying that request. Proportionality remains a consideration which in turns dictates a cautious approach, bearing in mind the time and expense of that non-party in complying with any document demand.

[112] PacNet's request would require officers at the VPD to comb through a tremendous amount of materials that have been acquired or created over the six years since August 2017.

[113] The broad language in para. 1 of the proposed order requires that the VPD, a non-party, review the complex allegations in the pleadings in detail so as to understand if any documents “refer to” or “contain” evidence relating to the allegations. This onerous burden on a non-party is part of the reason why the Court requires specificity in respect of non-party document requests, which do not require a stranger to the litigation to analyze pleadings and take steps to understand the allegations to the degree that a party would in respect of its document production.

[114] Indeed, the VPD contends that it is not possible for any officers to know whether evidence contained in or referred to in communications relate to the allegation in these actions and the proposed order may require the VPD to make assumptions about the purpose of any evidence and its potential relevance. To my mind, this is perfectly understandable and such burdens on the VPD should be avoided.

[115] I acknowledge that the VPD conducted its earlier review of the documents to August 2017 in compliance with the April 2022 Order. However, the April 2022 Order did not engage a consideration of the pleadings and, in any event, since that time the allegations in PacNet’s pleadings have been greatly expanded.

[116] In addition, PacNet’s request is an attempt to recast the April 2022 Order to expand the VPD’s production to re-review the hundreds of documents to August 2017 which were not produced, so as to set out the reasons for any non-production, with the added requirement to disclose the existence of those documents and provide a detailed written claim as to the basis for non-production. Based on the evidence, those documents may reach back many years before August 2017. This would result in added or duplicate VPD time and effort to review documents that were already reviewed for production under the April 2022 Order.

[117] As was emphasized in *Antunes*, the court will strive to reach an appropriate balance in any document production by a non-party, keeping in mind the burden of production on a person who is not involved in the litigation, and as relevant here, keeping in mind public interest concerns in relation to law enforcement agencies.

The court in *Antunes* found that balance in relation to law enforcement agencies, such as the VPD, was achieved in the order granted and set out in para. 25.

[118] The VPD's evidence on this application comes from the affidavits of Detective Constable Paramjit (Jos) Jassal. D.C. Jassal states that he is with the VPD FCU and is an investigator involved in the VPD's investigation of PacNet and Ms. Day.

[119] D.C. Jassal confirms that the VPD was cooperating with various U.S. law enforcement agencies and other foreign agencies, such as in Ireland, around the time of its own investigation. After the U.S. indictment in June 2019, the VPD decided not to pursue charges against PacNet's principals and no Report to Crown Counsel was ever submitted. As such, the Crown did not even consider, let alone lay, charges and no *Stinchcombe* disclosure arises in this case, such as there was in *Huang* and *Antunes*.

[120] D.C. Jassal indicates that the VPD has not been kept apprised of the status of other PacNet investigations or any resulting proceedings in the other jurisdictions, including the Nevada proceeding.

[121] D.C. Jassal confirms that the VPD's files remain a police report, subject to the provisions of the *FIPPA*.

[122] Firstly, the work required to comply with the broad scope of the sought-after production order must be considered.

[123] D.C. Jassal has completed a preliminary review of the VPD's files in relation to this application in terms of what work would be required to comply with the requested order. He has located approximately 900–1,000 emails (not pages or attachments) which are organized into one specific file. He estimates that it would take a VPD analyst one week to review and compile the information in the file and a further review of the file will take in excess of 150 hours (about 19 days at 8 hours/day). D.C. Jassal is the only officer who can complete this review.

[124] In my view, the burden on the VPD to comply with such an order is excessive. Further, as the VPD notes, the mere existence of these emails does not establish in any way that they are relevant to the issues in these actions.

[125] In addition, as stated, PacNet seeks to impose on the VPD a requirement to specifically object to production of any document with a specified reason, which could be challenged. This would require that the VPD produce and defend any “Form 22, Part 4” documents which it objects to produce. I do not question that a fulsome description of claims to privilege are an important aspect of normal document disclosure: *Stone v. Ellerman*, 2009 BCCA 294 at paras. 23–24. However, the *Rules* only imposes that requirement on a party and there is no such requirement on non-parties.

[126] This was same practical problem identified by the AGBC in *Antunes* (para. 23) with respect to the order granted in this Court, which:

[23] ... contemplates all documents being produced, subject to the police or Crown specifying why a particular document is not required to be produced. Further, the order contemplates that the Crown must assert public interest immunity on a document by document basis. ...

[127] In *Antunes* at para. 24, the court accepted, as a preferable approach, what was advanced by the AGBC: a production order that recognized Crown communications as a class subject to confidentiality based on the public interest. The parties would have liberty to apply to the court to decide whether particular documents or the whole class should be disclosed in any particular case.

[128] Clearly, PacNet seeks to depart from the *Antunes* approach by seeking wholesale production of the entire VPD file, with the VPD bearing the burden of justifying any refusal to produce on a document by document basis.

