Citation: 2014 BCSECCOM 403

**Applications**

**Forum National Investments Ltd., Daniel Clozza,
Martin Tutschek and Grant Curtis**

***Securities Act*, RSBC 1996, c. 418**

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| **Panel** | Nigel P. Cave | Vice Chair |
| | George C. Glover, Jr. | Commissioner |
| | Suzanne K. Wiltshire | Commissioner |
| **Date of Applications** | June 4 and September 10, 2014 | |
| **Date of Hearing** | September 15 and 16, 2014 | |
| **Date of Decision** | November 21, 2014 | |

**Appearing**

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| James Torrance<br>Anjalika Rogers | For the Executive Director |
| Jeff Bowser | For Forum National Investments Ltd. |
| Daniel Clozza | For himself |

**Ruling**

## I Introduction

¶ 1 Forum National Investments Ltd. and Daniel Clozza brought separate but identical applications for the relief set out below (reproduced as written from their applications):

1. a Judgment that Paul Bourque as the Executive Director, Malki Haer, and enforcement staff breached Section 1 of the *Privacy Act*, RSBC 1996, c. 373;

2. a declaration that Paul Bourque as the Executive Director, Malki Haer, and enforcement staff violated section 11 of the *Securities Ac*t by improperly disclosing to the public confidential private information from individuals that were [sic] obtained via the broad investigative powers of Staff investigators;

3. an initial Order directing the Executive Director to make full disclosure to the Applicants of all material pertaining to the grounds for making of the Non-Disclosure Order dated December 15, 2013[sic] (the Non-Disclosure Order), including, without limitation all evidence relied upon and the written submissions made by Staff of the British Columbia Securities Commission ("BCSC Staff") to obtain the Non-Disclosure Order;

4. in the alternative of the initial order sought above, should the Executive Director consent to this disclosure, the Applicants agree to be bound by the same terms as outlined in the Panel's decision dated May 7, 2014, in 2014 BCSECCOM 155 Nicolette Mainardi and Carina Van Der Walt, paragraph 26;

5. an Order revoking the Non-Disclosure Order pursuant to section 171 of the Securities Act on the basis that it is unconstitutional or in the alternative, an Order setting aside or revoking the Non-Disclosure Order pursuant to section 171 of the Securities Act as against the Applicants;

6. an Order directing the Executive Director to not attach Section 148 of the Securities Act to Demands and Summons sent out under Section 142 when a Section 148 [non-disclosure order] has not been issued;

7. an Order directing the Executive Director to draft, and publish, clear and concise policies and procedures surround [sic] the use of Section 148 and under which circumstances such orders are issued;

8. an Order instructing the Executive Director to inform all parties in writing when the investigation is at an end; AND

9. an Order directing the Executive Director to withdraw the Notice of Hearing dated July 20, 2012, or in the alternative, a summary decision dismissing the Notice of Hearing dated July 20, 2012.

¶ 2 Forum filed its application on June 4, 2014 and Clozza filed his application on September 10, 2014. As the applications were identical, the parties agreed that the panel hear the applications together, with the result that, in effect, we had one application. However, for greater clarity, all the decisions and orders that the panel previously made during the hearing and that are made in this ruling apply to both applications.

¶ 3 After it filed its application, Forum stated that it wished to call nine witnesses at the hearing of the application. At the start of the hearing, after hearing from the parties, the panel dismissed a number of Forum's requests for relief. Forum then withdrew its request to call witnesses. Clozza testified and was cross-examined during the hearing, but otherwise, the applications proceeded with affidavit evidence only.

¶ 4 During the hearing, we ordered the executive director to disclose to Clozza and Forum's representative a redacted version of a Staff memorandum. They reviewed the memorandum prior to making their oral submissions on paragraph 5 of their applications.

¶ 5 A portion of the hearing was held *in camera* when the parties' submissions involved information that was subject to confidentiality obligations attached to certain of the information under discussion.

¶ 6 We heard the applications on September 15 and 16, 2014.

¶ 7 At the start of the hearing, the applicants withdrew their request for relief under paragraph 1 of their applications, acknowledging that the panel has no authority to make any order under the *Privacy Act*.

