BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Forum National, 2019 BCSECCOM 257 Date: 20190722

Forum National Investments Ltd., Daniel Clozza, Robert Logan Dunn, Douglas Corrigan and Mosaic Holdings Ltd.

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Suzanne K. Wiltshire	Commissioner

Hearing dates	May 6 and 23, 2019
Submissions Completed	May 23, 2019
Decision date	July 22, 2019

Appearing

James Torrance	For the Executive Director
Patricia A.A. Taylor	For Daniel Clozza
Sean K. Boyle	For Robert Logan Dunn and Mosaic Holdings Ltd.
Douglas Corrigan	For himself

Decision and Reasons

I. Introduction

[1] On July 20, 2012, the executive director issued a temporary order and notice of hearing against Forum National Investments Ltd., Daniel Clozza, Martin Tutschek and Grant Curtis (2012 BCSECCOM 248). That notice of hearing did not allege that any of those respondents contravened any specific provision of the Act, instead describing the conduct as contrary to the public interest.

[2] On August 8, 2012, a panel of the Commission dismissed the executive director's application to extend the temporary order against all of those respondents (2012 BCSECCOM 315).

[3] On June 15, 2018, the executive director issued an amended notice of hearing against Forum, Clozza, Robert Logan Dunn, Douglas Corrigan and Mosaic Holdings Ltd. The amended notice of hearing alleges that these respondents (as set out in the amended notice of hearing) contravened specific provisions of the Act. The events that occurred between the date of issuance of the original notice of hearing and the date of issuance of the amended notice of hearing are discussed later in this decision.

[4] On August 8, 2018, at a set date hearing, hearing dates with respect to the allegations in the amended notice of hearing were set, with the hearing to commence on February 4, 2019.

[5] On January 10, 2019, Dunn and Corrigan applied for an adjournment of the hearing dates set to commence on February 4, 2019. On January 11, 2019, Clozza made a similar adjournment application.

[6] On January 17, 2019, the panel agreed to adjourn the hearing dates scheduled to commence on February 4, 2019 and rescheduled new hearing dates to commence on May 6, 2019.

[7] On April 18, 2019, Forum filed an application for a further adjournment of the hearing and to adjourn the hearing generally. On April 23, 2019, Clozza consented to Forum's application and filed his own application for a further adjournment of the hearing dates. Forum, Clozza and the executive director filed written submissions with respect to Forum's and Clozza's respective adjournment applications.

[8] On May 6, 2019, as a preliminary matter, we heard oral submissions from the parties on Forum's and Clozza's adjournment applications. Dunn and Mosaic took no position on either of the applications. Corrigan formally took no position on the applications but made oral submissions describing difficulties that he said he was having reading materials previously disclosed by the executive director due to a medical condition – from which we inferred that he supported the applications. After considering all of the written and oral submissions, we dismissed both Forum's and Clozza's adjournment applications. Set out below are our reasons for dismissing those applications.

[9] On May 6, 2019, after we advised the parties that we had dismissed the applicants' adjournment applications, Dunn, Mosaic and Clozza advised that they were bringing the following applications:

a) Dunn and Mosaic applied for an order for a stay of proceedings arising from the original notice of hearing and the amended notice of hearing or, in the alternative, an order that the proceedings be struck on a summary basis, in both cases as a matter of procedural fairness; and

b) Clozza applied for an order dismissing the proceedings on the basis of delay and abuse of process by the executive director.

[10] The executive director had not received prior notice of these applications and asked for time to respond to them.

[11] We granted this request and set May 23, 2019 as the date to hear oral submissions on these applications. As a consequence, we adjourned the commencement of the hearing on the allegations in the amended notice of hearing until after we heard the submissions on the applications set out in paragraph 9 (and rendered a decision thereon).

[12] Dunn and Mosaic, with respect to their application, Clozza, with respect to his application, and the executive director, with respect to all three of the applications, provided written submissions in advance of the May 23, 2019 hearing of the applications.

[13] On May 22, 2019, Clozza applied for an adjournment of the hearing of his application for an order dismissing the proceedings.

[14] On May 23, 2019, we heard oral submissions from Clozza and the executive director with respect to Clozza's application for an adjournment of the hearing of Clozza's application for an order dismissing the proceedings against him. None of Forum, Dunn, Mosaic or Corrigan took any position with respect to Clozza's application to adjourn the hearing of his application. After considering all of the submissions, we dismissed Clozza's adjournment application. Set out below are our reasons for dismissing that application.

[15] On May 23, 2019, we then heard oral submissions from the parties on the applications described in paragraph 9 above. During these submissions, Corrigan stated that he too was applying for an order staying proceedings against him. Although the executive director did not have notice of this application, he agreed that that application be heard and considered in connection with the applications from the other respondents described in paragraph 9. Set out below are our decision and reasons with respect to those applications.

II. Background

Procedural history

[16] This matter has an extensive procedural history. That history is relevant to these applications. What follows is a brief overview of the timeline and proceedings in this matter.

[17] According to the amended notice of hearing, the allegations in this hearing relate to events that occurred between December 2011 and June 2012.

[18] On July 2, 2012, the Commission issued an investigation order pursuant to section 142 of the Act. Forum, Clozza and Dunn were named, among others, in this investigation order but Corrigan and Mosaic were not.

