IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Director of Civil Forfeiture v. Hobbs,* 2019 BCSC 1344

Date: 20190619
Docket: S194992
Registry: Vancouver

Civil Forfeiture Action *in Rem* Against

The Lands and Structures situated at #TH22 - 1281 Cordova Street West, Vancouver, British Columbia, and having a legal description of parcel identifier 026-130-581 Strata Lot 12 of the Public Harbour of Burrard Inlet New Westminster District Strata Plan BCS1073 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V (the "Real Property"), a 2017 Land Rover Range Rover with Vehicle Identification Number SALGW3FE5HA366813, a 2018 Land Rover Range Rover with Vehicle Identification Number SALWZ2SE3JA192099 (collectively, the "Vehicles") and any funds notionally held by the Bank of Montreal, in particular account numbers 4642127 and 3716674, by Kevin Patrick Hobbs (the "Bank Funds") and their fruits and proceeds

Between

Director of Civil Forfeiture

Plaintiff

and

The Owners and all Others Interested in the Real Property, the Vehicles, and the Bank Funds, in Particular, Kevin Patrick Hobbs and Lisa Angela Cheng

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Plaintiff:	Howard A. Mikelson, Q.C. Adrian D.A. Greer
Counsel for Kevin Hobbs and Lisa Cheng:	Ian Donaldson, Q.C. Melanie R. Begalka
Place and Date of Hearing:	Vancouver, B.C. May 30 and 31, 2019
Place and Date of Judgment:	Vancouver, B.C. June 19, 2019

I. INTRODUCTION

[1] On March 14, 2019, on the *ex parte* motion of the Director, Madam Justice Power made an initial interim preservation order pursuant to s. 9 of the *Civil Forfeiture Act*, S.B.C. 2005 c. 29, with liberty to apply to set it aside on 48 hours' notice. Section 9 provides for *ex parte* orders that can endure for a maximum of 60 days. By consent, the order was extended until a with-notice application could be brought and determined under s. 8.

[2] The Director now applies with notice to the defendants for an interim preservation order ("IPO") and the defendants apply to set aside the *ex parte* order, largely on the basis of non-disclosure.

[3] The parties agree that the Director's application in effect supersedes the defendants' application. However, non-disclosure by the Director in obtaining the *ex parte* application is something that can be examined as a

consideration in whether a s. 9 order should be made. On that basis, I directed that the Director's argument should be heard first.

II. LEGAL FRAMEWORK

[4] The legal framework for an interim preservation order under s. 8 has been dealt with comprehensively in several decisions, and there is no debate between the parties as to the principles to be applied. I will therefore only briefly refer to those principles.

[5] Section 8(5) of the *CFA* sets out the two-stage test that applies to the issuance 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.

[6] The definition of "unlawful activity" is set out in s. 1:

> **"unlawful activity"** means an act or omission described in one of the following paragraphs:
>
> (a) if an act or omission occurs in British Columbia, the act or omission, at the time of occurrence, is an offence under an Act of Canada or British Columbia;
>
> (b) if an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence,
>
> (i) is an offence under an Act of Canada or the other province, as applicable, and
>
> (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia;
>
> (c) if an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence,
>
> (i) is an offence under an Act of the jurisdiction, and
>
> (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia,
>
> but does not include an act or omission that is an offence
>
> (d) under a regulation of a corporation, or
>
> (e) under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.

[7] Section 9 provides that the Director must demonstrate—on a "serious question to be tried" standard—that the subject property is the proceeds or an instrument of unlawful activity. In *Director of Civil Forfeiture v. Angel Acres Recreational and Festival Property Ltd.*, 2009 BCSC 322, aff'd 2010 BCCA 539, Davies J. concluded that "serious question to be tried" in s. 8(5) is to be interpreted in the same manner as the test for interlocutory civil injunctions discussed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The threshold is a low one and the object is to determine whether the application is "frivolous or vexatious": *Angel Acres* at paras. 181–184.

