

In The Matter of the *Securities Act*, R.S.B.C. 1996, c. 418

- And -

Forum National Investments Ltd., Daniel Clozza, Elizabeth Clozza, Martin Tutschek, Grant Curtis, Jacqueline Dawydiuk, Mark Lentsch, Robert Dunn, Admiral House Limited, Aldford Group Ltd., Arcade Investments Ltd., Elco Securities Limited And Global Maxfin Capital Inc.

- And -

Section 171 of the *Securities Act*, R.S.B.C. 1996, c. 418

NOTICE OF APPLICATION

Name of applicants: Dan Clozza

To:

British Columbia Securities Commission
12th Floor, 701 West Georgia Street
Vancouver, BC
Attention: Commission Secretary

On Notice to:

British Columbia Securities Commission
12th Floor, 701 West Georgia Street
Vancouver, BC
Attention: Paul Bourque, Q.C., Executive Director

Attorney General of Canada
900-840 Howe Street
Vancouver, BC
V6Z 2S9
Fax: 604-666-1585

Attorney General of British Columbia
Attn: Richard Fyfe QC
PO Box: 9290 Stn Prov Govt
Victoria BC
V8W 9J7
250-356-0149
Kim.king@gov.bc.ca

TAKE NOTICE that an application will be made by the Applicants to the British Columbia Securities Commission at 12th Floor, 701 West Georgia Street, Vancouver, BC on a date and time to be determined for the order(s) set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. A Judgment that Paul Bourque as the Executive Director, Malki Haer, and enforcement staff breached Section 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373.
2. A declaration that Paul Bourque as the Executive Director, Malki Haer, and enforcement staff violated section 11 of the *Securities Act* by improperly disclosing to the public confidential private information from individuals that were 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 (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*, R.S.B.C., 1996, c. 418 (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 has not been issued;
7. An Order directing the Executive Director to draft, and publish, clear and concise policies and procedures surround 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. The applicant can't request that specific allegations be dismissed, as the notice does not contain any allegations.

FACTUAL BASIS

BACKGROUND

1. The BCSC has initiated an investigation into whether Forum National Investments Ltd. ("Forum"), a company incorporated in Ontario, with material contacts to the United States and trading on the OTCBB in the United States, its principals, and various other individuals have violated section 57 of the *Securities Act* by engaging in a market manipulation.
2. The U.S. Securities and Exchange Commission (the "SEC") is also conducting an investigation into related matters, although the Applicants do not know the full scope of the SEC Investigation or have any details about it at this time. Although such information has been requested, BCSC Staff has declined to provide the Applicants with any information in that regard.

The Temporary Order and Notice of Hearing

3. On July 20, 2012, the Executive Director of the Commission issued a Temporary Order and Notice of Hearing (2012 BCSCCOM 294) pursuant to section 161 of the *Securities Act* (the “Temporary Order and Notice of Hearing”). The Temporary Order had the effect of temporarily continuing a ban on trading in Forum National’s shares.
4. The Temporary Order and Notice of Hearing do not contain any allegations.
5. The Hearing was convened before a panel (the “Panel”) of three Commissioners, Brent Aitken, Kenneth Hanna and Shelley Williams, on July 31, 2012.
6. On August 8, 2012, a decision was issued to revoke the Temporary Order, and not extend it citing that the Executive Director tendered no evidence whatsoever to support it.
7. Despite the revocation of the Temporary Order of July 20, 2012, the Notice of Hearing remains outstanding and continues to contain no specific allegation.

THE THIRD INVESTIGATION ORDER

8. The Third Investigation Order in this matter was amended on or about November 15, 2013. The Third Investigation Order appoints staff of the SEC as investigators authorized to make investigations into the subject matter of this investigation.

THE NON-DISCLOSURE ORDER

9. On or about December 10, 2013, the BCSC obtained a non-disclosure order pursuant to section 148 of the *Securities Act* (the “Non-Disclosure Order”). The Non-Disclosure Order provides at para. 4 as follows:

The Commission orders, under s. 148(1) of the Act, that any person, except BCSC Staff and persons appointed under s. 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 s. 142(1) and (2) of the Act, the existence of the investigation, the inquiries made by persons appointed under s. 142(1) and (2) of the Act, or the names of any witness examined or sought to be examined in the course of the investigation.