[19] On July 12, 2012, the Commission issued an amended investigation order pursuant to section 142 of the Act. The amended order added additional parties as being subject to the amended investigation order (but did not include Corrigan or Mosaic) and amended the period subject to the investigation to include an earlier period.

[20] As noted above, on July 20, 2012, the executive director issued a notice of hearing and a temporary order against Forum and Clozza, among others, and that temporary order was not extended by a decision of a panel of this Commission on August 8, 2012. Dunn, Corrigan and Mosaic were not named in the original notice of hearing nor were temporary orders made against them.

[21] On February 4, 2013, the Commission issued a further amended investigation order pursuant to section 142 of the Act. This further amended order amended the period of the investigation to include an earlier period.

[22] On November 15, 2013, the Commission issued a further amended investigation order pursuant to section 142 of the Act. The amended order added staff at the U.S. Securities and Exchange Commission (SEC) as permitted investigators.

[23] On December 13, 2013, the Commission issued a non-disclosure order (NDO) pursuant to section 148 of the Act, preventing any person, except BCSC staff, from (among other things) disclosing the existence of the investigation to any other person, except for their counsel.

[24] During the period of November 2013 through May 2014, various attempts were made to serve Clozza with a summons to attend an interview with Commission staff. During this same period various communications occurred between Commission staff, Dunn and counsel for Dunn regarding having Dunn attend an interview with Commission staff. No interviews of Clozza or Dunn were conducted during this period.

[25] On March 11, 2014, the Commission held a hearing management meeting with Clozza and counsel for Tutschek in attendance. The purpose of the meeting was to discuss the timing for bringing the matters in the original notice of hearing to a hearing. Counsel for the executive director advised that the Commission's investigation had been delayed due to two witnesses who had refused to appear for interviews with Commission investigators and that proceedings had been commenced in the British Columbia Supreme Court with respect to those matters. Clozza expressed concern about the length of the Commission's ongoing investigation.

[26] On May 14, 2014, the Commission held a hearing management meeting, attended by counsel for the executive director, B (an officer of Forum and a former Commission employee) representing Forum, Clozza and counsel for Tutschek. During this meeting, a discussion was held regarding the manner and time frame in which the allegations in the original notice of hearing could be brought on for a hearing and for scheduling hearing dates. Clozza, Forum and counsel for Tutschek all expressed concern about the length of the Commission's ongoing investigation.

[27] On June 4, 2014, Forum filed a notice of application with the Commission, which, among other things, challenged the constitutional validity of section 148 of the Act (the section which gives the Commission the authority to issue non-disclosure orders). Forum also sought to have the NDO issued under section 148 revoked.

[28] On July 3, 2014, Clozza attended the Commission offices, with B, for the purposes of attending an interview with Commission staff (in compliance with a summons previously issued by a Commission investigator). Clozza refused to answer questions without B being in attendance. B is not a lawyer and Commission staff did not permit B to assist

Clozza in the interview (the position taken by Commission staff was subsequently confirmed by the Supreme Court of British Columbia[1]).

[29] On August 20, 2014, the executive director of the Commission filed a petition for a contempt order against Clozza in the British Columbia Supreme Court citing his refusal to submit to a compelled interview.

[30] On August 20, 2014, Clozza filed a notice of application with the Commission challenging the constitutional validity of section 148 of the Act, substantively similar to the application previously filed by Forum on June 4, 2014.

[31] On September 5, 2014, the Commission held a hearing management meeting, attended by counsel for the executive director, B, representing Forum, and Clozza. The purpose of this hearing management meeting was to discuss the upcoming hearing of the applications by Forum and Clozza. At that time, Forum was directed to confirm compliance with the notice provisions of the *Constitutional Questions Act*, RSBC 1996, c. 68.

[32] On September 15 and 16, 2014, the panel heard the applications by Forum and Clozza. We adjourned the portions of those applications which raised constitutional challenges to section 148 of the Act due to a failure of the applicants to comply with the notice provisions of the *Constitutional Questions Act*.

[33] During the period of August and September, 2014, there were further conversations with Dunn regarding his attendance at an interview with Commission staff. On September 23, 2014, a Commission investigator issued a summons to Dunn to attend an interview – the summons was returnable October 2, 2014. Dunn did not attend an interview.

[34] On October 3, 2014, Clozza filed a notice of application in the British Columbia Supreme Court challenging the executive director's petition for a contempt order.

[35] On October, 15, 2014, Clozza filed notices in the British Columbia Supreme Court challenging the constitutional validity of sections 144 and 148 of the Act.

[36] On October 28, 2014, the British Columbia Supreme Court dismissed Clozza's application challenging the executive director's petition for a contempt order.

[37] On October 31, 2014, the executive director filed a petition for a contempt order against Dunn in the British Columbia Supreme Court citing his refusal to submit to a compelled interview.

[38] On November 18, 2014, the SEC filed a notice of civil complaint in a US court against Clozza, Dunn and Forum, among others, alleging that they "engaged in a fraudulent scheme to artificially increase the price of Forum's stock" using two components: "a public relations campaign and an internet stock promotion."

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[1] *British Columbia (Securities Commission)* v. *Clozza*, 2017 BCSC 419 at paras. 53 and 89.

[39] On November 21, 2014, the panel dismissed the applications to revoke the NDO.