[8] Meeting the threshold involves only a preliminary review of the merits: *Director of Civil Forfeiture v. PacNet Services Ltd.*, 2018 BCSC 387 at para. 41. The court should be cautious in weighing evidence, and should not "engage in an exercise of preferring some evidence over other evidence or begin to make findings of fact": *British Columbia (Director of Civil Forfeiture) v. Warwick*, 2016 BCSC 1471 at para. 27.

[9] If the Director has shown a serious question to be tried, s. 9 mandates the court to make the order unless it is clearly not in the interests of justice. The burden of demonstrating that is on the defendant: *British Columbia*

(Director of Civil Forfeiture) v. Fischer, 2010 BCSC 568.

[10] The courts in British Columbia and Ontario, which has a similar regime to that here, have held that:

> … Since preservation orders are interlocutory in nature, the "clearly not in the interests of justice" exception should be applied even more stringently at this motions stage than at the final forfeiture stage of the proceeding.
>
> *Attorney General of Ontario v. $7,950.05 in Canadian Currency (in rem)*, 2017 ONSC 5855 (Ont. S.C.J.), quoted with approval by Fitzpatrick J. in *PacNet* at para. 48.

[11] These cases also state that the person opposing the IPO must show that the forfeiture order would be a "manifestly harsh and inequitable result": *PacNet* at para. 48.

[12] As in any civil case, at the *ex parte* hearing, the Director must make full and frank disclosure of all material facts. While, as stated above, I am not dealing with an application to set aside the *ex parte* order, the failure to make full and frank disclosure is something that can be taken into account as part of the interests of justice requirement when determining whether to grant the Director the IPO at the with-notice hearing: *British Columbia (Director of Civil Forfeiture) v. Nguy*, 2018 BCSC 1621.

III. SERIOUS QUESTION TO BE TRIED

[13] Mr. Hobbs and Ms. Cheng are the principals of Vanbex Group Inc.("Vanbex") and Vanbex Labs Inc. (formerly known as Etherparty Smart Contracts Inc.) Vanbex conducts business under Etherparty, Vanbex Ventures Inc., Vanbex Cares Foundation, Genisys Ventures Inc., and Vanbex Labs Inc.

[14] In September and October 2017, Vanbex launched a cryptocurrency coin called the FUEL token and sold it to the public through an Initial Coin Offering ("ICO"). The ICO generated in excess of US$30 million. The public paid for their FUEL tokens largely by Bitcoin.

[15] Stating it at its most general level, the Director claims that the defendants, through Vanbex, marketed the sale of the tokens, generated revenue for Vanbex, and then converted this directly to their personal bank accounts. They then used the funds to buy personal assets including a condominium in Toronto and two high-end cars.

[16] The Director alleges the following offences:

a) Fraud over $5,000 contrary to s. 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46;

b) Affecting market price of anything offered for sale to the public contrary to s. 380(2) of the *Criminal Code*;

c) Failure to declare taxable income contrary to the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.); and

d) Laundering the proceeds of crime contrary to s. 462.31 of the *Criminal Code*.

[17] The alleged fraudulent acts involve the marketing and sale of the tokens (which I will refer to as the "front-end" of the alleged wrongs) and the siphoning of cash from the company to the personal benefit of Hobbs and Chen (which I will refer to as the "back-end"). The use of the funds is also the subject of the alleged *Income Tax Act* offence. At the hearing in front of me, the Director focussed on back end. I will deal with that first.

