

British Columbia (Director of Civil Forfeiture) v. [REDACTED]
[REDACTED] 2023] B.C.J. No. 2292

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

C.L. Forth J.

Heard: August 9-10, 2023.

Judgment: November 29, 2023

Docket: [REDACTED]

Registry: Victoria

[2023] B.C.J. No. 2292 | 2023 BCSC 2099

Civil Forfeiture Action in Rem Against The Lands and Structures defined in Schedule "A", attached hereto (the "Real Property"), a 2013 Smart Fortwo with Vehicle Identification Number [REDACTED] (the "Vehicle") seized by the Saanich Police Department on July 21, 2022, and their proceeds Between Director of Civil Forfeiture, Plaintiff, and The Owners and all Others Interested in the Property, in Particular, [REDACTED]

[REDACTED] Defendants

(93 paras.)

Case Summary

Civil litigation — Civil procedure — Discovery — Production and inspection of documents — Privileged documents — Confidential or private communications — Materiality and relevance — Scope — Production by non-parties — The Director of Civil Forfeiture (Director) sought for documents in the possession or knowledge of third parties, granted — The Director claimed that the various defendants acquired ten properties for approximately \$12 million without mortgages over a period of just over two years, hence, sought records and information from various financial institutions — An application to produce documents was not a final order and as such the rules relating to the use of hearsay in final orders did not apply — Not persuaded that the issue of whether the proceeding was to be bifurcated must be determined before an order was granted.

The Director of Civil Forfeiture (Director) claimed that the defendants have engaged in unlawful activity and sought forfeiture of a number of properties. The unlawful activities related to illegal possession and distribution of psilocybin and cannabis products. The Director sought for documents in the possession or knowledge of third parties. The Director claimed that the various defendants acquired ten properties for approximately \$12 million without mortgages over a period of just over two years, hence, sought records and information from various financial institutions to determine the legitimacy of the funds used to acquire the assets subject to the forfeiture action. The defendants opposed the order for production at this stage of proceedings in claiming that the majority of them filed or intend to file an application for bifurcation and it should proceed prior to the production application. The defendants further claimed the production

application was based on information obtained in breach of Charter of Rights and Freedoms s. 8 and therefore it risks further breaching their constitutional rights if granted. The defendants took the position that document production ought to proceed under the Rules, as opposed to Civil Forfeiture Act s. 11.01(1).

HELD: Application granted.

The legislation was clear that the Director was permitted to bring an application for the production of information and documents pursuant to s. 11.01(1) after the proceeding was commenced, s. 11.01(1) gave the Director added powers to seek not only records from third parties, but also information. Saw no support for the defendants' argument that there was a risk that the documents obtained under s. 11.01(1) were not protected by the implied undertaking and could be shared with other police organizations. An application to produce documents was not a final order and as such the rules relating to the use of hearsay in final orders did not apply. It was an interlocutory order and hearsay evidence was admissible. The information and documents meet the test for production. Not persuaded that the issue of whether the proceeding was to be bifurcated must be determined before an order was granted for the production of the financial records and materials sought. The order for production from third parties should be made. The defendants have privacy interests in their financial record, which individuals expected would remain confidential. The information and documents should go to counsel for the defendants for safekeeping.

Statutes, Regulations and Rules Cited:

Canada Act 1982 (U.K.), 1982, c. 11

Cannabis Control and Licensing Act, [S.B.C. 2018, c. 29](#)

Civil Forfeiture Act, S.B.C. 2005, c. 29, Pt. 5, s. 1(1), s. 3, s. 5, s. 6, s. 11.01, s. 11.01(1), s. 11.01(2), s. 11.02, s. 15, s. 21, s. 22, s. 22.02(2), s. 22.02(3), s. 22.02(5), s. 22(4)

Charter of Rights and Freedoms, s. 8

Constitution Act, 1982, Pt. 1

Controlled Drugs and Substances Act, [S.C. 1996, c. 19](#)

Freedoms of Information and Protection of Privacy Act, s. 32, s. 33

Supreme Court Civil Rules, Rule 7-1(31), Rule 12-5(67)

Counsel

Counsel for the Plaintiff: J. Plonka, M. Alcorn.

Counsel for the Defendants [REDACTED]
[REDACTED] R.L. Neary.

No one appearing for the Defendant [REDACTED]

Counsel for the Defendants [REDACTED] S. Gu.

No one appearing for the Defendant [REDACTED].

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C.L. FORTH J.