[40] On December 9, 2014, Dunn filed a notice in the British Columbia Supreme Court challenging the constitutional validity of section 148 of the Act.

[41] On January 9, 2015, we resumed the proceedings on the applications filed by Clozza and Forum challenging the constitutional validity of section 148 of the Act. We again adjourned the matter generally for the continuing failure by the applicants to comply with the notice provisions of the *Constitutional Questions Act*.

[42] On April 22, 2015, the executive director brought an application in the British Columbia Supreme Court asking that the judge hearing challenges to the petitions for contempt orders recuse himself from the applications.

[43] On June 10, 2015, that judge of the British Columbia Supreme Court recused himself.

[44] On November 4, 2015, the executive director filed a notice of application with the British Columbia Supreme Court requesting that the proceedings seeking contempt orders against Clozza and Dunn be consolidated.

[45] On January 5, 2016, the executive director filed a notice of application with the British Columbia Supreme Court seeking an order that the materials filed by Clozza in the proceedings seeking contempt orders be sealed.

[46] On January 13, 2016, the Alberta Court of Appeal released its decision in *Beaudette v. Alberta (Securities Commission)*, 2016 ABCA 9 (CanLII) in which it upheld an Alberta Court of Queen's Bench decision that a provision of the Alberta *Securities Act*, RSA 2000, c. S-4, substantially similar to section 144 of the Act, did not contravene the *Canadian Charter of Rights and Freedoms, Part of the Constitution Act, 1982*, being *Schedule B* to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (Charter).

[47] On March 30, 2016, the British Columbia Supreme Court made an order that the materials filed by Clozza in the proceedings petitioning for contempt orders be sealed.

[48] On June 30, 2016, the Supreme Court of Canada denied leave to appeal of the *Beaudette* decision.

[49] On September 8, 2016, Clozza filed a notice of constitutional question in the British Columbia Supreme Court challenging the constitutional validity of sections 144 and 148 of the Act.

[50] On September 26, 27 and 28, 2016, the British Columbia Supreme Court heard the executive director's petition for contempt orders against Clozza. During that hearing, Clozza abandoned his constitutional applications relating to section 144 of the Act.

[51] On March 15, 2017, the British Columbia Supreme Court dismissed all of Clozza's applications and ordered him to attend an interview with Commission staff.

[52] On April 7, 2017, Clozza filed a notice of appeal of that decision.

[53] On November 16, 2017, Clozza's appeal was scheduled for a hearing on April 11, 2018.

[54] On March 12, 2018, Clozza swore an affidavit and requested an adjournment of the hearing of the appeal. The hearing of the appeal was rescheduled to June 15, 2018.

[55] On May 28, 2018, counsel for the executive director and counsel for Clozza agreed to reschedule, at the request of Clozza, the hearing of the appeal to October 11, 2018.

[56] As noted above, on June 15, 2018, the executive director issued an amended notice of hearing which involved adding additional respondents, deleting certain original respondents and making allegations that were not contained in the original notice of hearing.

[57] On August 8, 2018, at a set date hearing, hearing dates with respect to the allegations in the amended notice of hearing were set, with the hearing to commence on February 4, 2019.

[58] On September 25, 2018, the executive director filed an application with the Commission to revoke the NDO. None of the respondents responded to this application.

[59] On October 8, 2018, Clozza abandoned his appeal of the British Columbia Supreme Court decision requiring him to attend an interview with Commission investigators.

[60] On January 10, 2019, Dunn and Corrigan applied for an adjournment of the hearing dates set to commence on February 4, 2019. On January 11, 2019, Clozza made a similar adjournment application. The basis of those applications was that the existence of the NDO had prevented the applicants from properly preparing for the upcoming hearing and that they required additional time to speak with potential witnesses and collect relevant evidence.

[61] On January 15, 2019, the panel revoked the non-disclosure order.

[62] On January 17, 2019, the panel agreed to adjourn the hearing dates set to commence on February 4, 2019 and rescheduled new hearing dates to commence on May 6, 2019.

[63] The remainder of the relevant dates are set out in paragraphs 7 through 15 above.

Additional facts and/or evidence filed in support of the various applications

[64] On February 22, 2019, Clozza applied, pursuant to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (FIPPA), for disclosure of all records within the possession of the Commission relating to Clozza (within a date range).

[65] On February 25, 2019, the Commission responded that it would provide a response by no later than April 5, 2019.

[66] On March 13, 2019, the Commission extended the deadline for providing a response to Clozza's FIPPA application to May 23, 2019.

[67] On March 14, 2019, Clozza objected to the Commission regarding its decision to extend the deadline for responding to his FIPPA request on the grounds that it would prejudice his ability to advance his defence to the allegations in the amended notice of hearing at the hearing set to commence on May 6, 2019.

[68] On March 15, 2019, Forum applied, pursuant to FIPPA, for disclosure of all records within the possession of the Commission relating to Forum.

[69] Although no correspondence was tendered to support this, Forum's submissions indicated that the Commission responded that it would provide a response to Forum's request by June 12, 2019.

[70] On April 8, 2019, Clozza applied under FIPPA to the Office of the Information & Privacy Commissioner for British Columbia for a review of the Commission's decision to extend the time for responding to Clozza's FIPPA request.