¶ 8 We dismissed relief requests 2, 6, 7, 8 and 9. We heard requests 3 and 4 and made a disclosure order. We heard and reserved on that part of 5 not addressing constitutional issues. We adjourned the constitutional part of 5 to January 9, 2015.

¶ 9 These are our further decisions and reasons for all of our decisions.

## II Background

¶ 10 On July 9, 2012, the Commission issued an investigation order under section 142 of the Act into the affairs of Forum and others. The investigation order has been amended from time to time.

¶ 11 On July 20, 2013, the executive director issued a temporary order and a notice of hearing under section 161(2) of the Act against the respondents (2012 BCSECCOM 294).

¶ 12 On July 31, 2013, the executive director applied to the Commission for the temporary order to be extended until a hearing is held and a decision rendered.

¶ 13 On August 8, 2013, a panel of the Commission dismissed the executive director's application to extend the temporary order.

¶ 14 On December 10, 2013, the Chair of the Commission issued a non-disclosure order under section 148 of the Act in connection with the executive director's investigation under the investigation order. The basis for the order was the risk to the integrity of the investigation that the executive director identified in his application for the order. Part 4 of the order states:

> The Commission orders, under section 148(1) of the Act, that any person, except BCSC staff and persons appointed under section 142(1) and (2) of the Act, is prohibited for the duration of the investigation from disclosing to any other person, except BCSC staff and persons appointed under section 142(1) and (2) of the Act, the existence of the investigation, the inquiries made by persons appointed under section 142(1) and (2) of the Act, or the name of any witness examined or sought to be examined in the course of the investigation.

## III Analysis

### A. Authority to Grant the Requested Relief or Orders

¶ 15 The panel first dealt with the issue of whether it had the authority to grant the relief requested in the applications.

¶ 16 There was no dispute from the executive director that the panel had the authority to grant the relief requested in paragraphs 3, 4 and those parts of paragraph 5 that did not involve challenging the constitutionality of the non-disclosure order. We deal with those requests below.

¶ 17 First, however, we deal with our authority to grant the relief requested in paragraph 2, the constitutional portion of paragraph 5, and paragraphs 6 to 9 of the applications.

#### 1. *Violations of section 11 of the Act*

¶ 18 In paragraph 2 of their applications, the applicants seek a declaration that Commission staff violated section 11 of the Act by disclosing confidential information in affidavits filed in a civil suit in the Supreme Court of British Columbia commenced by a Commission staff member. The Supreme Court proceeding relates to matters that are the subject of the notice of hearing, but it does not involve all of the same parties.

¶ 19 Section 11 of the Act states that:

> Every person acting under the authority of this Act must keep confidential all facts, information and records obtained or provided under this Act, or under a former enactment, except so far as the person's public duty requires or this Act permits the person to disclose them or to report or take official action on them.

¶ 20 The applicants' specific complaint is that, in the Supreme Court proceeding, there were filed copies of unredacted affidavits that the Commission had ordered be filed in a redacted form in Commission proceedings.

¶ 21 The executive director says that this panel does not have jurisdiction to make a declaration, a form of relief that the Supreme Court can grant but which is not found anywhere in the *Securities Act*.

¶ 22 We agree. We were not directed to any statutory provision or other authority which grants the panel the power to make a declaration.

¶ 23 The executive director also argues that that filing of the affidavits occurred in a private civil suit that involves persons who are not respondents to this proceeding. Accordingly, he says that the filing of the affidavits is not relevant to the matters for which this panel was appointed and that the applicants have no standing to make this application on behalf of other parties to the civil suit.

¶ 24 We agree. This panel was appointed to deal with the allegations set out in the notice of hearing and matters relevant to that. The affidavits were filed in a private civil suit which is not relevant to any matter which this panel has been appointed to deal with, nor could it be appointed: we could not order that the affidavits be redacted in the Supreme Court proceedings, nor could we grant a sealing order in that proceeding. Those are orders that only the Supreme Court could make.

¶ 25 The applicants essentially seek a statement from the panel about Commission staff's conduct. It is not the role of a hearing panel to make general statements about staff conduct.

