



No. 16 3652
Victoria Registry

In the Supreme Court of British Columbia
Civil Forfeiture Action *in Rem* Against

Funds held at The Toronto-Dominion Bank in Accounts 9313-7200698, 9313-5006595 and
9313-50077362 and the Proceeds thereof

Between

Director of Civil Forfeiture

Plaintiff

and

The Owners and all Others Interested in the Bank Accounts,
in particular CNM Communications Inc. and Easy Padala Inc.

Defendants

NOTICE OF APPLICATION

Name of applicant: the plaintiff, Director of Civil Forfeiture

WITHOUT NOTICE

TAKE NOTICE that an application will be made by the applicant, Director of Civil Forfeiture (the "Director"), to the presiding judge at the courthouse at 850 Burdett Street, Victoria, BC at 9:45 am on 27/SEP/2016 for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Toronto-Dominion Bank branch located at Unit 1 - 110 Brew Street, Port Moody, British Columbia, V3H0E4, Transit #9313 ("TD"), shall hold and not dispose of, or otherwise deal with, any accounts or moneys held under account number 9313-7200698 ("CMN USD Account"), 9313-5006595 ("CNM CAD Account") and 9313-50077362 ("Easy Padala USD Account") to the benefit of CNM Communications Inc. and Easy Padala Inc. (the "Accounts") until October 26, 2016, or until further order of this court, pursuant to s. 8 and 9 of the *Civil Forfeiture Act*, SBC 2005, c. 29 (the "CFA")

2. Any party or person claiming an interest in the Accounts is at liberty to apply to vary this order on at least two (2) business days' notice to the Director, such notice to be by facsimile to (250) 387-4002, or by delivery to 1001 Douglas Street, in the City of Victoria, to the attention of counsel for the Director.

Part 2: FACTUAL BASIS

Summary

1. The Director has commenced an action under the *CFA* seeking the forfeiture of the funds in the Accounts on the basis that the Accounts are both proceeds and instruments of unlawful activities, namely fraud and money laundering.

Notice of Civil Claim filed 30/AUG/2016

2. On August 30, 2016, the Honourable Mr. Justice Gaul granted an *ex parte* interim preservation order under s. 9 of the *CFA* for 30 days with respect to the Accounts.

Affidavit #2 of A. Turner, at para. 2 and Exhibit A

3. On September 8, 2016, Manjinder Singh, Process Server, British Columbia, served the defendants with the notice of civil claim, the *ex parte* interim preservation order, and other documents.

Affidavit of Service of M. Singh

4. The Director seeks an extension of the IPO for 30 days so that the defendants may be given a proper opportunity to file a response to the notice of civil claim and so that a hearing can be scheduled on the issue of having an IPO in place until a judgment is rendered in this action, if such a hearing is necessary.

Background

5. The defendant, CNM Communications Inc. (“CNM”) is a company incorporated in British Columbia on April 19, 2012 with a registered and records office of 205 – 101 Morrissey Road, Port Moody, BC.

Affidavit #1 of K. Sledding, para. 11, Exhibit A

6. Francisco Cortes (“Mr. Cortes”) and Zeala Cortes (“Ms. Cortes”) are the sole directors and officers of CNM.

Affidavit #1 of K. Sledding, para. 11, Exhibit A

7. CNM maintains a US Dollar bank account at the Toronto-Dominion Bank, with an address of Unit 1 - 110 Brew Street, Port Moody, British Columbia, V3H0E4, Canada (the “TD”) under account number 9313-7200698 (the “CNM USD Account”).

Affidavit #1 of K. Sledding, para. 10. a

8. CNM maintains a Canadian Dollar bank account at the TD under account number 9313-5006595 (the “CNM CAD Account”).

Affidavit #1 of K. Sledding, para. 10. c

9. The defendant, Easy Padala Inc. (“Easy Padala”) is a company incorporated in British Columbia on March 8, 2014 with a registered and records office of 205 - 101 Morrissey Road, Port Moody, BC.