Introduction

1 The Director of Civil Forfeiture (the "Director") alleges that the defendants have engaged in unlawful activity and seeks forfeiture of a number of properties, a vehicle, and their proceeds. The unlawful activities alleged relate to illegal possession and distribution of psilocybin and cannabis products. This is an application for documents in the possession or knowledge of third parties (the "Production Application"), pursuant to s. 11.01(1) of the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 [Act].

2 The Director alleges that the various defendants acquired ten properties for approximately \$12 million, without mortgages, over a period of just over two years (the "Real Property"). The Director's position in the civil forfeiture action is that the Real Property and the vehicle are proceeds and instruments of

unlawful activity. The Director seeks records and information from various financial institutions to determine the legitimacy of the funds used to acquire the assets subject to the forfeiture action.

3 The defendants oppose the order for production at this stage of the proceeding on the basis that the majority of them filed or intend to file an application for bifurcation. The thrust of the majority of the defendants' argument is that the bifurcation application should proceed prior to the Production Application. They argue that the Production Application is based on information obtained in breach of s. 8 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] and therefore, it risks further breaching the defendants' constitutional rights if granted.

4 The defendants [REDACTED] raise additional procedural objections to the Production Application.

5 The various banking institutions which hold the information and records were served and filed no response to the Production Application.

Nature of Order Sought

6 The records and information sought by the Director are as follows:

- a. Scotiabank - any and all records and banking information relating to [REDACTED] and eight bank accounts, from 2016 to present;
- b. Scotiabank - account information, including the name, incorporation number, and account number, of any society, cooperative association, partnership or company for which any of [REDACTED] have signing authority held with Scotiabank;
- c. Scotiabank - information for any bank account jointly held by any of [REDACTED] with any society, cooperative association, partnership or company held with Scotiabank, including the name, incorporation number, and account number;
- d. President's Choice Financial - any and all records and banking information relating to [REDACTED] one account number, from 2016 to present;
- e. President's Choice Financial - information, including the name and incorporation number, of any society, cooperative association, partnership or company for which any of [REDACTED] have signing authority held with President's Choice Financial;
- f. President's Choice Financial - information for any bank account jointly held by any of [REDACTED] with any society, cooperative association, partnership or company, held with President's Choice Financial, including the name, incorporation number, and account number;
- g. HSBC - any and all records relating to [REDACTED] and two account numbers, from 2016 to present;
- h. HSBC - information, including the name and incorporation number, of any society, cooperative association, partnership or company for which any of [REDACTED] have signing authority held HSBC;

- i. HSBC - any bank account jointly held by any of [REDACTED] with any society, cooperative association, partnership or company, held with HSBC, including the name, incorporation number, and account number;
- j. CIBC - records relating to [REDACTED] and two account numbers from 2016 to present;
- k. CIBC - information, including the name and incorporation number, of any society, cooperative association, partnership or company for which any of [REDACTED] have signing authority held with HSBC;
- l. CIBC - information for any bank account jointly held by any of [REDACTED] with any society, cooperative association, partnership or company, held with CIBC including the name, incorporation number, and account number;
- m. Desjardins - records relating to [REDACTED], from 2016 to present;
- n. Desjardins - information, including the name and incorporation number, of any society, cooperative association, partnership, or company for which any of [REDACTED] have singing authority held with Desjardins; and
- o. Desjardins - information for any bank account jointly held by any of [REDACTED] with any society, cooperative association, partnership or company, held with Desjardins, including the name, incorporation number, and account number;

The Parties

7 The defendants, [REDACTED]
[REDACTED]

8 The defendant, [REDACTED] is a company duly incorporated in British Columbia. [REDACTED] is the director of [REDACTED]

9 The defendant, [REDACTED] is a company duly incorporated in British Columbia. Defendants [REDACTED] are directors of [REDACTED]. The Director asserts that [REDACTED] are well-known illicit cannabis products which are sold on its website and by other cannabis vendors.

10 The defendant, [REDACTED] is a company duly incorporated in British Columbia. [REDACTED] is the director of [REDACTED]

11 The defendant, [REDACTED] is a company duly incorporated in British Columbia. [REDACTED] are the directors of [REDACTED].

Background

Prior Legal Action Involving the Defendants

12 In 2018, [REDACTED] were directors of two numbered companies, being [REDACTED] [REDACTED] which were the subject of a previous civil asset forfeiture claim based on the sale and distribution of illicit cannabis. This forfeiture claim was brought following a search that was conducted of a property leased by [REDACTED] (the "2018 Search").