[129] I agree that PacNet’s approach is more akin to what Smith J. described in *Centura Building Systems* at para. 22 as “eras[ing] any distinction” between production required of a party versus production that can be demanded of a non-

party. The proposed order does not contain any reasonable limits, as required by paras. 22 and 26 of *Centura Building Systems*.

[130] I have no doubt that any production by the VPD will only be the start of a long and arduous process. The VPD has already indicated its objection to much of what is requested and why. In response, PacNet's counsel has clearly signalled that this will likely lead to a heavily contested and extensive application by which PacNet will challenge any objections to production by the VPD and seek the Court's determination as to any claims of privilege asserted by the VPD. This will only result in further embroiling the VPD in this heavily contested litigation to which it is a stranger.

[131] Paragraph 6 of the proposed order requires PacNet to pay all "reasonable costs" incurred by the VPD for the retrieval, production, inspection and copying and delivering of the documents. Having said that, the question as to what is "reasonable" is debatable and may turn out to be another point of controversy between the parties and the VPD.

[132] All of this is to say that the proposed order and what PacNet really seeks to achieve at the end of the day puts an extraordinary burden on the VPD which, in my view, is not balanced or justified against the speculative basis for production advanced by PacNet.

[133] The fact that PacNet's pleadings level accusations at the VPD in relation to the abuse of process allegations does not mean that the VPD is not a stranger to this litigation in the true sense and, significantly, does not justify treating the VPD as if it were a party, when it is not: *Yen* at para. 68.

Harm to VPD/CFO

[134] D.C. Jassal states that, in his view, and after his review of the files, it would be harmful to the VPD's relationship with the USDOJ to provide most, if not all of the documents, in its files. Specifically, he states:

- a) Disclosure would reveal confidential communications between the VPD and other Canadian and foreign agencies;
- b) Disclosure would reveal police investigative techniques of the VPD and other agencies, the nature and scope of investigations and the subject matter of interviews with potential witnesses; and
- c) Disclosure would reveal the names and addresses of witnesses, who are the same witnesses involved in the Nevada prosecution, which could compromise the U.S. indictment.

[135] Imposing such a requirement on the VPD could well result in the VPD having to contact each of the other agencies to determine their position on disclosure and whether they consent to it. I acknowledge PacNet's submission that it is not their intent to require the VPD to do so, however, it remains the practical and likely consequence of PacNet's demand.

[136] Further, D.C. Jassal states that disclosure of the investigations before the U.S. prosecution is complete would set a significant precedent that may impact ongoing or future financial crime investigations with Canadian and foreign agencies. He refers to the transnational aspect of crimes such as fraud and identity theft and the need for law enforcement agencies to work together. He considers that full disclosure of the VPD files would harm the VPD's ability to investigate such crimes in that other agencies may not trust that Canadian law enforcement agencies will be able to secure any shared information until investigations are completed and any charges are brought and tried.

[137] Similarly, the Director refers to potential harm to the CFO if any law enforcement cooperating with it is required to be subjected to substantial and significantly time consuming and contentious document production if a referral is made to the CFO. The Director fears a "chilling effect" in fulfilling its mandate under the *CFA* as a result if it does not receive referrals, which are made on a voluntary basis.

[138] The Director's concerns are supported by the evidence of Jared Larson, a director at the CFO.

[139] Mr. Larson raises more general concerns about the chilling effect on potential future referrals, arising from PacNet's approach in this litigation. For example, even though the VPD is not a party to the litigation, PacNet has alleged in its September 2019 pleading that the VPD committed an "abuse of process". This led to the April 2022 Order and its production, which in turn led to an expansion of those "abuse of process" allegations, including in relation to the VPD.

[140] Specifically in respect of PacNet's latest step in relation to the VPD and the sought-after document production, Mr. Larson states:

5. ... This concern [about the chilling effect] arises because, should broad orders such as the Proposed Order be granted, the work for law enforcement officers is time consuming and burdensome, particularly where the underlying files are complex due to either their subject matter or multi-jurisdictional nature.

[141] The VPD also emphasizes and raises concerns about the escalating nature of PacNet's allegations and requirements sought to be imposed on it, notwithstanding that the VPD is not a party.

[142] In my view, all of the concerns mentioned in this section are not idle ones and the proposed order does not address such concerns.

CONCLUSION

[143] I conclude that, even assuming a tenuous claim of relevance in relation to the Documents, the other factors militate against requiring the VPD to be subject to the production sought by PacNet.

[144] However, as above, I referred to PacNet seeking information regarding details of the numbering sequence and the meaning of certain designations in the VPD materials, of which the Director was unaware. I would order that the VPD provide a response to requests #28–29 from PacNet's counsel arising from Mr. Tawtel's examination for discovery on June 9, 2022 in relation to Tab 5D referred to in the Director's Third Amended List of Documents.

[145] Subject to the above requirement, PacNet's application is dismissed, with costs in any event of the cause in favour of the Director and with costs in any event of the cause in favour of the VPD.

[146] To address any potential future applications, PacNet has liberty to further apply for document production by the VPD if it can fashion a demand that is acceptable to the Director and the VPD, and if not, fashion one that will accord with these reasons.

"Fitzpatrick J."