Affidavit #1 of A. Turner, para. 3, Exhibit A

10. Mr. Cortes is the officer of Easy Padala. Mr. Cortes and Ms. Cortes are the directors of Easy Padala.

Affidavit #1 of A. Turner, para. 4, Exhibit A

11. Easy Padala maintains a US Dollar bank account at the TD under account number 9313-50077362 (the “Easy Padala USD Account”).

Affidavit #1 of K. Sledding, para. 10. b

Unlawful Activities

12. On June 6, 2016, Port Moody Police Department (“PMPD”) commenced an investigation into an allegation that Doris Gray (“Ms. Gray”) was defrauded.

Affidavit #1 of K. Sledding, para. 12

13. On or about April 8, 2016, an 84-year-old, New Jersey resident Ms. Gray was contacted by an unknown male claiming to be “Christopher Quinn”, working for “Anderson and Quinn Associates Law Firm”, who convinced Ms. Gray in telephone conversations that she had won a grand prize sweepstakes lottery of \$1,500,000.00 USD.

Affidavit #1 of K. Sledding, para. 13

14. Ms. Gray was informed that she needed to make payment on account of taxes incurred by the prize money winnings, so she could receive the grand prize. The bank account that Ms. Gray was to transfer money into was under the name “CNM Communications”, with an address of 205 – 101 Morrissey Road, Port Moody, BC, Canada.

Affidavit #1 of K. Sledding, para. 13

15. On April 18, 2016, Ms. Gray transferred \$49,500 USD to the CNM USD Account.

Affidavit #1 of K. Sledding, para. 14. a

16. On May 17, 2016, Ms. Gray transferred \$43,000 USD to the CNM USD Account.

Affidavit #1 of K. Sledding, para. 14. b

17. On June 23, 2016, PMPD obtained a Production Order for the CNM USD Account.

Affidavit #1 of K. Sledding, para. 15

18. Between April 8, 2016 and June 15, 2016, 25 deposits were made into the CNM USD Account, totaling \$1,191,377.01 USD.

Affidavit #1 of K. Sledding, para. 17. b. i

19. Of these 25 deposits, 13 deposits consisted of wire transfers received from the United States, including Ms. Gray's, totaling \$715,060.50 USD.

Affidavit #1 of K. Sledding, para. 17. b. ii

20. Subsequent investigation revealed that at least 5 individuals from the United States made police reports, and/or provided information confirming that they had forwarded money to the CNM USD Account under the belief that they were winners of a "sweepstakes lottery grand prize" requiring payment on account of taxes and fees for receipt of the full amount of the prize money.

Affidavit #1 of K. Sledding, para. 17. b. ii.a.

21. These additional money transfers by these additional fraud victims to the CNM USD Account were similar in nature to Ms. Gray's money transfers.

Affidavit #1 of K. Sledding, para. 17. a

22. Between April 8, 2016 and June 15, 2016, numerous transfers of funds were made out of the CNM USD Account to several accounts and/or companies registered to Mr. Cortes, including:

- a. 9 transfers from the CNM USD Account to the Easy Padala USD Account, totaling \$222,039.88 USD;
- b. 3 transfers from the CNM USD Account to the CNM CAD Account, totalling \$99,610.24 USD; and
- c. 3 transfers from the CNM USD Account to Elan Wellness Group Inc. account, totaling \$90,000.00 USD.

Affidavit #1 of K. Sledding, para. 18

23. Between April 8, 2016 and June 15, 2016, there was an inter-account transfer from the CNM CAD Account to the CNM USD Account, totaling \$23,279.27 USD.

Affidavit #1 of K. Sledding, para. 17. b. iv

24. Between April 8, 2016 and June 15, 2016, there were 10 transfers from Elan Wellness Group Inc. account to the CNM USD Account, totaling \$453,000.00 USD.