13 The Director, [REDACTED] resolved the civil asset forfeiture claim by consent order entered on June 20, 2018, in which the companies were granted partial relief from forfeiture.

14 [REDACTED] were formerly directors of another company, [REDACTED] [REDACTED] which ran an unlicensed cannabis retail store [REDACTED]. Following an inspection pursuant to the *Cannabis Control and Licensing Act*, [S.B.C. 2018, c. 29](#) [CCLA] in 2019 (the "2019 Search"), [REDACTED] was issued a monetary penalty for possessing cannabis for the purpose of sale without a non-medical retail store license. In February 2021, [REDACTED] agreed to a concession order and paid a monetary penalty for unlicensed distribution of cannabis.

The 2022 Inspection and Search

15 On July 21, 2022, members of the Community Safety Unit ("CSU") attended a commercial building located at [REDACTED] Victoria, British Columbia (the "[REDACTED]") to conduct an inspection under s. 89 of the CCLA. They were accompanied by members of the Saanich Police Department ("SPD"). They allege that they found psilocybin at the [REDACTED], which is outside the mandate of the CSU, at which point the inspection was halted and the SPD sought a search warrant pursuant to the *Controlled Drugs and Substances Act*, [S.C. 1996, c. 19](#) [CDSA]. On July 22, 2022, the SPD executed a search warrant at the [REDACTED]. On the same day, CSU completed their inspection (the July 21 and 22, 2022 searches are collectively referred to as the "2022 Search").

16 The SPD allegedly found packaged cannabis, records relating to the sale of cannabis products and packaging materials under the name of [REDACTED]. The CSU claims it seized in excess of 7,500 cannabis from the [REDACTED] Property.

17 A vehicle was seized, with the registered owner being [REDACTED] (the "Vehicle").

18 [REDACTED] is listed as the lessee for the [REDACTED] Property.

Procedural Background

19 The Director filed the notice of civil claim on October 6, 2022, seeking forfeiture of the Real Property, the Vehicle, and their proceeds.

20 The Director filed the Production Application seeking records in the possession of third parties on December 1, 2022, setting the hearing for December 15, 2022. The defendants filed their application responses on December 12 and 13, 2022.

21 On December 15, 2022, the parties appeared before Justice Saunders who adjourned the Production Application.

22 On January 30, 2023, [REDACTED] filed their response to notice of civil claim. In their response, they raise a number of alleged *Charter* breaches, including that the 2018, 2019 and 2022

Searches and subsequent investigations violated their constitutional rights. They also submit that sections of the *CCLA* and the *Act* are unconstitutional and therefore of no force and effect. They seek an order for a bifurcated proceeding, seeking to have the alleged *Charter* violations decided first.

23 On February 1, 2023, [REDACTED] filed their response to notice of civil claim in which they also allege that the forfeiture action is a result of various *Charter* breaches. They raise a number of other arguments, including that sections of the *Act* violate the *Charter* and are unconstitutional.

24 On February 6, 2023, [REDACTED] filed its response to notice of civil claim denying that any of its properties constitute instruments of unlawful activity within the meaning of the *Act*.

25 On February 7 and 8, 2023, the Director obtained default judgments against [REDACTED].

26 On April 13, 2023, [REDACTED] filed an application pursuant to Rule 12-5(67) of the *Supreme Court Civil Rules* [Rules] that the trial be bifurcated, such that the issue of whether the defendants' s. 8 *Charter* rights were violated be determined prior to and separately from any other remaining issues raised in the pleadings (the "Bifurcation Application"). The Bifurcation Application further seeks an order that the defendants be released from the requirement to provide any further amended list of documents or attend examinations for discovery until the adjudication of the *Charter* issues. It was set to be heard on June 12, 2023 on the assize list, but the parties agreed to adjourn it. The Bifurcation Application and other bifurcation applications yet to be filed are scheduled for a nine-day hearing, commencing on February 12, 2024.

27 On May 11, 2023, [REDACTED] filed an amended response to notice of civil claim providing further particulars of the facts in support of the alleged *Charter* breaches.

Legal Principles

28 Before setting out the issues and positions of the parties on this Production Application, it is helpful to understand the purpose and framework of the *Act* and the Director's powers to obtain documents and information under it.

29 The purpose of the *Act* was summarized by Justice Fitzpatrick in *Director of Civil Forfeiture v. PacNet Services Ltd.*, [2018 BCSC 387](#) [PacNet #1]:

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

- (a) to take the profit out of unlawful activity;
- (b) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
- (c) to compensate victims of crime and fund crime prevention and remediation. ...