¶ 26 Accordingly, we dismiss the applicants' request for relief in paragraph 2 of their applications.

### 2. *Constitutionality of the non-disclosure orders*

¶ 27 In paragraph 5 of their applications, the applicants seek an order under section 171 of the Act revoking the non-disclosure order on the basis that it is unconstitutional.

¶ 28 Section 8 of the *Constitutional Questions Act*, RSBC 1996, c. 68 requires the applicants to give the Attorney General of Canada and the Attorney General of British Columbia at least 14 days' notice of their constitutional challenge to the non-disclosure order. This requirement is also described in section 2.10 of BC Policy 15-601.

¶ 29 The applicants did not provide notice as required under the *Constitutional Questions Act*. That Act is explicit that the Commission cannot grant a constitutional remedy until an applicant gives the required notice.

¶ 30 We adjourned this request for relief until the applicants comply with the notice requirements of the *Constitutional Questions Act*. Below we deal with the balance of the applicants' request in paragraph 5 of their applications.

### 3. *Relief sought in paragraphs 6, 7 and 8*

¶ 31 In paragraphs 6, 7 and 8 of their applications, the applicants ask the panel to direct or instruct the executive director to take certain action – to not attach section 148 to summonses; to publish guidance on the use of section 148; and to notify parties when an investigation is completed.

¶ 32 In response, counsel for the executive director argues that the panel has no authority to issue the orders the applicants seek under paragraphs 6, 7 and 8.

¶ 33 He argues that the panel was appointed to hear the allegations in the notice of hearing and related procedural matters. The directions the applicants seek are beyond the scope of the notice of hearing and therefore beyond what the panel was authorized to address.

¶ 34 He further argues that section 171 of the Act, which the applicants rely on in support of their applications, may allow the panel to review a decision of the executive director, but in this case there is no decision to review. Those sections do not give the panel authority to direct the executive director to take certain action.

¶ 35 Finally, he argues that administrative functions of Commission staff are not reviewable under the Act, citing this Commission's decision in *Re Mercury Partners*, 2002 LNBCSB 520.

¶ 36 We agree with the executive director that we do not have the authority to make the orders the applicants seek in paragraphs 6, 7 and 8.

¶ 37 Regarding summonses and demands, BC Form 15-901F is the required form for a summons to attend before an investigator appointed under the Act. BC Form 15-902F is the form for a demand for production. Neither form requires that the text of any sections of the Act be attached to an issued summons or demand.

¶ 38 Therefore, there is no need to order what the applicants seek, even if we had the authority to do so, since BC Form15-901F and BC Form 15-902F set out the required form of a summons or demand.

¶ 39 If the text of section 148 was attached to a summons or demand, it was done in error. It is not the role of a hearing panel to make general statements about staff conduct.

¶ 40 Regarding notifying parties when an investigation is at end, we note that a party who is subject to a non-disclosure order can apply to the Commission to revoke or vary the order under section 171, as the applicants have done in this case. There is no general authority for a panel to direct the executive director to adopt a practice or procedure outside the context of a specific application in a particular proceeding.

¶ 41 Accordingly, we dismissed the applicants' request for relief in paragraphs 6, 7 and 8 of their applications.

### 4. *Order directing the executive director to withdraw the notice of hearing or for a summary decision dismissing the notice of hearing*

¶ 42 In paragraph 9 of their applications, the applicants seek an order that we direct the executive director to withdraw the notice of hearing in the matter. In the alternative, they say that we should make a summary decision dismissing the notice of hearing.

¶ 43 The applicants argued that because 23 months have passed since the executive director issued the notice of hearing, the time period required to bring this matter to a hearing will be excessive, and it is in the public interest to order the executive director to withdraw the notice of hearing or to make an order dismissing the notice of hearing. However, to the extent they argued that the passage of time is an issue, they led no evidence to support this submission.

¶ 44 The executive director says that the request for an order directing him to withdraw the notice of hearing is effectively a request to have the panel reverse the administrative decision of the executive director in issuing the notice of hearing. He cites the *Mercury Partners* decision for the proposition that the decision to issue a notice of hearing is an administrative function, exempt from review by the panel.