[18] The RCMP investigation disclosed a series of transactions in which Bitcoin was converted by Etherparty into U.S. currency through a US cryptocurrency company, Cumberland Mining and Minerals, LLC, and then money was transferred by Etherparty to Hobbs and Cheng. For example:

a. August 17, 2017 Etherparty Inc. received its first ICO pre-sale contribution reported to FINTRAC (Exhibit "B" page 36);

b. August 21, 2017 Etherparty Inc. received US$200,000 from Cumberland (Exhibit "B" page 36);

c. August 29, 2017 Etherparty Inc. received US$500,341 from Cumberland (Exhibit "B" page 36);

d. September 1, 2017 Etherparty Inc. received US$1,000,000 from Cumberland (Exhibit "B" page 36);

e. October 10, 2017 Mr. Hobbs received US$200,000 from Cumberland (Exhibit "B" page 10);

f. November 21, 2017 Mr. Hobbs received US$150,000 from Cumberland (Exhibit "B" page 10);

g. November 27, 2017 Mr. Hobbs received US$500,000 from Cumberland (Exhibit "B" page 10);

h. November 30, 2017 Etherparty Inc. received $500,000 from Cumberland (Exhibit "B" page 36);

i. December 1, 2017 Mr. Hobbs received US$500,000 from Cumberland (Exhibit "B" page 10); and

j. December 4, 2017 Mr. Hobbs received US$2,000,000 from Cumberland (Exhibit "B" page 10).

[19] In December 8, 2017 Hobbs and Cheng purchased the Real Property (a condominium in Coal Harbour) for CDN$4.1 million in cash. The day prior to that, Hobbs withdrew over $4.1 million of the Cumberland transactions from his personal accounts.

[20] At the same time and shortly after, Mr. Hobbs made the following purchases:

a) On or about February 16, 2018 Mr. Hobbs purchased a 2017 Range Rover SV with an estimated retail value of CDN$178,703 to CDN$187,089 (one of the Vehicles referred to in the style of cause);

b) On March 2, 2018 Mr. Hobbs purchased real property at 5204 – 311 Bay Street, Toronto, Ontario for CDN$3,738,053 in cash; and

c) On or about April 21, 2018 Mr. Hobbs purchased a 2018 Range Rover with an estimated retail value of $122,935 to $129,485 (the other Vehicle referred to in the style of cause).

[21] A mortgage was registered on the Bay Street property in the amount of CDN$2,250,000 on February 25, 2019. Mr. Hobbs and Ms. Cheng also mortgaged the Real Property on December 20, 2018. The Director draws the inference that some or all of the proceeds of these financings form the Bank Funds held at the Bank of Montreal, which are captured by the current IPO. I draw the same inference.

[22] The RCMP investigator deposes that Mr. Hobbs apparently had no substantial wealth or assets prior to the ICO. As of September 29, 2017 Mr. Hobbs had only CDN$15,122.99 in his personal bank accounts. Ms. Cheng does not appear to have any active personal Canadian bank accounts. Mr. Hobbs lives in a residence owned by Ms. Cheng's parents.

[23] Section 380 of the *Criminal Code* sets out the offence of fraud:

> 380(1) Every one who, by deceit, falsehood ***or other fraudulent means***, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars […]
>
> [Emphasis added.]

[24] The Director relies on fraud by "other fraudulent means". He argues that the taking of funds from the company was done without authorisation and for no proper corporate purpose. He relies on *R v. Zlatic*, [1993] 2 S.C.R. 29, which dealt with this aspect of fraud. The court noted (cited to 1993 CarswellQue 6):

> **Fraud by "Other Fraudulent Means"**
>
> 18 … Most frauds continue to involve either deceit or falsehood. As is pointed out in Théroux, proof of deceit or falsehood is sufficient to establish the *actus reus* of fraud; no further proof of dishonest action is needed. However, the third category of "other fraudulent means" has been used to support convictions in a number of situations where deceit or falsehood cannot be shown. These situations include, to date, the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property. [citations eliminated]
>
> 19 The fundamental question in determining the actus reus of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest: *Olan*, supra. In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest?...
>
> 21 Appellate courts have followed the same approach, asking whether the diversion of funds at issue could reasonably be thought to serve personal rather than bona fide business ends….

[25] The defendants argue that the evidence is entirely speculative. It is true that the evidence is circumstantial, but the courts are permitted to draw inferences and this is especially so with respect to an ITO that is determined on the low standard of an arguable case.