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

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

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

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

...

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

[30] Under ss. 5 and 6 of the Act, if the Court finds that property is either proceeds of unlawful activity or an instrument of unlawful activity, or both, the property is forfeited to the government unless forfeiture is clearly contrary to the interests of justice. The Act codifies the common law principles that a person cannot have an enforceable property right as a result of illicit possession and, in the absence of a true owner, unowned property is escheated to the Crown: *British Columbia (Civil Forfeiture Act) v. Nguyen*, [2009 BCSC 185](#) at para. 42.

30 Pursuant to the Act, the Director has the power to compel the production of information and records. Section 11.01(1) of the Act provides:

On application of the director, a court may make an order requiring a person to disclose to the director information or records in the custody or control of the person if the court is satisfied that the information or records are reasonably required by the director in order to exercise the director's powers or perform the director's functions and duties under this Act.

31 Section 11.01(1) imposes a two-part inquiry. First, the court must be satisfied that the documents or information sought are in the custody or control of the person from who it is sought. Second, the court must be satisfied that the documents or information sought are reasonably required by the Director in order for the Director to exercise their powers, or perform their functions and duties under the Act.

Issues

32 I will address the following issues:

1. Is the Director required to pursue production through the *Rules* instead of s. 11.01(1) of the Act?
2. Has the Director met the requirements of s. 11.01(1) of the Act?
3. Should the orders not be made as a result of the bifurcation application(s)?
4. What production orders, if any, should be granted?
5. What costs should be awarded?

Analysis

Issue 1: Is the Director required to pursue production through the *Rules* instead of s. 11.01(1) of the Act?

33 Several defendants take the position that document production ought to proceed under the *Rules*, as opposed to s. 11.01(1) of the *Act*, for various reasons. The following arguments are advanced:

1. The Director has not demonstrated that the document production procedure provided in the *Rules* is insufficient;
2. Documents produced in the action under the *Rules* have the protection of the implied undertaking, whereas documents produced under the *Act* may not; and
3. Since the Director issued Form 5 requests to the third parties and commenced the civil forfeiture action prior to making this application, it is restricted by s. 22.02 of the *Act* to pursuing document production under the *Rules*.

Document Production Under the Rules

34 [REDACTED] submit that the Director failed to establish that document procedures under the *Rules* are insufficient or do not allow the Director to meaningfully exercise his powers, functions and duties under the *Act*.

35 The Director submits that there is no requirement that the remedies available under the *Rules* be exhausted before proceeding with production under the *Act*; both avenues are independently available to the Director. Further, the Director disputes that s. 11.01(1) of the *Act* is interchangeable with the document production provisions under the *Rules*; rather, s. 11.01(1) imposes a lower burden and grants substantially greater powers. I agree.

36 I see no requirement that after an action has been commenced the Director must seek document production under the *Rules* and not under s. 11.01(1) of the *Act*. The *Act* requires that a production application be made to the Court and it does not limit the Director's authority to do so to the period prior to the commencement of proceedings. The issue of when a production application can be brought is expressly addressed in s. 11.01(2) of the *Act* which provides:

- (2) The director may apply for an order under subsection (1) before, at the time of or subsequent to
 - (a) commencing proceedings under section 3, or
 - (b) an order under section 11.02.

37 In my view, the legislation is clear that the Director is permitted to bring an application for the production of information and documents pursuant to s. 11.01(1) after the proceeding is commenced.

38 Section 11.01(1) gives the Director added powers to seek not only records from third parties, but also information.

The Implied Undertaking Issue

39 Defendants [REDACTED] claim that documents produced in the action under the *Rules* have the protection of the implied undertaking whereas documents produced under the *Act* may not have that protection. Their concern is that the Director could share the documents with other enforcement agencies, noting that s. 22(4) of the *Act* expressly authorizes information sharing. They submit that the Director should seek production of the records through the *Rules* to ensure they are protected by the implied undertaking.

40 The implied undertaking rule in British Columbia has its origins in *Hunt v. Atlas Turner Inc.*, (1995) 4 B.C.L.R. (3d) 110 (C.A.), 1995 CanLII 1800, where the Court of Appeal, sitting as a five-judge panel, overruled its earlier decision in *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1 (C.A.), 1986 CanLII 167. The Court held that the law imposes an obligation on a party receiving documents through the discovery process to not make use of those documents other than in the proceeding in which they were produced except with the consent of the disclosing party or a court order: at paras. 63-64.