¶ 45 We agree with the executive director that we have no authority to make an order directing him to withdraw a notice of hearing that contains allegations. Issuing a notice of hearing is an administrative matter. This panel has been appointed to hear the allegations in the notice of hearing; it is not for this panel to direct the executive director to take such an administrative step regarding the notice of hearing.

¶ 46 On this basis we dismissed the application to make an order directing the executive director to withdraw the notice of hearing.

¶ 47 The executive director argues that there is no provision in the Act to allow the panel to make a summary decision as the applicants request.

¶ 48 We were not directed to any authority for our making a summary dismissal order of a notice of hearing. In this case we do not need to decide this issue. The applicants' submissions on this request for relief depend substantially on there being no allegations in the notice of hearing and on the harm done to the respondents through delay. We have addressed the issue of delay above.

¶ 49 In oral submissions, the applicants acknowledged that there is an allegation made in the notice of hearing. Given this, there is no basis for dismissing the notice of hearing without hearing submissions from the parties on the issues raised in the notice of hearing.

¶ 50 Accordingly, we denied the applicants' request for an order dismissing the notice of hearing.

**B. Decisions on the merits**

***1. Application for disclosure of materials supporting the non-disclosure order***

¶ 51 In paragraph 3 of their applications, the applicants seek an order directing the executive director to disclose to the applicants all material (the Material) that was relied upon by the Chair of the Commission to make the decision to issue the non-disclosure order on December 10, 2013.

¶ 52 In the alternative, in paragraph 4 of their applications, the applicants say that if the executive director consents to the disclosure of the Material, they would agree to be bound, in respect thereof, by the same terms as imposed by this Commission in *Nicolette Mainardi and Carina Van Der Walt*, 2014 BCSECCOM 155 at para. 26.

¶ 53 The Material was comprised of a single memorandum that was redacted in part to remove references to the names of individuals who are not parties to this proceeding or the *Mainardi* proceeding.

¶ 54 As is obvious from the alternative relief requested, disclosure of the Material has already been the subject of a proceeding before another panel of this Commission in *Nicolette Mainardi and Carina Van Der Walt*. In that proceeding, the executive director did not object to the disclosure of the Material, provided that certain conditions were imposed upon its recipients.

¶ 55 In this case, the executive director is objecting to the disclosure of the Material. He says that there is evidence of breaches of the non-disclosure order by the applicants which militate against further disclosure. Secondly, he says that in *Mainardi* the disclosure was to be made to the applicants' lawyer and that lawyer could ensure adequate security for the Material following disclosure.

¶ 56 After considering the prior disclosure of the Material in *Mainardi* and reviewing the Material itself we decided to allow the applicants to review the Material in relation to their arguments in respect of the last request for relief, an order under section 171 to revoke or vary the non-disclosure order.

¶ 57 Accordingly, we ordered the disclosure of the Material with the following conditions:

a) the executive director make the Material available for viewing by Jeff Bowser (on behalf of Forum) and Daniel Clozza at the Commission offices on reasonable prior notice from Bowser or Clozza;

b) the Material may only be used by Bowser and Clozza for the purposes of an application under section 171 of the Act to revoke or vary the non-disclosure order and the adjourned application that the non-disclosure order is unconstitutional;

c) while the non-disclosure order is in effect, Bowser and Clozza shall not make copies of the Material, or any other material containing disclosed information from the Material, and shall not disclose any disclosed information to any person other than each other; and

d) Bowser and Clozza shall give the executive director at least five business days' prior written notice if they wish to file with a court or with this Commission any document containing disclosed information from the Material, in order to allow the executive director to apply for a sealing order.

¶ 58 As we granted the applicants' initial request in paragraph 3 of their application for a disclosure order, we did not consider the applicants' alternative requested relief in paragraph 4.

**2. *Order revoking or varying the non-disclosure order***

¶ 59 As noted above, we adjourned the applicants' application in paragraph 5 of their applications to set aside the non-disclosure order on the grounds that it was unconstitutional. The remaining request in paragraph 5 therefore was an application under section 171 of the Act to revoke or vary the non-disclosure order.