[71] In connection with Dunn's (and Mosaic's) application for a stay of proceedings arising from the original notice of hearing and the amended notice of hearing or, in the alternative, an order that the proceedings be struck on a summary basis, Dunn filed an affidavit. The following is a summary of Dunn's statements made therein (without duplicating matters already described above):

- on March 6, 2013, Dunn was served with a demand for production from the Commission which required him to provide communications between himself and Clozza and between himself and Corrigan (among others);

- on March 18, 2013, Dunn complied with the Commission's demand for production;

- previously, on March 4, 2013, an individual (M) died whom Dunn believed would have had material evidence that would have assisted him in defending the allegations against him;

- as M had died before Dunn received the demand for production and prior to Dunn's receiving any particulars from the executive director on its investigation, Dunn did not have an opportunity to collect evidence from M;

- beginning in April 2013, the Commission began contacting Dunn's bank to obtain banking records – those contacts led to his bank shutting down his accounts and altering the terms of his mortgage to his financial detriment;

- Dunn was named in the Commission's non-disclosure order issued on December 10, 2013;

- the non-disclosure order went into effect before Dunn had meaningful knowledge of the allegations against him and prevented him from speaking with people who may have had evidence that would have assisted his defence;

- on September 23, 2014, Dunn was served with a summons in a public place and was humiliated by that experience;

- on June 30, 2015, Clozza's mother died;

- Dunn believes that Clozza's mother would have had material evidence that would have aided in his defence;

- on June 28, 2018, the Commission filed a certificate of pending litigation against Dunn's home and the home of his ex-wife – preventing Dunn from completing a division of assets in his divorce proceedings; that divorce proceeding has been an ongoing emotional and financial strain on him and his ex-wife; and

- the proceedings have adversely affected Dunn's personal and professional relationships and materially affected his financial affairs.

[72] Corrigan made oral submissions, without any evidence in support of the submissions, that he was suffering from significant loss of vision and was unable to properly defend himself due to his inability to read documents disclosed to him by the executive director.

III. Forum's and Clozza's application to adjourn the hearing commencing May 6, 2019

[73] The submissions made in support of Forum's and Clozza's adjournment applications filed on April 18, 2019 and April 23, 2019, respectively, focused on two principal issues:

a) that the hearing should await the outcome of Forum's and Clozza's FIPPA requests, as those processes might result in the disclosure of documents that might assist their respective defences to the allegations in the amended notice of hearing; and

b) that during the period in which the NDO was in effect, Forum and Clozza were not able to talk to prospective witnesses and collect possibly relevant evidence, a state of affairs that ended only upon the revocation of the order on January 15, 2019; as a consequence, there was an unfair imbalance in the length of time that the executive director had to prepare for the hearing versus that of the respondents and that the respondents had had insufficient time since the revocation of the NDO to prepare for the hearing.

[74] Forum added one additional submission – that B had not received certain disclosure from the executive director until February 2019 and that this prejudiced Forum's ability to properly prepare for the hearing commencing on May 6, 2019.

[75] The executive director's position on these issues was as follows:

a) that the executive director has met his disclosure obligations to the applicants in this matter as set out in *Fernback (Re)*, 2004 BCSECCOM 378 (which confirms that the executive director's disclosure obligation is similar to the standard set out in *R. v. Stinchcombe*, [1991] 3 SCR 326);

b) that Forum's and Clozza's FIPPA requests were speculative in nature and that neither of the applicants pointed to any specific disclosure that they believed had not been provided to them;

c) that the applicants had had 10 months (since June 2018) to prepare for the hearing in respect of the allegations in the amended notice of hearing and that was sufficient time to prepare; and

d) that delays in bringing this matter to a hearing had been caused by Clozza and not by Commission staff.

[76] While the parties spent considerable time and energy arguing over who was responsible for the delays in this proceeding, we did not find that issue to be relevant to Forum's and Clozza's applications for an adjournment.

[77] A decision to adjourn a proceeding is a discretionary matter for a Commission panel to make in the context of procedural fairness. In other words, was there some reason, raised by the applicants, why this matter could not proceed on May 6, 2019 in a manner that was fair to the applicants?

[78] First, we agree with the executive director that Forum and Clozza's FIPPA requests are speculative in nature and that the applicants did not identify specific relevant documents (or types of documents) that they say are: a) in the possession of the Commission; and b) that have not been disclosed to the respondents in this matter.

[79] The executive director confirmed in his written submissions and again during the oral hearing of this application that he had met his disclosure obligations. In effect, the

applicants' submissions were that they did not believe the executive director has met his disclosure obligations but they did not provide any evidentiary basis for that submission. We had no basis to question the executive director's submissions that he is in compliance with his disclosure obligations. We note that if, at a subsequent date, the results of the FIPPA requests raise doubt whether that is, in fact, the case, the applicants may seek a remedy at that time.

[80] With respect to matters related to the NDO and whether the applicants had had sufficient time to prepare for the hearing, the applicants did not provide any evidence as to what steps (that would be relevant to the defence of the allegations against them) they had had insufficient time to complete since the revocation of the non-disclosure order.

[81] In January 2019, when Dunn and Clozza applied for an adjournment of the hearing set to commence on February 4, 2019, the basis for those applications was a need for further time to collect potentially relevant evidence after the revocation of the NDO. Although no evidence was filed by the applicants, at that time, of the specific steps that they intended to undertake if they were granted an adjournment, we granted that request and provided the respondents with a further three months in order to prepare for the hearing. The applicants did not object, at that time, to the length of the adjournment.

