

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

Citation: Re Forum National, 2019 BCSECCOM 342

Date: 20190930

**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 date August 27, 2019

Decision date August 27, 2019

Date of reasons September 30, 2019

Appearing

James Torrance For the Executive Director

Patricia A.A. Taylor For Forum National Investments Ltd. and Daniel Clozza

Micah Rankin For the Attorney General for British Columbia
Ashley Caron

Reasons for Decision

I. Introduction

[1] This matter deals with applications (Applications) by Forum National Investments Ltd. and Daniel Clozza (Forum and Clozza, and collectively, the Applicants) for:

- a) orders under section 43(2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (ATA), to have certain questions referred to the Supreme Court of British Columbia (Court) as a stated case; and
- b) an order under section 43(5)(b) of the ATA to have certain applications previously made by the Applicants (described below) suspended until the opinion of the Court in the stated case be given.

- [2] The Applicants, the executive director and the Attorney General for British Columbia (AG) all provided written submissions on the Applications and the Applicants applied for, and were granted, an oral hearing. On August 27, 2019, the Applicants, the executive director and the AG all made oral submissions on the Applications.
- [3] At the conclusion of the oral hearing, we dismissed the Applications with reasons to follow. These are our reasons for dismissing the Applications.

II. Background

- [4] This matter has an extensive procedural history. That history was chronicled in a recent decision (*Re Forum National*, 2019 BCSECCOM 257). It is sufficient for the purposes of these reasons to note the following from that history:

- on July 20, 2012, the executive director issued a notice of hearing and a temporary order against Forum and Clozza, among others;
- on December 10, 2013, the Commission issued a non-disclosure order (NDO) pursuant to section 148 of the Act, preventing any person, except Commission staff, from (among other things) disclosing the existence of the investigation to any other person, except for their counsel;
- 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;
- on August 20, 2014, Clozza filed a notice of application with the Commission substantively similar to the June 4, 2014 application filed by Forum referred to above;
- 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 the failure of the applicants to comply with the notice provisions of the *Constitutional Questions Act*, R.S.B.C. 1996, c.68;
- on November 21, 2014, the panel dismissed the applications to revoke the NDO;
- 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*;

- on June 15, 2018, the executive director issued an amended notice of hearing which added additional respondents, deleted certain original respondents and made allegations that were not contained in the original notice of hearing;
 - 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; and
 - on January 15, 2019, the panel revoked the NDO.
- [5] On May 17, 2019, Forum filed an application seeking, what it termed, “procedural orders” and “declarations and orders”, including (among others):
- (a) a finding and declaration that section 148 and the NDO unjustifiably infringe and are inconsistent with section 2(b) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982, being *Schedule B to the Canada Act 1982 (U.K.). 1982, c. 11* (the “Charter”) and are of no force and effect;
 - (b) further, or in the alternative, a declaration and finding that the executive director’s and Commission’s use of the NDO pursuant to section 148 of the Act to unreasonably restrict a respondent’s ability to investigate, gather evidence and speak to witnesses unjustifiably infringes and is inconsistent with section 2(b) of the Charter and is of no force and effect;
 - (c) further, or in the alternative, a declaration and a finding that the infringement of section 2(b) of the Charter is not saved pursuant to section 1 of the Charter;
 - (d) a declaration pursuant to section 24 of the Charter that the Respondents’ rights and freedoms have been infringed or denied and such further remedy that the Commission considers appropriate in the circumstances; and
 - (e) further, a finding and declaration pursuant to section 171 of the Act that the use of the NDO by the executive director in the manner in which he did constitutes a breach of procedural fairness and/or natural justice and is an abuse of process and directing a stay of the proceedings.
- [6] Forum filed with the Commission a copy of a notice, dated May 17, 2019, addressed to the AG and to the Attorney General of Canada, providing notice to them pursuant to section 8(2)(a) of the *Constitutional Questions Act*.
- [7] On June 17, 2019, Forum filed an application seeking the following orders:
- (a) an order pursuant to section 43(2) of the ATA, referring the question of the constitutionality of section 148 of the Act to the Court as follows:
 - (i) is s. 148 of the Act consistent with s.2(b) of the Charter?

- (ii) if the answer to question 1 is no, does s. 148 of the Act constitute a reasonable and demonstrably justified limit under s. 1 of the Charter?
 - (b) an order pursuant to s. 43(2) of the ATA referring the related applications of procedural fairness and abuse of process within the stated case as follows:
 - (i) does the procedure used by the executive director to obtain and then maintain the NDO pursuant to section 148 of the Act create a complete bar to the preparation of a defence?
 - (ii) does the ability of the executive director to keep the NDO active for the “duration of the investigation” extend beyond the final interview?
 - (iii) does the reliance by the executive director on the NDO beyond the conclusion of the investigation give the executive director an enforcement tool that creates an abuse of process and is procedurally unfair?
 - (c) an order pursuant to s. 43(5)(b) of the ATA, suspending the applications described in paragraph 7(b) until the opinion of the Court has been given in the stated case.
- [8] On July 5, 2019, Clozza filed materials consenting to Forum’s application described in paragraph 7 and applied for a further order that the following questions also be referred as a stated case pursuant to section 43(2) of the ATA:
- (a) if section 148 of the Act violates the respondents’ (the reference to “respondents” was not defined in the applications) section 2(b) Charter rights, should the evidence obtained be excluded on the basis that the administration of justice has been brought into disrepute; and
 - (b) if the use of section 148 of the Act by the Commission Chair or Commission staff violated the respondents’ section 2(b) Charter rights, should the evidence obtained be excluded on the basis that the administration of justice has been brought into disrepute.

III. Law

- [9] Sections 43(1), (2) and (5) of the ATA state:

Discretion to refer questions of law to court

43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

...