Affidavit #1 of K. Sledding, para. 17. b. iii

25. The defendants acquired some or all of their financial resources directly or indirectly from the following unlawful activities, including:
 - a. Fraud contrary to section 380 of the *Criminal Code of Canada*, RSC 1985, c. C-46 (the “*Criminal Code*”); and
 - b. Laundering Proceeds of Crime contrary to section 462.31 of the *Criminal Code*; (collectively, the “Unlawful Activities”).

Affidavit #1 of K. Sledding, para. 19

26. The proceeds of the Accounts were acquired as a result of the participation of the defendants and/or others in the Unlawful Activities.

Affidavit #1 of K. Sledding, para. 20

27. If the proceeds of the Accounts are not forfeited, the defendants are likely to use these properties to fund or facilitate the Unlawful Activities or similar activities in the future.

Affidavit #1 of K. Sledding, para. 21

28. The Accounts are movable and very liquid assets. If they are not preserved by court order they will be either transferred or liquidated and any claim for forfeiture of these assets will not be able to move forward.

Affidavit #1 of K. Sledding, para. 21

Part 3: LEGAL BASIS

Summary

1. Under ss. 8(1) and 8(2) of the *CFA* if the Director has commenced an action for forfeiture of property the Director may apply to court for one or more IPOs.
2. Section 9 of the *CFA* allows the Director to make an application for an extension of an order under s. 8 for a period of up to 30 days.
3. The best way to preserve the court's jurisdiction over the Accounts and ensure they are not used in future unlawful activity is for TD to be restrained from disposing of or dealing with the Accounts in the manner sought in this application.
4. The Director respectfully submits that a 30-day extension of Mr. Justice Gaul's order is appropriate in the circumstances.

The Civil Forfeiture Act

5. The *CFA* provides for an *in rem* cause of action against property located in British Columbia that is either an instrument or proceeds of unlawful activity.
6. The overarching purpose of the *CFA* is threefold:
 - a. To take the profit out of unlawful activity (“disgorgement”);
 - b. To prevent the use of property to unlawfully acquire wealth or cause bodily injury (“incapacitation”); and
 - c. To compensate victims of crime and fund crime prevention and remediation (“compensation”).

British Columbia (Director of Civil Forfeiture) v. Onn, 2009 BCCA 402, at para. 14 (“*Onn*”)

7. The Director is created by the *CFA* and is given conduct of proceedings under it.
8. “Proceeds” and “instruments” of unlawful activity are defined in s. 1(1) of the *CFA*.
 - a. Proceeds of unlawful activity is property, in British Columbia, that is acquired directly or indirectly by unlawful activity – offences under provincial or federal law, or acts or omissions occurring outside Canada that are illegal in the jurisdiction they occurred and would be offences here.
 - b. An instrument of unlawful activity is property in British Columbia that has been used in or is likely to be used in unlawful activity for a profit or that is likely to cause bodily harm.
9. Under ss. 5, 6 and 13 of the *CFA*, if the court finds that property is either proceeds or an instrument of unlawful activity, the property is forfeited to the government unless

forfeiture is contrary to the interests of justice or, in the case of instruments, to the extent the interest belongs to an uninvolved interest holder.

10. The burden of proof that the property is proceeds or an instrument of unlawful activity is on the Director on a balance of probabilities. The burden of proof of any defence is on the person asserting it, also on a balance of probabilities.
11. The proceeds of forfeiture are paid into a special account in the consolidated revenue fund, which is used to compensate eligible victims, fund crime-prevention initiatives, remediate the effects of unlawful activities, administer the *CFA* or for other prescribed purposes.
12. The *CFA* 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 can be claimed by the Crown as *bona vacantia*.