[82] With the current adjournment applications, the applicants, again, failed to provide evidence of why the time they have had to prepare for the hearing has been insufficient or the specific benefit to them of an adjournment with respect to the steps they need to take in aid of their defence to the allegations in the amended notice of hearing. They had no evidence of a specific individual or individuals that they wished to speak with, nor evidence as to why that person or persons could not have been contacted during the time period available to them. Neither did they have evidence of why documentary evidence could not have been gathered during the time period available. The applicants have known since June 2018 of the specific allegations in the amended notice of hearing.

[83] With respect to Forum's submissions that they were prejudiced by B's not receiving disclosure documents until February 2019, these submissions misconstrued B's role in these proceedings. Forum is a respondent in these proceedings, not B. Forum was represented by counsel in June 2018 when the amended notice of hearing was issued and the executive director provided disclosure to the respondents in connection with issuing that notice. In its own application materials, filed by its counsel at the time, Forum acknowledged receiving that disclosure. There was no evidence that Forum was prejudiced in any manner by B's not receiving copies of disclosure documents until February 2019. In fact, the fault (if there is any) appears to lie with Forum and the manner in which information was communicated between its various representatives.

[84] For these reasons, we dismissed these Forum and Clozza adjournment applications.

IV. Clozza's application to adjourn the hearing of his dismissal application on May 23, 2019

[85] On May 22, 2019, Clozza filed an application to adjourn the hearing of his application for an order dismissing the proceedings against him. Clozza proposed an adjournment for 10 business days.

[86] The reason cited in this adjournment application was that the executive director had provided to Clozza on May 21, 2019 a copy of a 249 page affidavit that the executive director intended to file in connection with the hearing on May 23, 2019 and he wanted an opportunity to prepare and file an affidavit in response.

[87] Dunn and Mosaic took no position on this application and indicated that they were in a position to proceed with their application on May 23, 2019.

[88] Although the affidavit that the executive director intended to (and did) file during the hearing on May 23, 2019 was 249 pages in length, all but one page of its contents were copies of materials filed in court proceedings between Clozza and the executive director between 2014 and 2016 – all of which would have already been in the possession of Clozza. The other page was a copy of an e-mail between counsel for the executive director and counsel for Dunn (and Mosaic) and Clozza from September 2018.

[89] Clozza did not provide any indication of the type of material that he suggested that he would need to file in response to that affidavit.

[90] Therefore, we had no evidence of any actual prejudice to Clozza that would be caused by requiring him to make his submissions on his application on May 23, 2019. We were also guided by the fact that this was Clozza's application and materials in support of that application would generally be required to be filed by the applicant with his application.

[91] For these reasons, we dismissed Clozza's application to adjourn the hearing of his application to dismiss the proceedings against him.

V. Applications for a permanent stay of proceedings or to dismiss the proceedings

Positions of the parties

[92] Dunn and Mosaic submitted that:

- the amended notice of hearing was effectively a new notice of hearing, given the substantial differences between its contents and the contents of the original notice of hearing;

- the issuance of the amended notice of hearing was unfair;

- they had been prejudiced by the executive director's delay in issuing the amended notice of hearing;

- their rights to procedural fairness have been denied owing to the delay, particularly in light of the existence of the NDO under section 148 of the Act that was in effect throughout a substantial portion of the intervening time period; and

- the decision in *R. v. Jordan*, 2016 SCC 27 should be viewed as having altered the principles to be applied in administrative proceedings pertaining to delay since the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

[93] Clozza adopted the submissions of Dunn and Mosaic and added the following further submissions that:

- the original notice of hearing, naming Clozza, issued in July 2012, was not pursued by the executive director for almost six years until he issued the amended notice of hearing and then set the matter down for hearing dates;

- there was no reasonable explanation for the executive director to wait almost six years without bringing the original notice of hearing forward for hearing dates;

- the investigation by the executive director was substantially complete by March 2014 and yet the NDO under section 148 of the Act remained in effect until January 2019, preventing Clozza from gathering evidence;

- the combination of the delay in the proceedings, the substantial changes in the amended notice of hearing and maintaining the NDO created a delay that "offends the community's sense of fairness" and

- the delay in proceedings constitutes an abuse of process.

[94] The executive director submitted that:

- the principles in *Jordan* are inapplicable to administrative proceedings and the decision in *Blencoe* is still the governing authority relating to applications for a stay based upon delay in an administrative proceeding;

- under the test in *Blencoe*, the applicant must establish that the delay was unreasonable or inordinate and that the delay was unacceptable to the point of tainting the fairness of the proceedings;

- mere delay is insufficient to grant a stay – the applicant must establish actual prejudice;

- in this case, the delay was not inordinate due to the complexity of the case and because both Clozza and Dunn contributed to the delay through their refusal to attend interviews with Commission staff and, in Clozza's case, through the various and lengthy proceedings in the British Columbia Supreme Court; and

- none of Dunn, Mosaic, Clozza or Corrigan provided evidence of actual prejudice.