41 The rationale for the implied undertaking was addressed by Justice Binnie in *Juman v. Doucette*, 2008 SCC 8. The rationale is two-fold.

42 First, the rule provides a measure of protection of the privacy rights of litigants who are compelled to disclose their private information in the course of the proceedings. Second, the implied undertaking rule encourages litigants to provide a more complete and candid discovery by assuring that their evidence will not be used for collateral purposes: at paras. 23-26.

43 The decision in *Director of Civil Forfeiture v. PacNet Services Ltd.*, 2018 BCSC 2070 [PacNet #2] recognizes that in civil forfeitures cases the implied undertaking exists:

[82] In addition, all parties acknowledge the protections afforded the Defendants in this proceeding by reason of the implied undertaking rule that prevents the Director from using compelled evidence for any purpose other than prosecuting the present action: *Juman v. Doucette*, 2008 SCC 8 at paras. 4-5; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2014 BCCA 258 at para. 28.

[83] There is no substance to the stated concerns of the Defendants that "somehow" the VPD "may" gain access to document disclosure in this case in breach of the implied undertaking. There is no suggestion that the Director will not comply with that undertaking, although I recognize that the Director has the ability to share information with other agencies in accordance with s. 22(4) of the CFA. In any event, the Defendants have not brought any application to expand or amend the implied undertaking imposed upon the Director in this case or address any concerns arising under s. 22 of the CFA.

44 The defendants argue that the production of documents pursuant to s. 11.01(1) of the Act does not carry the same implied undertaking as documents produced under the Rules.

45 In my view, if documents and information are obtained by the Director under s. 11.01(1) there would be a duty on the Director to list those documents in a list of documents in the action. Rule 7-1(31) requires that only documents produced in accordance with this rule can be used at trial without further order of the court. Once the documents are listed, the implied undertaking would apply. Further, Form 22 specifically requires that the following wording be added to a party's list of documents:

Implied undertaking to the court

Documents produced are not to be used by the other party(ies) except for the purposes of this litigation unless and until the scope of the undertaking is varied by a court order or other judicial order, consent or statutory override or a situation of immediate and serious danger emerges. This implied undertaking continues despite settlement or completion of the litigation.

46 It is clear that documents, including financial records from third parties, that come into the hands of the Director are covered by the implied undertaking.

47 In addition, there was an amendment made to the *Act* in May 2023 that restricts how the Director may use or disclose information obtained under the *Act*, including under s.11.01:

22.002 (1) In this section, "specified information" means information and records obtained by or on behalf of the director

- (a) in proceedings commenced under section 3, other than information or records obtained under section 22 (4), (6) or (6.1),
- (b) pursuant to an order of the court, or
- (c) under section 22.02,

but does not include information that is available to the public.

- (2) Despite any other enactment or law other than a prescribed enactment, the director must not use or disclose specified information except as authorized by this section.
- (3) The director may use or disclose specified information as follows:
 - (a) for the purposes of administering this Act, including any proceedings under this Act;
 - (b) for the purposes of a prosecution for perjury or for proceedings for contempt;
 - (c) in accordance with an order of the court made on application by the director in proceedings under this Act.
- (4) Despite any other enactment or law, the director must not be required, in connection with any legal proceedings, to give or produce evidence relating to any information or records obtained by or on behalf of the director under this Act.
- (5) Subsection (4) does not apply in respect of legal proceedings referred to in subsection (3) (a) or (b).
- (6) To the extent of any inconsistency or conflict with sections 32 [*use of personal information*] and 33 [*disclosure of personal information*] of the *Freedom of Information and Protection of Privacy Act*, this section applies despite that Act.

48 I see no support for the defendants' argument that in some fashion there is a risk that the documents obtained under s. 11.01(1) of the *Act* are not protected by the implied undertaking and can be shared with other police organizations.

The Form 5 Bar

49 [REDACTED] submit that the issuance of Form 5 requests constitutes a bar to applying for an order under s. 11.01 or s. 11.02 after an action has been commenced. They submit that, in the circumstances, the Director must pursue production through the *Rules*. I disagree.