Director of Civil Forfeiture v. Nguyen, 2009 BCSC 185 at para. 42

The Test for the issuing of an Interim Preservation Order (“IPO”)

Interim Preservation Orders (“IPOs”) under the *CFA*

13. The purposes of the *CFA* would be frustrated if there were no mechanism to ensure that the value of property that is subject to forfeiture proceedings is maintained until trial and that the property is not disposed of, removed or hidden to avoid forfeiture.
14. In particular, if there were no mechanism in place to prevent dissipation of the value of the property subject to forfeiture while awaiting trial or other disposition of the proceeding, then the compensatory purpose of the *CFA* would be rendered hollow. This mechanism is provided by s. 8 of the *CFA*.

15. The purpose of IPOs is to preserve the value of the property that is the subject of a forfeiture action under the *CFA*.

Onn, at paras. 16 and 31

16. Indeed, one of the primary purposes of IPOs is to prevent the direct or indirect reduction of the amount of money that would otherwise arise from the disposition of the property on its forfeiture.

CFA, s. 8(8)

17. Therefore, a reduction of the value of property that is the subject of a forfeiture action is inconsistent with the *CFA*, and the Director may take away property regardless of the forfeiture action's final outcome when its value is threatened.

British Columbia (Director of Civil Forfeiture) v. Henry, (October 22, 2010), Victoria Supreme Court Registry No. 10-3356 (BCSC – Chambers), paras. 36-37

18. Section 8 of the *CFA* fulfills the same purposes as Supreme Court Civil Rule 10-1 – namely the detention and preservation of property that is the subject of a proceeding. But the Legislature, recognizing the unique circumstances of civil forfeiture proceedings, chose not to rely on Rule 10-1. Instead, it provided for a specific statutory regime for interim preservation in forfeiture proceedings.

19. In comparison to ordinary litigation, defendants in civil forfeiture cases will generally have particularly strong incentives and opportunity to remove, hide or damage their property, and unlike an ordinary litigant, the Director is a public official, subject to public accountability.

20. For that reason, unlike in Rule 10-1, s. 8 of the *CFA* sets out a scheme in which preservation is mandatory and the onus of persuasion and proof is on the respondent to show that the form of the order sought is not in the interests of justice. This is a deliberate decision and shows both that some form of preservation is mandatory and that

the burden of proof and persuasion lies on the respondent to show that a particular order sought is not appropriate.

21. Subsections 8(1) and 8(2) provide that the Director may apply for an IPO against property or an interest in property in a proceeding against either alleged proceeds or instruments of unlawful activity.
22. Subsection 8(3) sets out the type of orders that the Director may seek. The orders include restraint on disposition or transmission of the property (s. 8(3)(a)), possession and delivery of the property (s. 8(3)(b)), appointment of a receiver (s. 8(3)(c)), disposition or sale of the property (s. 8(3)(d)), a lien on the property (s.8(3)(e)), any other order considered just for the preservation of the property, for the preservation of its value or protection of the rights of creditors (s. 8(3)(f)) and any other order the court considers appropriate in the circumstances (s. 8(3)(g)).
23. Subsection 8 (5) sets out the test to be met for the granting of an IPO:

8 (5) Unless it is clearly not in the interests of justice, the court must make an interim preservation order applied for under this section if the court is satisfied that one or both of the following constitute a serious question to be tried:

 - a. whether the whole or the portion of the interest in property that is the basis of the application under subsection (1) is proceeds of unlawful activity;
 - b. whether the property that is the basis of the application under subsection (2) is an instrument of unlawful activity.
24. This places the court under a mandatory duty to make an IPO so long as there is a serious question to be tried regarding whether or not the property is either an instrument of

unlawful activity or proceeds of unlawful activity and the preservation of the property would not be contrary to the interests of justice.

Director of Civil Forfeiture v. Angel Acres, 2007 BCSC 1648 (“*Angel Acres #1*”) at para. 47
British Columbia (Director of Civil Forfeiture) v. Warwick, 2016 BCSC 1471

25. At the first stage, the onus is on the Director since it is necessary to establish, as an affirmative fact, that a serious question to be tried exists. As in an ordinary interlocutory injunction application, the applicant is required to show evidence that he or she has a case, but the threshold is a low one so as not to prejudge the merits.
26. At the second stage, the onus at this stage is on the respondent resisting the interim preservation order to provide a sound evidentiary basis upon which the Court could conclude that preservation of the property would clearly be contrary to the interests of justice.