[95] We agree with the executive director that the principles in *Jordan* are not applicable to the circumstances of these applications. The decision in *Jordan* dealt with the application of constitutional rights to post charge delay in a criminal proceeding. The applications for a stay in this matter were not seeking a remedy under the Charter. These applications clearly were founded in remedies derived from administrative law principles. Thus, these are different circumstances from those in *Jordan* and we do not think it appropriate to extrapolate principles from that decision to modify the law as set out by the Supreme Court of Canada in *Blencoe*. In our view, these applications are governed generally by the principles of law as set out in *Blencoe*.

[96] We also agree that *Blencoe* makes clear that granting a stay based on delay in an administrative proceeding (whether on the grounds of procedural fairness or on the basis of an abuse of process) would only arise in the clearest of cases.

[97] *Blencoe* sets out the following analysis for an application of this type:

- has there been an unreasonable or inordinate delay in the proceedings (looked at in the specific circumstances of the case, including factors such as any contribution to the delay brought about by the applicant (among others))?;

- has the delay prejudiced the applicant's ability to answer the complaint against them (i.e. has the delay impaired the fairness of the hearing?)?

- has the delay resulted in prejudice to the applicant in a manner other than an impairment to the applicant's ability to answer the complaint against them (i.e. would continuing the hearing amount to an abuse of process even if the fairness of the hearing has not been compromised ?)?

a) <u>Reasonableness of delay and impairment to the fairness of the hearing</u>

[98] The majority in *Blencoe* sets out that there are remedies available in administrative law for delay in administrative proceedings (paras 101-102):

> 101. In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L (W.K.)*, [1991] S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

> 102. There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceedings. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose leaf), at p. 9-67 ….

[99] The majority decision also sets out that part of the analysis must include a determination of whether the delay in the proceeding was unreasonable or inordinate (at paras 121-122):

> 121. To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings….
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> 122. The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[100] In this matter, the material facts in relation to the question of the reasonableness of the delay and any impairment to the fairness of the hearing are as follows:

- the Commission's investigation into this matter commenced in July 2012, with an Investigation Order naming Forum, Clozza and Dunn, among others;

- in July 2012, the executive director issued a notice of hearing and issued temporary orders against Forum and Clozza;

- the original notice of hearing did not allege any conduct of the respondents which contravened a specific provision of the Act (instead describing their conduct as contrary to the public interest) but did, generally, describe conduct that could be considered market manipulation;

- during an August 2012 hearing to consider an extension of the temporary orders, the executive director made clear that he was in the early stages of an investigation into the matters described in the original notice of hearing;

- in November 2013, staff of the Commission commenced attempts to have Clozza and Dunn attend interviews;

- in December 2013, the NDO was issued (preventing any person, other than BCSC staff, from discussing the Commission's investigation with any other person, other than their counsel);

- neither Clozza nor Dunn attended compelled interviews in July and October 2014 and the Commission petitioned for contempt orders against them in August 2014 and October 2014, respectively – we reject Clozza's submissions that he did attend the Commission for an interview and agree with Sigurdson J.'s findings in this regard (referenced in paragraph 28);

- in November 2014, the SEC commenced civil proceedings against Forum, Clozza and Dunn alleging that they engaged in a fraudulent scheme to artificially increase the price of Forum's stock;

- in November 2014, we dismissed Clozza's application to revoke the NDO;

- between the fall of 2014 and November 2015, various applications were heard with respect to the contempt proceedings – in November 2015, the Commission applied to consolidate the Clozza and Dunn contempt proceedings;

- between November 2015 and November 2018, various applications and adjournments took place relating to Clozza's contempt proceedings;

- on June 15, 2018, the executive director issued the amended notice of hearing, adding Dunn, Mosaic and Corrigan as respondents and alleging contraventions of specific provisions of the Act as set out in the amended notice of hearing;

- on August 4, 2018, dates were scheduled for a hearing related to the matters in the amended notice of hearing, commencing in February 2019;

- on September 25, 2018, the executive director applied for a revocation of the NDO;

- on January 15, 2019, we issued a revocation order for the NDO; and

- on January 17, 2019, we issued an order, upon the applications of Clozza, Dunn and Corrigan, adjourning the hearing of the matters set out in the amended notice of hearing to dates commencing on May 6, 2019.

[101] Clozza and Dunn have been under investigation in relation to matters involving the suspicious market activity of Forum's securities since July 2012. Clozza has been subject to allegations in a notice of hearing (made public at the time of issuance) since July 2012. Dunn, Mosaic and Corrigan have been subject to allegations in the amended notice of hearing since June 2018.

[102] There is no doubt that there has been substantial delay:

- with respect to Clozza, there have been almost seven years between the date of the original notice of hearing issued against him and May 2019 when hearing dates were set to commence the hearing on the merits of this matter;

- with respect to Dunn, there have been almost six years between the date of the original Investigation Order naming him and June 2018 when the amended notice of hearing was issued naming him as a respondent; and

- with respect to Corrigan and Mosaic, there have been almost six years between the date of the misconduct described in the amended notice of hearing and June 2018 when the amended notice of hearing was issued naming them as respondents.

[103] The length of these delays are unusual by traditional Commission procedural standards. However, the question is whether these delays were unreasonable or inordinate in the circumstances. As described by the Supreme Court of Canada, that analysis must be contextual and specific to each case, including the complexity of the case and whether the applicant has contributed to the delay.