50 Section 22.02(2) gives the Director the authority to issue a Form 5 request where the following conditions are met. First, the Director must have reason to suspect that the whole or a portion of an interest in property is proceeds of unlawful activity or that property is an instrument of unlawful activity. Second, the Director must have reason to believe that the property is in British Columbia. Third, where the recipient is a financial institution, the Director must have reason to believe that the financial institution is in possession of the whole or the portion of the interest in the property. Finally, the information must be reasonably required by the Director in order to discharge their powers, functions, or duties under the *Act*.

51 Where these conditions are met, pursuant to s. 22.02(3) of the *Act*, the Director can request basic

information about the property through a Form 5 request including: any information necessary to identify the account, including the account number and other particulars; the nature and type of the account; whether the account is active; and the names and addresses of the account holders.

52 In this case, the Director issued a number of Form 5 requests to financial institutions, which were returned with some account information about the various defendants, including the existence of a number of bank accounts.

53 Section 22.02(5) of the *Act* states:

- (5) If the director provides a notice under subsection (2) to a person referred to in subsection 2(c)(i), the director must, as soon as practicable after providing the notice, do one of the following:
 - (a) disclose to all account holders identified by the persons that a notice was given under this section;
 - (b) commence proceedings under section 3 in relation to the whole or the portion of the interest in property;
 - (c) apply for an order under section 11.01 or 11.02.

54 [REDACTED] submit that this section means that once a Form 5 request is made, the Director must only do one of the three options. Thus, if an action is commenced, as was done in this case, then the Director is not entitled to seek an order to produce information or records under s. 11.01. Instead, the Director must resort to the *Rules* to pursue further document disclosure.

55 I disagree with that interpretation. I do not see the three options as mutually exclusive. Such an interpretation would mean that, if the Director decided to disclose to the account holders that a notice had been given, then the Director would not be permitted to bring an action. That cannot be the correct interpretation of this section.

56 In my view, the Director can do one, two, or all three of the actions set out; what he cannot do is nothing once a Form 5 request is made. To do nothing would be to deprive the account holders of knowledge that the Director has taken steps to make inquiries about them. Clearly, this is not a permissible outcome.

57 The fact that an application for an order under ss. 11.01 and 11.02 can be made *ex parte* is not inconsistent with proceedings having been commenced. *Ex parte* applications are frequently made when actions have already started.

58 The issuance of Form 5 requests does not constitute a bar to applying for an order under s. 11.01 the *Act*.

Issue 2: Has the Director met the requirements of s. 11.01(1) of the *Act*?

59 Defendants [REDACTED] argue that the Director has failed to satisfy the test under s. 11.01(1) of the *Act*, as it has not demonstrated that the records and information are reasonably required by the Director to exercise his powers or perform his statutory duties.

60 The Director argues that both parts of s. 11.01(1) of the *Act* are satisfied. I agree.

61 The first part of the inquiry is that the financial institutions have the custody or control of the requested documents or information. It is clear that the financial institutions have account records and the information respecting the owners of various accounts in their possession.

62 The second part of the inquiry relates to whether the information or records are reasonably required by the Director in order to exercise the Director's powers or perform the Director's functions and duties under the *Act*. The Director is not required to prove his case in order to establish that the records are reasonably required. On the evidence provided, I am satisfied that a reasonable inference can be drawn that the financial information and records sought are reasonably required for the Director to perform his statutory duties with respect to disgorgement, prevention, and to identify the income from illicit sales. I accept that these records will enable the Director to trace the source of the funds used to purchase the Real Property. Further, I accept that the information and account records could assist the Director in distinguishing whether any of the accounts or funds are legitimate and thus not properly subject to forfeiture. I conclude that the Director has satisfied the second aspect of the inquiry.

63 At the hearing, counsel for [REDACTED] argued that the Production Application lacks the proper evidentiary foundation since an application for documents and information is akin to seeking a final order and as such, hearsay in affidavits cannot be relied upon. According to their position, the affidavit evidence of the Director, Mr. Larson, is largely inadmissible.

64 I am not persuaded that an application under s. 11.01(1) of the *Act* for the production of information and records comes within the ambit of a final order. I do not see how the production of the financial information and records would finally dispose of the rights of the parties as set out in *Purewal Blueberry Farm Ltd. v. J.T. Johnson Co.*, [2005 BCCA 30](#), as argued by the defendants. That case involved a decision on adding defendants to the litigation; it is clear that such a decision is a final one. An application to produce documents is not a final order and, as such, the rules relating to the use of hearsay in final orders does not apply. It is an interlocutory order and hearsay evidence is admissible: *Sermeno v. Trejo*, [2000 BCSC 846](#) at para. [10](#).