The test for the issuing of an IPO with or without notice

27. Section 9 of the *CFA* allows the Director to make an application under s. 8 without notice to any person, for a period of up to 30 days.

British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.,
2009 BCSC 322 (aff'd 2010 BCCA 539) (“*Angel Acres #2*”)

28. When making without notice applications for interim preservation orders under s. 8 and 9 of the *CFA*, the Director must, in good faith, make full and fair disclosure of material facts, including those facts that would tend to diminish the Director’s right to the relief sought. The Director must also not misstate or exaggerate the strength of the Director’s case or the evidence adduced to obtain the relief sought.

Angel Acres #2 at para. 52

29. However, the Director is not to be held to the fastidious disclosure standards that govern the actions of a plaintiff seeking to invoke the Court's equitable jurisdiction to obtain relief that may often amount to pre-judgment execution.

Angel Acres #2 at para. 51

30. In an application for an interim preservation order in relation to property that is the subject matter of an application for forfeiture, the Director must show that there is a serious question to be tried as to whether the property is either proceeds or instruments of unlawful activity as those terms are defined in the *CFA*. Once the Director has done this, the respondent must demonstrate that the order sought is clearly not in the interests of justice.

British Columbia (Director of Civil Forfeiture) v. Halstead, 2015 BCSC 1860, at para. 7

First prong of the test: Serious question to be tried

31. Within the context of civil forfeiture litigation in British Columbia the Court has considered the “serious question to be tried” test in s. 8(5) of the *CFA*:

[182] I see no reason why the phrase “a serious question to be tried” in s. 8(5) of the Act should not be interpreted in a manner that is consistent with the decision of the Supreme Court of Canada in *RJR*. That is so because the relief available to the Director under the Act is in the nature of injunctive relief relating to the preservation of property pending the determination of the merits of a claim at trial.

[183] In both *Tse* and *Peterson*, this Court determined that the previous threshold test of a “reasonable grounds to believe” was a “relatively low” one.

[184] I have concluded that the deliberate change from criminal law concepts to civil law ones in the present iteration of s. 8(5) of the Act must be interpreted as lowering the threshold test that must now be met by the Director when applying for an interim preservation order under the Act. What was formerly a “relatively low” test is now even lower.

Angel Acres #2

32. The court has confirmed the lowering of the threshold test for the making of an IPO.

British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corporation, 2016 BCSC 166 at paras. 73-80

33. Thus, it is not necessary for the Director to negative every possible defence – only to show a serious question to be tried in relation to the allegation that the property is either an instrument or proceeds of unlawful activity.

34. Of note, the existence of numerous legal issues in the action, including constitutional issues, is no reason to deny an interim preservation order.

Director of Civil Forfeiture v. Tse, 2007 BCSC 995 at para. 17

Second prong: IPO not clearly contrary to the interests of justice

35. The Legislature deliberately refrained from setting out an exhaustive list of factors for determining whether the terms of an interim preservation order are “not in the interests of justice” under s. 8(5) of the *CFA*.

36. Factors to be considered in order to determine whether forfeiture is “clearly not in the interests of justice” include the following:

1. proportionality;
2. fairness;
3. the degree of culpability, complicity, knowledge, acquiescence, or negligence;

4. the extent of the problem in the community of the sort of unlawful activity in question;
5. the need to remove profit motive;
6. the need for disgorgement of wrongfully obtained profits;
7. the need for compensation;
8. prevention of future harm;
9. general deterrence.

British Columbia (Director of Civil Forfeiture) v. Rai, 2011 BCSC 186 at para. 111

37. The “interests of justice” usually requires “the exercise of judicial discretion not only in assessing the competing interests of the parties, but also in assessing and balancing any identifiable societal interests in the matter under consideration.”