[104] We find that the delay was not unreasonable or inordinate with respect to Clozza; we have concerns about the reasonableness of the delay with respect to Dunn; and, we find the delay was unreasonable with respect to Mosaic and Corrigan, for the following reasons:

- although long and arduous, the procedural history with respect to this matter before the Commission, the Commission's attempts to have Clozza attend an interview with Commission staff and subsequent court proceedings for contempt in relation to those orders to attend compelled interviews, do not leave any significant unexplained gaps in the timeline in relation to Clozza from July 2012 through until the present day;

- the executive director made it clear during the temporary order proceedings in 2012 that, although he had issued a notice of hearing, the investigation into the alleged misconduct was in the early stages and was ongoing;

- many of the delays in the proceedings against Clozza stem from his decision not to attend an interview with Commission staff and subsequent court proceedings in relation to that decision;

- similarly, the procedural history with respect to the Commission's attempts to have Dunn attend an interview with Commission staff and subsequent court proceedings for contempt in relation to that decision do not leave any significant gaps in the timeline from July 2012 until the end of 2015;

- we then have an unexplained delay in proceedings against Dunn commencing at the beginning of 2016; and

- we have no explanation for the delay in bringing proceedings against Corrigan and Mosaic – we have no evidence of the reasons for the delay or any explanation therefor (other than as set out below).

[105] The evidence suggests that the Commission's investigation into this matter was substantially complete in March 2014. However, the executive director's explanation for any unexplained delay in these proceedings thereafter was that he was attempting to have Clozza and Dunn attend interviews with Commission staff and that court proceedings in relation to those efforts continued in the intervening years.

[106] That explanation makes sense in relation to Clozza and, to some extent, Dunn. However, the executive director offered no explanation as to the significance of those interviews to the investigation into misconduct by Mosaic or Corrigan. We were given no explanation for why those interviews were necessary with respect to the investigations against Mosaic or Corrigan. At the end of the day, interviews with Clozza and Dunn were never conducted and yet the executive director issued the amended notice of hearing, naming Dunn, Mosaic and Corrigan as new named respondents. We simply do not have any evidence or explanation from the executive director to determine that the delay in bringing proceedings against Mosaic and Corrigan was anything other than unreasonable or inordinate. We also have an unexplained delay in bringing allegations against Dunn commencing in early 2016.

[107] We are not able to answer the question of whether the investigation and the executive director's case was complex and whether that, in any way, added to the delay in these proceedings. We say that for two reasons. First, the executive director, at different points in his submissions, made contradictory comments on the complexity of the case. At one point, he suggested that the executive director's theory of the case and what occurred (relative to the allegations) was relatively straightforward and at another point, he suggested that the investigation and the allegations of market manipulation were relatively complex. However, more importantly, we were really given no evidence (outside of the basic timeline set out above) as to the nature of the executive director's investigation (during the relevant period) and its complexity.

[108] Even though we find that the delay was unreasonable with respect to Corrigan and Mosaic and, possibly, Dunn, we would not find that that delay has impaired the fairness of the hearing or prejudiced the ability of Dunn, Corrigan or Mosaic to meet the case against them. Similarly, if we are wrong in our finding above and the delays were unreasonable or inordinate regarding either or both of Clozza and Dunn, we would also not find that such delay has impaired the fairness of the hearing or prejudiced their ability to meet the case against them.

[109] The reasons for these findings is that none of Corrigan, Clozza, Dunn or Mosaic has tendered persuasive evidence to support a finding of serious actual prejudice to their ability to meet the case against them.

[110] In particular, the applicants point to the following as evidence of actual prejudice to their ability to meet the allegations made against them:

- the death of Clozza's mother in June 2015;
- the death of a second potential witness (M) in March 2013;
- that the NDO was in place between December 2013 and January 2019, preventing the applicants from speaking to potential witnesses and gathering evidence in the ordinary course;
- that Corrigan is suffering from significant visual impairment – although no medical evidence of Corrigan's condition or the manner in which it may impair his ability to participate in a hearing was tendered into evidence;
- that the actual allegations in the amended notice of hearing differed substantially from those set out in the original notice of hearing, thereby prejudicing the applicants' ability to gather evidence, in the intervening years, with respect to the specific allegations that they now face;
- an inability to obtain certain evidence relating to the business of Forum and trading of Forum securities during the relevant period; and
- a general deterioration of memories, loss of documents and inability to collect evidence that occurs when dealing with matters which occurred almost seven years ago.

[111] The death of two potential witnesses was raised several times by the applicants as a significant prejudice to their ability to meet the case against them. However, they provided no evidence of how these deaths resulted in serious prejudice.

[112] We understood from the submissions of all parties that the executive director's case includes an assertion that Clozza's mother was the holder of a nominee account through which improper trading relating to securities of Forum occurred. We also understand from submissions of Clozza, without evidence, that in his opinion, M was experienced in small cap investing and that M's views were followed by a number of local investors. It was not clear to us what evidence Clozza's mother would have had that is not currently available to Clozza or the financial institution which held her trading account(s). Further, we do not understand why evidence of M's views, to the extent they are relevant to the allegations, cannot be adduced in some manner during the hearing. The submissions of the applicants with respect to the deaths of these individuals amount to vague assertions of prejudice rather than establishing serious actual prejudice.