- (5) Subject to the direction of the court, the tribunal must
- (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
 - (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
 - (c) decide the application in accordance with the opinion.

IV. Positions of the Parties

[10] The Applicants submitted the following in support of their Applications to refer the above noted questions to the Court as a stated case:

- the ATA permits any party to a proceeding before the Commission to request a matter be referred as a stated case;
- the Court is the preferred forum for constitutional challenges;
- the British Columbia Court of Appeal in *Shapray v. British Columbia Securities Commission*, 2009 BCCA 322 found a previous version of section 148 of the Act to be unconstitutional and therefore the courts have a historical expertise with respect to the constitutionality of this section;
- because the constitutionality of the revised section 148 has not been considered by the courts, it is a “live issue” (notwithstanding that the NDO has been revoked) that should be referred to the Court for its consideration;
- the tribunal of the Commission does not have the jurisdiction to recommend or impose changes to the process by which orders under section 148 of the Act are made; and
- the orders which touch on procedural fairness are necessarily related to the constitutional challenge to section 148 of the Act and should therefore be referred as a stated case alongside the Applicants’ constitutional challenge to section 148 of the Act.

[11] The AG submitted that the questions should not be referred to the Court as a stated case for the following reasons (among others):

- the Applicants’ challenge to section 148 of the Act is moot because the NDO has already been revoked by the Commission;
- the Commission is the presumptive forum for the Applications and the Applicants did not provide a persuasive reason to rebut that presumption;

- although the constitutionality of section 148 of the Act is one of the questions that the Applicants seek to have referred to the Court, in reality they are seeking personal remedies that they say should flow from the unconstitutionality of that provision and therefore this is not a case involving an issue of the pure constitutionality of a provision (for which the Court might be a better forum); and
- the Court would not address issues of what administrative practices the executive director should follow in carrying out investigations.

[12] The executive director agreed with the submissions of the AG and added to them the submission that the Applications should be dismissed because referral of these questions as a stated case will further delay the hearing on the merits of the allegations in the amended notice of hearing.

V. Analysis

[13] Section 43 of the ATA provides a mechanism whereby a question, that would otherwise be determined by the Commission, can or must be referred to the Court (for an opinion of the Court on the referred question) as a stated case.

[14] Therefore, there was no dispute that we have the jurisdiction to grant the Applications.

[15] However, the ability to refer a question under section 43(2) of the ATA is discretionary and the issue raised by the Applications was in what circumstances would it be appropriate for the Commission to exercise its discretion to refer matters as a stated case.

[16] This question was recently addressed by a panel of this Commission in *Re BridgeMark Financial*, 2019 BCSECCOM 248, albeit the circumstances underlying that decision are different from those in the present case. In *BridgeMark*, the panel expressed the view that, ultimately, the discretion to refer a matter as a stated case should be exercised where to do so is in the public interest. We agree with that perspective.

[17] The Applicants submitted that the Commission was not the presumptive forum for certain kinds of constitutional issues. In support of that proposition, they pointed to the discussion in Hansard setting out comments from the then AG during the second reading of the bill which introduced section 43 of the ATA. In those comments, after noting that the Commission was one of two tribunals which courts have recognized as having the necessary expertise to address constitutional questions during their proceedings, the then AG also set out the following:

I would say that to the extent that my views are relevant, I would encourage, the tribunals I've mentioned – the Securities Commission and the Labour Relations Board – to, where appropriate, use the authority to refer constitutional questions by way of stated case as the preferred way of dealing with constitutional questions.

- [18] It is clear from the passage above that those were the personal views of the then AG. As they are personal views, it is not clear what weight they should be given in interpreting the legislative intent behind section 43(2). The views of the then AG also do little to aid in our interpretation of section 43(2) of the ATA. The statutory framework of section 43 is clear - the Commission has been given the authority to address constitutional questions when they arise in our proceedings but, *where appropriate*, we should consider referring such questions to the court as a stated case. Again, the issue is, when is that appropriate?
- [19] The Commission, exercising its role as a tribunal, has been established by legislation as an expert tribunal. It is consistent with that mandate to exercise the discretion to refer matters as a stated case in a conservative manner.
- [20] The Applicants suggested that a previous finding by our Court of Appeal that a predecessor of the current section 148 of the Act was unconstitutional makes it both important to determine if the amended section 148 is constitutional and appropriate to refer that issue to the Court.
- [21] Even if the constitutionality of the amended section 148 is an important issue to be considered, this submission did not address why the Court would be the more appropriate forum to address this issue in first instance. The Applicants did not provide us with a clear reason why that would be the case.
- [22] While we agree with the Applicants' submission that this panel does not have the jurisdiction to direct the executive director to adopt particular general practices relating to his investigations (that is a matter of prosecutorial discretion), we do have jurisdiction (pursuant to either section 165 or 171 of the Act) to consider the circumstances under which an order under section 148 has been made and to revoke or vary any such order if appropriate.
- [23] In sum, we could see no compelling reason why it would be in the public interest to refer the questions posed in the Applications to the Court as a stated case. A number of the submissions of the AG were persuasive that, in this case, the Commission is the preferred forum to deal with these issues in first instance.
- [24] In contrast, the investigation of this matter has experienced lengthy delays. Clozza and certain of the other respondents have previously applied for a stay of these proceedings as a consequence of those delays. We dismissed those applications. There is no doubt that granting the Applications would lead to further significant delay to the hearing dealing with the merits of the allegations in the amended notice of hearing. We do not consider that to be in the public interest. The panel can deal with the applications set out in paragraph 5 in a more efficient manner than could the courts.

[25] In view of the all of the above, we dismissed the Applications.

September 30, 2019

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commissioner