Angel Acres #2 at para. 220

38. This Court has granted a similar application without notice as well as with notice with respect to funds held by a bank.

British Columbia (Director of Civil Forfeiture) v. Wong, 2014 BCSC 359

39. The Director has shown a triable issue, and the Legislature has decided preservation should be paramount. The Accounts, their value and the jurisdiction of the court over them must be preserved.

Application

40. In applying the above to the facts of this case the following questions must be answered:
- a. Is there a triable question as to whether the Accounts are proceeds or an instrument of unlawful activity?
 - b. If so, are the terms of the order sought contrary to the interests of justice?

Triable Question

41. In this case, there is a triable question as to whether the Accounts are proceeds or an instrument of unlawful activity based on the following:
 - a. CNM received funds through the CNM USD Account. These funds were obtained by fraud contrary to section 380(1) of the *Criminal Code*.
 - b. The defendants transferred fraudulently received money through accounts of non-arm's length companies, thereby laundering the proceeds of crime contrary to section 462.31 of the *Criminal Code*.
 - c. The Accounts are proceeds of unlawful activity under the *CFA* because they were directly or indirectly acquired, in whole or in part, from the commission of some or all of the Unlawful Activities.
 - d. Since the proceeds of the Accounts are proceeds of unlawful activity, so too are any of their proceeds.
 - e. During the material times, the Accounts were used as an instrument of unlawful activity. An instrument of unlawful activity includes property that has been, or that is likely to be, used to engage in unlawful activity that, in turn, resulted in, was likely to result in, or that may result in the acquisition of property or an interest in property or caused, was likely to cause, or that may cause serious bodily harm to a person.

Interests of Justice

42. Having regard to the factors addressed in the authorities dealing with the second prong of the test, it is the Director's submission that the issuing of an IPO in the manner sought would not be clearly contrary to the interests of justice.

Tse at paras. 20-22
Angel Acres #2 at paras. 219-249
Rai at para. 111

Conclusions

43. The Accounts are an instrument of unlawful activity and if they are not seized they will likely be used to facilitate further unlawful activity.
44. If the defendants are able to withdraw or dispose of the Accounts, the civil forfeiture action will fail, since it is an *in rem* proceeding and the "thing" which is the subject of the action must be available for forfeiture at the end of the proceeding if the Director's case succeeds at trial.
45. Thus, in the present case, the best way to preserve the court's jurisdiction over the Accounts, pending trial on the merits, preserve their value and ensure they are not used in future unlawful activity is for the Director in the manner sought in this application, is for TD to be restrained from disposing of or dealing with the Accounts in the manner sought in this application.
46. On the basis of the above outlined factual basis and recognizing the low threshold for establishing a triable issue, it is clear that the Director has met the burden for the issuance of an interim preservation order.

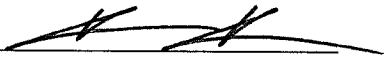
Part 4: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim, filed 30/AUG/2016
2. Affidavit #1 of Det./Cst. K. Sledding, made 25/AUG/2016.
3. Affidavit #1 of A. Turner, made 26/AUG/2016.
4. Affidavit #2 of A. Turner, made 15/SEP/2016.
5. Affidavit of Service of M. Singh, made 9/SEP/2016.

The applicant estimates that the application will take **10 minutes**.

- This matter is within the jurisdiction of a master.
 This matter is not within the jurisdiction of a master.

Date: 15/SEP/2016


 Signature of **Carley Gering**
 Lawyer for applicant

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

.....

Date:[dd/mmm/yyyy].....

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

interim orders

This **NOTICE OF APPLICATION** is prepared by Carley Gering, Barrister and Solicitor, of the Ministry of Justice, whose place of business and address for service is PO Box 9280, Stn Prov Govt, 1001 Douglas Street, Victoria, British Columbia, V8W 9J7; Telephone: (250) 387-1354; Facsimile: (250) 387-4002.