65 To seek to appeal a document production order, leave must be sought. An appeal of a document production order will be subsumed within the appeal of the final order: *SCP 173 Realty Limited v. Costa Del Sol Holdings Ltd.*, [2022 BCCA 93](#) at para. [16](#)

66 I reject the defendants' submission that the affidavit evidence relied on in *Mand v. Cheema*, [2021 BCSC 1854](#) is akin to the affidavit relied on in this action. In *Mand*, the affidavit was from a paralegal who had no personal knowledge of any of the documentation attached to her affidavit: at paras. 30-39. The primary affidavit evidence relied on in this application is from Jerad Larson, the Director of Civil Forfeiture. I see no basis to object to the nature of the affidavit evidence tendered.

Issue 3: Should the orders for production be made in light of the bifurcation application(s)?

67 I found that the information and documents meet the test for production as set out in s. 11.01(1) of the *Act*, and so, the only issue is whether there should be a delay in granting this order until the matter of bifurcation is determined.

68 The main thrust of the defendants' argument is that this Production Application should not proceed until the bifurcation application(s) are heard. They assert that the Director relies on information in support of the Production Application that was obtained through a number of serious *Charter* breaches and thus,

proceeding with document production prior to the determination of the *Charter* issues risks further violations.

69 The Director disputes that the bifurcation hearing needs to proceed prior to the production of the information and records from third parties on the following bases:

1. While bifurcation orders are commonly accompanied by an order limiting discovery obligations on the defendants as a matter of efficiency, should the forfeiture action not be pursued following the determination of *Charter* issues, this is an application for documents and information in the possession of third parties, not the defendants;
2. None of the defendants have sought, in any bifurcation application, that the Director be restrained from seeking documents under s. 11.01 or from third parties generally;
3. The three defendants that filed the Bifurcation Application agreed to an adjournment of it with no concession by the Director that there would be a stay of the proceedings or that the Director was otherwise acquiescing to delay;
4. The majority of the defendants have never applied for bifurcation despite ample opportunity to do so;
5. A defendant seeking to postpone other matters because they intend to file for a bifurcation must also adduce evidence to support the allegations on which the bifurcation is based and the defendants have failed to do so;
6. Three defendants cannot advance bifurcation arguments. [REDACTED], cannot advance bifurcation arguments since default judgment has been obtained against them and [REDACTED] cannot because it did not plead any *Charter* or constitutional issues;
7. The unlikely success of any bifurcation applications;
8. The production of documents does not govern their admissibility at trial so, even if produced, the defendants can still seek exclusion of the evidence at trial; and
9. This is not a case where the action will necessarily end if the defendants are able to successfully prove the alleged *Charter* breaches, as is often the case where the asset(s) subject to forfeiture are discovered in the course of a warrantless search.

70 I am not persuaded that the issue of whether the proceeding is to be bifurcated must be determined before an order is granted for the production of the financial records and materials sought in this case.

71 In *British Columbia (Director of Civil Forfeiture) v. Huynh*, [2012 BCSC 740](#) at paras. [46-47](#), Justice Schultes held that it would be more efficient not to engage in discoveries and production of lists of documents until the *Charter* issues had been resolved. I reject the argument that this rationale applies in the circumstances of this case. The defendants are not being asked to attend a discovery or take steps to list and disclose all documents. This is an application to third parties to provide the information and records in their possession.

72 I also find that this case is not equivalent to *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, [2019 BCSC 70](#) [2019 *PacNet*], where the Court found that the defendants' position was "entirely based on speculation and conjecture as to what may unfold in this proceeding": at para. 45. In that case, the defendants did not bring any applications raising *Charter* issues for determination. Here, one set of defendants filed the Bifurcation Application and others confirmed their intention to do so. In this litigation, the *Charter* breaches are front and centre. The defendants are not asserting "potential"

Charter infringements; rather, they assert that the searches and subsequent investigations which preceded the action were unconstitutional. The particulars of why have been provided in the pleadings.

73 I accept that the defendants are not seeking to delay production in the "abstract" akin to the situation faced in *2019 PacNet*.

74 At this stage of the proceeding it is also not clear to me that if the evidence from the searches is excluded this would inevitably result in the resolution of this civil forfeiture proceeding. I accept that publicly available documents exist that the Director can rely upon in support of the allegations of unlawful activity.