[26] Given the timing of the various transfers and the amounts involved it is reasonable to draw the inference that the funds that made their way to Hobbs and Cheng came from the coin offering and the company and that the funds were used to purchase the assets sought to be attached. With resect to taking the funds without authorisation, the former CFO stated that he discovered the funds had been withdrawn and he booked it as a shareholder's loan. The defendants argue that lends the transaction some legitimacy. However, an ex *post facto* accounting treatment is not an authorisation.

[27] Hobbs and Cheng swore affidavits. They did not attempt to explain the source of the funds or offer evidence that the corporation authorised their withdrawal. However, they did make broad denials of having committed any fraud or of misusing corporate funds.

[28] The courts have granted ITO's using similar circumstantial evidence. See, for example, *PacNet*; *British Columbia (Director of Civil Forfeiture) v. Wong*, 2014 BCSC 359 and *Warwick*.

[29] Turning back to the substance of the alleged offence of fraud by other fraudulent means, the Director argues that the unauthorised taking of funds from the company in and of itself amounted to fraud. As mentioned in *Zlatic*, the taking of funds without a proper corporate purpose can constitute fraud by dishonest means. The unusual feature of this case is that the defendants owned the shares of the company, which was a private corporation. The Director goes further: he also argues that the purchasers of the tokens had an expectation that the purchase funds would be used for *bone fide* corporate purposes. He notes the following statement from the white paper, which was used to promote the ICO:

> The ICO will allow us to hire new talent, pay for marketing, as well as for business and product development so that we can be the first to market with a smart contract platform that anyone can use.

[30] In *Zlatic*, the accused was a businessman who bought goods from suppliers on credit. Mr. Zlatic sold the goods but instead of using the sales proceeds to re-pay the suppliers he gambled the money and lost. He was convicted of fraud. The Supreme Court upheld the conviction, noting, in addition to the above, that the wrongful use of money in which others have a pecuniary interest for purposes that have nothing to do with the business may

constitute fraud (para. 37). The court also noted that Zlatic having legal title to the money he gambled did not alter the result.

[31] Based on the evidence I have described and *Zlatic*, in my view, the Director has made out a serious case to be tried for fraud by other means. He has also made out a serious case to be tried that the assets sought to be preserved are the proceeds of that alleged crime.

IV. INTERESTS OF JUSTICE

[32] A major issue raised by the defendants with respect to the interest of justice aspect of the test for an ICO is that they say the Director did not make full and frank disclosure at the *ex parte* hearing. As I said above, that is something that can be taken into account in the interests of justice test.

[33] In *Nguy*, DeWitt-Van Oosten J. referred to the authorities setting out the disclosure obligation:

> [80] When the Director applies for an IPO on an *ex-parte* and without notice basis, he has an obligation to make full and frank disclosure. The nature of this obligation was discussed in *Angel Acres #2:*
>
> > [52] I have accordingly concluded that when making without notice applications for interim preservation orders under ss. 8 and 9 of the *Act*, the Director must, in good faith, make full and fair disclosure of material facts, including those facts that would tend to diminish the Director's right to the relief sought. The Director must also not misstate or exaggerate the strength of the Director's case or the evidence adduced to obtain the relief sought.
> >
> > [Emphasis added in *Nguy*.]
>
> [81] In *Ontario (Attorney General) v. $787,940 in Canadian Currency (In Rem)* (2014), 2014 ONSC 3069, 120 O.R. (3d) 300 (O.N. S.C.), the Court helpfully provided the following articulation of "materiality":
>
> > 45 The materiality of the facts that need to be disclosed on an *ex-parte* application must be interpreted broadly … "any fact that would have been weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material".
>
> [Internal references omitted in *Nguy*].
>
> [83] The duty to make full and frank disclosure in an *ex-parte* proceeding, irrespective of the context in which it arises, was restated by the Court of Appeal for British Columbia in *Kriegman v. Dill*, 2018 BCCA 86:
>
> > [43] … Little is to be gained by trying to formulate the standard in different ways to meet different contexts. The duty is to make full and frank disclosure of all *material* facts -- meaning facts that might be expected to influence the granting or rejection *of the application in question*. Materiality is ultimately to be determined by the court in each particular case; where a lawyer is in doubt, he or she should obviously err on the side of disclosure …
> >
> > [Underlining added in *Nguy*. Italics in the original.]