¶ 60 The applicants' position is that the decision of the Chair of the Commission to issue the non-disclosure order was improper because there was no evidence the order was required to support the integrity of the investigation and because the process for issuing the order was procedurally deficient.

¶ 61 The applicants further argue that the non-disclosure order was made when "the horse was already out of the barn", by which they mean it was issued nearly eighteen months after the executive director issued the notice of hearing, and when Commission staff had already questioned many witnesses.

¶ 62 Finally, the applicants argue that the Commission only has three witnesses left to interview in its investigation and those interviews are delayed due to contempt proceedings at the Supreme Court of British Columbia. Although they did not state it, we presume that their argument is that there is no need to continue the non-disclosure order since the investigation is nearly complete.

¶ 63 The executive director submits that there was sufficient evidence of potential harm to the integrity of the investigation before the Chair to support granting the non-disclosure order. The executive director also says that the investigation is ongoing and there remain threats to the integrity of the investigation. He pointed to Clozza's extensive knowledge of the investigation both prior to the issuance of the non-disclosure order and currently as evidence in support of the need for the continuation of the non-disclosure order.

¶ 64 The applicants essentially argued that the order should not have been made in the first place and that it should not continue now.

¶ 65 The applicants have brought their applications under section 171 of the Act. Section 171 is not a provision that allows simply for an appeal of an earlier decision.

¶ 66 The applicants' argument that we revisit the circumstances under which the order was initially issued is essentially an appeal, and not a proper issue in an application under section 171.

¶ 67 The use of the phrase "would not be prejudicial to the public interest" in section 171 shows a legislative intent to undertake a current and forward looking analysis when applying that test.

¶ 68 This means that the panel must consider the potential impact of its order to revoke or vary, considering factors beyond those related to the issuance of the underlying order. In other words, in order to determine whether it would not be prejudicial to the public interest, we must consider the impact of our decision to revoke or vary, which requires us to consider current or future circumstances

¶ 69 However, even if we were reviewing the decision to issue the non-disclosure order as an appeal, we find that the applicants' arguments that the order was improperly issued are not persuasive.

¶ 70 Our review of the memorandum, and Clozza's admissions during the hearing of the frequency with which he was in contact with many of the Commission's potential witnesses, show that there was a clear risk to the integrity of the investigation at the time the non-disclosure order was issued.

¶ 71 The memorandum shows that Clozza provided suggestions or directions to witnesses as to how to deal with Commission staff. There was clear evidence in the memorandum of witnesses communicating among themselves as to what was said to Commission staff.

¶ 72 While there may have been less risk to the investigation given the non-disclosure order came 18 months after the date of the notice of hearing, the timing does not, in and of itself, make it unreasonable.

¶ 73 Turning to section 171, the issue on this application is whether it would be not prejudicial to the public interest to revoke the non-disclosure order.

¶ 74 The parties acknowledge that the investigation into the matters that are the subject of the notice of hearing continues. The investigation is currently delayed by contempt proceedings in the Supreme Court of British Columbia.

¶ 75 Clozza's oral testimony at the application shows he has an intimate knowledge of the current state of the Commission's investigation.

¶ 76 He also acknowledged frequent conversations with many of the potential witnesses in this proceeding and with two of the witnesses that are the subject of the contempt proceedings.

¶ 77 There is nothing in evidence to suggest that the risks to the investigation that led to the initial order are not still present. At the time of the initial order there were clear risks of collusion among witnesses and respondents. The circumstances of the respondents and their relationship to key witnesses appear to be little changed from when the order was originally made. The risk of collusion remains.

¶ 78 The integrity of the investigation remains at risk and that is of paramount importance to protecting the public interest. In our view, it would be prejudicial to the public interest to revoke or vary the non-disclosure order.

¶ 79 Accordingly, we dismiss this applicants' request in paragraph 5 of their applications for an order under section 171 of the Act revoking or varying the non-disclosure order.

¶ 80 November 21, 2014

¶ 81 **For the Commission**

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commission