75 I am particularly concerned about how long the procedure will take. At present there are nine days set aside for the bifurcation application(s) in February 2024. If it completes, the next step will be for the reasons to be released and then potentially an appeal. If the bifurcation is successful, the next step will be a trial on the *Charter* breaches, time for the pronouncement of the reasons, and then a potential appeal. It is my view, these various steps could take up to two years, if not more, and during this period there is a risk that the documents could be destroyed.

76 The defendants submit that financial institutions generally retain records for seven years. No authorities for this proposition were provided; however, I note that there is some reference in the case law to seven-year retention policies as a matter of internal policy. The Director seeks documents going back to 2016. Delaying the production order until later in the proceedings creates a risk that relevant documents will be unavailable.

77 The argument advanced by the Director is that the defendants did not have legitimate funds to purchase \$12 million in properties without mortgages. As such, their financial circumstances are very relevant to this proceeding. I note the first property was purchased on or about June 20, 2019 and, as such, the financial circumstances of the defendants for a period of time prior to this date are relevant.

78 I disagree that a preservation order alone would suffice. The Director is also seeking information about the existence of various accounts. It is not possible to preserve the documents relating to those other accounts when the identity of the various accounts is not known.

79 I am persuaded that the order for production from the third parties should be made; however, as discussed below, I am concerned with the privacy rights of the defendants if, at the end of the day, they succeed on the bifurcation application and on the *Charter* breaches, and this civil forfeiture action is not pursued.

Issue 4: What production orders should be made?

80 I agree that the defendants have privacy interests in their financial records, which individuals expect will remain confidential: *Schreiber v. Canada (Attorney General)*, [1998] S.C.R. 841 at para. 22, [1998 CanLII 828](#).

81 The order should be crafted in a way that ensures the information and records are obtained, but also ensures that the Director cannot make use of the information and documents until the bifurcation hearing has taken place and, if there is a bifurcation, until the alleged *Charter* breaches have been resolved. At that point, if the Director decides to pursue the civil forfeiture action the information and documents

should be produced in the action. If the bifurcation application(s) are not successful, the information and documents should be disclosed to the Director at that time.

82 This affords the necessary protection to the defendants and also ensures that the information and documents requested will be available in the future without delay. It is my view that this best achieves a balancing of the interests of the parties and is in accordance with the interests of justice.

83 I do not agree that a typical *Halliday* order is required. The purpose for *Halliday* orders in personal injury actions is to provide the plaintiff with the opportunity to review documents, usually medical records, to ensure that non-relevant and confidential personal medical information is not produced. I do not find that the financial information sought by the Director engages the risk of the same type of personal confidential information existing in medical records.

84 I would not permit the defendants' counsel to redact information on the basis of privilege nor relevancy. In my view, the totality of the defendants' financial circumstances is relevant to the issue of whether funds from unlawful activities were used to purchase the Real Property. The source of the funds is a key issue. The financial documents clearly relate to that issue.

85 I agree that the information and documents should go to counsel for the defendants for safekeeping. Once the issues relating to the bifurcation, and if bifurcated once the alleged *Charter* breaches have been resolved, then all the information and documents from the third parties shall be produced to the Director.

86 In my view, it may be the least complex if the order has only one defence counsel responsible for receiving the information and documents from the third parties. This requires that paragraph 2 in the order be changed to reflect that counsel's name. I will leave it for counsel to agree on which counsel should be responsible for this.

87 The Director shall remain responsible to pay for the reasonable costs to the third parties as currently provided in paragraph 3 of the proposed order.

88 There should be an additional paragraph that reads that upon the decision in the bifurcation application(s), and, if ordered, after a bifurcated trial on the issue of the alleged *Charter* breaches is heard and if the Director decides to pursue this civil forfeiture action, then the information and documents shall be provided to the Director for use in this proceeding.

89 Leave is granted to the parties if any further guidance is needed in the drafting of the order relating to which defence counsel should be the custodian of the information and records.

Issue 5: What costs should be awarded?

90 The Director seeks an award of special or increased costs on the basis that the defence arguments in opposing this order should not have been made and the defence should not have occupied multiple days of scarce chambers time to make them.

91 Some of the defendants argue that the Director should pay costs and the costs be summarily assessed.

92 I agree that some of the defence arguments, including some in the application responses which were

abandoned and not pursued, had little merit. However, a number of them raised legitimate issues that needed to be addressed by the Court. I am not persuaded that an order for costs should be made at this time. If the Director is ultimately successful in this civil forfeiture action then the issue of costs of the Production Application can be addressed at that time.

93 I order that costs of the application be in the cause.

C.L. FORTH J.