[34] As recognised by DeWitt-Van Oosten J. in *Nguy* at para. 181, a refusal to grant an ITO based on the interests of justice will be rare. She found that the case before her was one of those rare instances. I will return to this later.

[35] The defendants argue that Power J. was misled about Mr. Hobbs's criminal record because the affidavit in support of the application referred to a criminal conviction for possession of marijuana; however, the conviction had been overturned.

[36] The affiant, an RCMP officer, explained that this was an honest mistake: another officer gave him the trial judgment and he did not think to check if the decision had been reversed on appeal.

[37] While the conviction was mentioned in the affidavit, it was not raised in argument at the hearing. Moreover, the affidavit also referred to a conviction of Mr. Hobbs for possession of property obtained by crime over $5,000 and laundering the proceeds of crime.

[38] The defendants say that the court was misled with respect to Mr. Hobbs's gambling history and proclivities. They say that the portrait was conveyed that "Mr. Hobbs had taken funds from FUEL token purchasers and he was gambling recklessly with those funds". Further, the court was not informed that Mr. Hobbs was a successful gambler and did not disclose that he had substantial cash receipts from that.

[39] Counsel at the *ex parte* hearing referred the judge to the record of Mr. Hobbs's gaming, which are not denied as being accurate. While he advised the court that Hobbs was a substantial gambler he also said that Hobbs was, on occasion, a wildly successful gambler. Successful gambler or not, it was perfectly legitimate to point out to the court that Hobbs was a prolific gambler because there is a fair inference to be drawn that funds taken from the company were or may have been put at risk. I note that in *Zlatic* the court said that no actual deprivation is necessary to make out a charge of fraud; the risk of deprivation is sufficient (para. 25). Moreover, Mr. Hobbs's winnings can in no way explain the amount of the property purchased by him and Cheng.

[40] Further with respect to gambling, Mr. Hobbs says the court was told that he was put on a watch list and then denied access. He says this was a result of the commencement of this action, and that the court should have been told of this. The evidence in support of this is Mr. Hobbs's affidavit where he says, "I was never aware that I was on a 'watch list' at BC Casinos until this legal proceeding." That is not evidence as to the cause of him being put on a watch list.

[41] Further, counsel for the Director told the court:

> And again, I will take Your Ladyship to the evidence with respect to that. He was put on a watch list from the BC Lottery's Commission and, as I say, denied access. Paragraph 34 of the affidavit of Corporal Johnson deposes to that taking place on November 27th of 2017. And that was predicated upon a period of just about seven months or so, between September of 2016 and March of 2018 where casino disbursements for Mr. Hobbs totalled just shy of $2 million.

I do not find that to be a misleading or false representation.

[42] The defendants make reference to alleged inaccurate statements in the Notice of Civil Claim, primarily that Vanbex was a shell company. The duty of full and frank disclosure does not extend to pleadings, which are not taken as evidence. Examining the veracity of the pleadings for the purposes of determining full disclosure at an *ex parte* hearing would impose too high a burden on an applicant and bog the court down in endless debate.

[43] The balance of the other allegations of non-disclosure concern what I referred to as the "front-end" alleged criminal activities; that is, those concerning the floating of the ICO and representations made to the public in relation to what the company was actually doing or did do. Much of the affidavit material provided by the defendants was addressed to this, and much of that to show that the company was not a shell.

[44] While, as I have indicated, the Notice of Civil Claim alleged that Vanbex was a shell company, the case was not presented to Power J. on that basis. In fact, that term was not used at the hearing or in the affidavits. Rather, the thrust of the case before Power J. was the "back-end" alleged crimes and that, at the "front-end", that the company did not deliver what it promised.