[113] That Corrigan is suffering from some visual impairment was not supported by medical evidence so we do not know to what extent, if any, that that prejudices his ability to participate in a hearing. Nor do we know to what extent, if any, Corrigan's eyesight has deteriorated during the period of the delay in these proceedings. Finally, we have no evidence (or basis to conclude) that some accommodation in our hearing procedures would not alleviate some or all of any prejudice that Corrigan's visual impairment may cause.

[114] The existence of the NDO throughout the period of December 2013 through January 2019 colours, to some extent, this proceeding and makes this application and the circumstances surrounding it unusual. The applicants were prohibited, during the tenancy of the NDO, from contacting third parties in respect of the allegations in the notice of hearing. The matter is further complicated by the substantial amendment of the notice of hearing in June 2018 (from the original notice of hearing issued in July 2012). The applicants say that this amendment meant that in the intervening period they were prejudiced as they were not able to collect evidence relevant to the specific allegations in the amended notice of hearing.

[115] We do not find that the mere existence of the NDO, alone, or in combination with the amendments to the notice of hearing, caused substantial prejudice to the applicants' ability to meet the case against them.

[116] Clozza and Dunn had a significant time period between being named in the investigation order in July 2012 and the issuance of the NDO in December 2013 to speak to witnesses and collect evidence. In the case of Clozza, although the contraventions of specific provisions of the Act that are included in the amended notice of hearing against him were not set out in the original notice of hearing, the general conduct (i.e. suspicious trading activity in the securities of Forum) was described in the original notice of hearing and would have provided him with a basis for the collection of relevant evidence. Similarly, with respect to Dunn, although not named in the original notice of hearing, that document along with the investigation order would have given him a general outline of the conduct relating to Forum that was of concern to the Commission and similarly given him a basis for collecting evidence. The same cannot be said for Mosaic and Corrigan who would not have had any basis for collection of relevant evidence. However, all of the current respondents had from January to May of 2019 to collect evidence (unencumbered by the NDO). None of the respondents set out any specific evidence that they say they were prevented from obtaining as a consequence of the NDO.

[117] Finally, the submission that the delay has resulted in prejudice through a failing of memories, a loss of documents and an inability to find other evidence, while generally trite, was also unsupported by any specific material examples of harm or prejudice to the applicants' ability to meet the case against them. As per the decision in *Blencoe*, delay, without evidence of actual prejudice, is insufficient to obtain a stay of proceedings.

[118] As a consequence of all of the above, we would not grant a stay to any of the applicants under this first aspect of the test in *Blencoe*.

b) Abuse of process

[119] Even if an unreasonable or inordinate delay has not prejudiced a respondent's ability to meet the case against them, a stay may still be granted if the delay has resulted in another form of prejudice to the respondent.

[120] The Supreme Court of Canada in *Blencoe*, after a review of the case law, set out the following at para.115:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

[121] In the context of these applications, the question before us is has there been an unreasonable or inordinate delay and significant prejudice that brings the Commission's securities misconduct enforcement system into disrepute?

[122] Dunn was the only applicant who tendered any evidence about potential prejudice arising from the delay in these proceedings that did not go to the issue whether the applicant was able to meet the case against him. In particular, Dunn tendered evidence of:

- the stigma attached to the service in a public place of documents relating to the proceedings;

- the financial impact that the proceedings have had upon him;

- the impact that certificates of pending litigation on real estate held by him and his wife had on his ability to conclude divorce proceedings; and

- the proceedings having negatively affected his physical and emotional well-being over the past seven years.

[123] We do not find that any of this alleged prejudice actually stems from the delay in the proceedings. Any harm described above has its roots from the proceedings themselves, an order made in connection with the proceedings or the public nature of the proceedings rather than from any delay. A delay in the proceedings may have exacerbated one or

more of the prejudices set out above but there is no evidence that the delay has made any of those prejudices materially worse.

[124] Neither Clozza nor Corrigan provided evidence of prejudice of the kind required to support a stay under this second leg of the test in *Blencoe*.

[125] As a consequence, we would not grant a stay to any of the applicants under this second leg of the test in *Blencoe*.

[126] We dismiss each of the applications for a stay by Clozza, Dunn, Mosaic and Corrigan.

[127] We conclude with a note about the delay evident in the investigation and the prosecution of these proceedings against Mosaic and Corrigan and, to a lesser extent, Dunn. The delay in bringing proceedings against these parties since the Commission first became aware of the misconduct has been significant. We were given some information that explained that delay, but no explanation was given for that part of the delay from the beginning of 2016 to June 2018 with respect to Dunn, nor for the almost six year delay with respect to Mosaic and Corrigan. The length of that delay causes us concern. It also causes us concern that the delay coincided with the existence of the NDO and that the amended notice of hearing was issued at almost the latest possible date within the limitation period (and as a result, the time within the limitation period only covers a small portion of time during which certain of the respondents' alleged misconduct took place). Serious and significant questions should be asked with respect to the causes for these delays. A dismissal of these applications does not condone the delay. However, as set out above, the delay has not resulted in significant actual prejudice to the applicants sufficient to grant any stays under the *Blencoe* test, and, importantly, there is a significant public interest in these proceedings determining whether any of the applicants have engaged in market manipulation, which is very serious misconduct under our Act. For all these reasons, these proceedings should carry on to a hearing on the merits of the allegations in the amended notice of hearing.

July 22, 2019

For the Commission:

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commissioner