[45] The affidavit material before the court made the case that while the company promised to deliver "self-executing agreements on the user-friendly Smart Contract platform" the company delivered Rocket, a lesser system.

[46] In the affidavit material now filed by the defendants the capability and functionality of Rocket is disputed, as is how much development the company had underway at the time of the injunction. That might be a matter of

debate based on the evidence *now* before me, but it is axiomatic that the time to assess alleged non-disclosure is the time of the *ex parte* hearing. There is no evidence that the Director had that fine-tuned information available to him or ought to have had.

[47] Based on the disclosure standards outlined in the case law, with the possible exception of the "white paper", there are no material details that the defendants have shown the Director was aware of or ought to be aware of, that in my view should have been disclosed.

[48] Turning to the white paper it is functionally (not legally) somewhat akin to a prospectus for a securities issue. It was written and put on-line by the company in 2017. As described by one of its authors in his affidavit:

> 17. The White Paper was written for public review. It was a roadmap for what we wanted to create and what we thought we could accomplish. It showed a foundational technology, an infrastructure or the bones of a system, and then explained the different ideas we had for how to use that base to build blockchain systems for different markets.

[49] A FUEL token purchaser had to confirm that they read the white paper.

[50] In his affidavit filed in support of the *ex parte* injunction, RCMP Cpl. Johnson stated that the FUEL tokens were sold pursuant to the white paper, but he did not attach it as exhibit.

[51] It would have been preferable had the white paper been attached; nevertheless, I do not agree with the defendants that it was intentionally concealed so as to create a false impression. As I have said, Cpl. Johnson referred to it in his affidavit.

[52] Moreover, the white paper does not constitute a substantive defence to the alleged charges. First, it has nothing to do with the allegations of the improper taking of funds from the company. Second, the case at the front-end was that what was promised was not delivered or deliverable given the company's state of affairs. The white paper discussed the company's plans; in other words, it was primarily a future-looking document. Cpl. Johnson did not misrepresent what was promised and the white paper did not constitute evidence of what the state of the company was.

[53] The defendants argue that Cpl. Johnson's affidavit conveyed the impression that the tokens were a security and somehow in violation of security regulations. Cpl. Johnson said in his affidavit:

> The FUEL token was, in substance, treated like a security while avoiding the protections of securities regulation that would ordinarily protect investors.

[54] At the hearing, counsel for the Director stated:

> And this FUEL token was effectively marketed as a security, but it is not regulated by the BC Securities Commission because it's not a security. It's just akin to it given the nature of cryptocurrency.

Although the white paper stated that it was not a prospectus, it served a similar function of advising of what was being sold, some of the risks, and providing disclaimers. Instead of an initial public offering, it referred to an ICO, meaning an initial coin offering. I do not find that Power J. was given a false impression with respect to this point.

[55] Moreover, the issue of whether the coin offering is a security is an open issue. Although not put in an affidavit, the Securities Commission wrote to counsel—Mr. Mikelson and Mr. Donaldson—on this:

> In the above noted action, the defendants have filed an affidavit of Brian Onn, sworn April 30, 2019, that states at paragraph 31:

> *When we were getting ready to launch the product we worked very closely with the BC Securities Commission to make sure the product was in compliance. That was difficult because it took a lot of time away from actually working on the product. They required us to build in a lot that was not in the original plans. It was important to us that we were putting out a product that was compliant with the securities laws.*
>
> Staff of the BC Securities Commission (the Commission) believes that Mr. Onn's evidence gives the impression that Etherparty worked successfully with Commission staff to ensure compliance with securities legislation.
>
> That is not accurate.
>
> Etherparty did engage with Commission staff after it had announced its initial coin offering (ICO) of FUEL tokens. Etherparty was seeking comfort from Commission staff that it would not view the FUEL token as a security under the *BC Securities Act* (the Act).
>
> Ultimately, Commission staff could not provide Etherparty with any assurance that the Commission would not view the FUEL token as a security, and advised Etherparty that their position was that the token was a security under the Act. Therefore, all relevant provisions of the Act, including the prospectus requirements, applied to Etherparty's distribution of FUEL tokens.
>
> The compliance issues resulting from staffs position that the FUEL token is a security remain outstanding and unresolved.

[56] The case at bar may be contrasted with *Nguy*, in which DeWitt-Van Oosten J. refused to grant an ITO because there was not proper disclosure at the *ex parte* hearing. In *Nguy*, the assets sought to be seized by the Director were the subject of an initial three-month Provincial Court detention order made under s. 490(1) of the *Criminal Code*. A Provincial Court judge had under reserve a motion by the police to extend the initial three-month preservation order under s. 490(2) of the *Code*. When the matter was still under reserve the Director applied for and was granted an *ex parte* IPO in this court. The Provincial Court proceedings and status were not disclosed at the *ex parte* hearing. DeWitt-Van Oosten J. held that that non-disclosure was serious enough to refuse the granting of the ITO at the with-notice hearing. Amongst other things it affected the expressed urgency for the *ex parte* ITO. She stated:

> [163] One possible outcome of the s. 490(2) application, as acknowledged by the Director, was that the seized money would remain with police for another five months and Mr. Le would be unable to seek its return in the interim. If this occurred, there was no longer an "urgent" need for the Director to apply for an IPO and the s. 8(5) application could have proceeded with notice and full submissions on behalf of the defendants. Failing to ensure that the Court was cognizant of the outstanding Provincial Court proceeding, and the potential effect on Mr. Le's application for return of the money, substantially risked the hearing Judge being deprived of the opportunity to fully assess whether it was appropriate to proceed *ex-parte* and to weigh this factor under both ss. 8 and 9 of the *Civil Forfeiture Act.*

[57] Turning to other aspects of the "interests of justice" component, in *British Columbia (Director of Civil Forfeiture) v. Fischer*, 2010 BCSC 568 at para. 21, Punnett J. considered a number of factors that have subsequently been used by the court in other cases:

a. the plaintiff's interest in preserving the property;
b. the defendant's interests in possessing and using the property;
c. the interests of any uninvolved interest holders in ensuring that their interests in the property are protected;
d. society's interest in protecting individual property rights;
e. the purposes of the Act; and
f. the nature and effect of the order requested.

[58] In *British Columbia (Director of Civil Forfeiture) v. Rai*, 2011 BCSC 186 at para. 111, Silverman J. outlined the following non-exhaustive list factors:

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.

This has been adopted by the Court of Appeal: *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89.

[59] At the oral hearing the defendants' argument focussed almost entirely, if not entirely, on the non-disclosure issue. However, in their written argument, they submit, in part:

> Seizing houses, vehicles, and bank accounts poses a hardship for any person. The impact these proceedings have had on the defendants is substantial.
>
> The defendants are unable to make mortgage payments from their seized bank accounts.
>
> The amount of money alleged is significant, but this factor has little relevance because there is really no proper evidence that is proceeds of crime.
>
> Forfeiture of the defendants' two pieces of real property, two vehicles, and bank accounts would be disproportionate to the interests of justice.
>
> …

[60] Counsel did not take me to any evidence of hardship, and I did not see any reference to that in the affidavits of Hobbs or Cheng. The seizure order does not apply to the company and it is free to carry on its business.

[61] Given the amount that appears to have been taken from the company, I do not find the seizure of the property to be disproportionate.

[62] Looking at the matter overall, I do not think the defendants have demonstrated that the seizure is clearly not within the interests of justice. While the disclosure at the *ex parte* hearing was not perfect, it was not near the situation in *Nguy*. It does not cause me to conclude that it should be a determining factor in the interests of justice test.

[63] The Director's application is therefore allowed and the defendants' motion is dismissed.

"E.M. MYERS J."