10. This Non-Disclosure Order has been obtained nearly one and a half years after the initial Temporary Order and Notice of Hearing, dated July 20, 2012 was issued. The existence of an investigation has been publically known since at least that time.
11. Despite the plain and ordinary meaning of the Non-Disclosure Order, the BCSC takes the position that the scope of the Non-Disclosure Order prohibits the Applicants from discussing any information pertaining to the investigation with anyone else.
12. On Tuesday May 13, 2014, the parties attended a second Hearing Management Meeting at the offices of the BCSC. At this meeting Mr. Clozza requested disclosure in relation to obtaining the section 148 Non-Disclosure Order. Staff of the BCSC refused to provide this disclosure without the existence of an application.
13. Without disclosure, The Applicants are therefore unable to determine the evidentiary basis upon which the Executive Director has sought the Non-Disclosure Order in this matter or the policy basis upon which it was purportedly made.
14. There is no publicly available policy that explains the circumstances upon which a Non-Disclosure Order will be sought or ordered “for the purposes of protecting the integrity of an investigation”, or otherwise.
15. The consequence of section 148(1) is to:
 - (a) prohibit the Applicants on their own and through their counsel from engaging in otherwise lawful speech with other individuals; and
 - (b) interfere with the Applicants’ counsel’s ability to protect the interests of their clients and to discharge their obligations and professional responsibilities.
16. This prohibition is continuing to cause irreparable harm to the Applicant.

17. In the face of ongoing investigations by the SEC and possibly the US Department of Justice, in order to fairly prepare and defend themselves, the Applicant must be permitted to clarify facts, speak to witnesses and locate relevant documents that may be in the possession of third parties.
18. The Non-Disclosure Order significantly impairs the rights of the Applicant to a fair process and the duty owed to them of natural justice and procedural fairness.
19. The Applicant is impaired in their ability to take steps, to make full answer and defense to potential regulatory and criminal proceedings both in Canada and the U.S.

THE PUBLIC DISCLOSURE OF CONFIDENTIAL PRIVATE INFORMATION.

20. Pursuant to section 11 of the *Securities Act*, on which the Applicants plead and rely, every person, including staff of the Commission, acting under the authority of the Act must keep confidential all facts, information and records obtained under the Act, except so far as the person's public duty requires or the Act permits the person to disclose them or to report or take official action on them.
21. In or about June 2012, the Commission commenced an investigation of an alleged "promotional campaign" relating to Forum National. In general terms, the promotional campaign consisted of statements by third parties unrelated to Forum National, promoting Forum National's business prospects and encouraging investors to purchase Forum National stock on the OTCBB.
22. On July 9, 2012, Commissioner Bradley Doney of the Commission signed an Investigation Order pursuant to section 142 of the *Securities Act*, which Order was later amended on July 12, 2012 (the "Investigation Order"). The Investigation Order appointed various individuals, including Malki Haer, to act as investigators, and gave them broad, sweeping powers to investigate, inquire into, inspect and examine any person, company or other entity on any matter that might reasonably relate to:
 - (a) Forum National, its directors, officers, subsidiaries, agents, insiders, employees and their inter-relationships;
 - (b) The trading or distribution of the securities of Forum National or any of its subsidiaries in British Columbia and elsewhere;

- (c) Records of any transfer of Forum National shares, or records of any transfer of accounts related to Forum National shares; and
 - (d) The operations and affairs of the Defendants and others.
23. Also on July 9, 2012, Commissioner Doney signed an Order to Freeze Property directed at a brokerage house and a transfer agent. The Freeze Order related to securities of Forum National held by or in the names of various individuals including Daniel Clozza, his mother Elizabeth Clozza, and Shareholders Martin Tutschek, Grant Curtis, Jacqueline Dawydiuk, Mark Lentsch and Robert Dunn.
 24. As part of its investigation, staff Investigators obtained reports known as Market Integrity Computer Analysis or "MICA" reports of trading activity in Forum National shares, and determined that Grant Curtis and Elizabeth Clozza had bought and sold shares of Forum National in April, May and June 2012.
 25. One of the Commission's investigators, Lana Jardine, is a member of the Royal Canadian Mounted Police ("RCMP") on secondment to the Commission, in furtherance of the objectives of the RCMP's integrated market enforcement team. Using the powers given to her as an RCMP officer, Ms. Jardine conducted a BC driver's license inquiry for Mr. Curtis and, through that means, obtained Private Confidential Information about Mr. Curtis, including his home address.
 26. Pursuant to the powers conferred on it under the *Securities Act*, the Commission issued Production Orders to various entities, including brokerages. In response to these Production Orders, one brokerage produced to the Commission Private Confidential Information about the Shareholders, including the Shareholders Dunn, Curtis, Lentsch, Tutschek and Elizabeth Clozza, including information relating to their private brokerage accounts.
 27. The same brokerage, as it was required to do pursuant to the Orders issued by the Commission pursuant to its sweeping powers under the *Securities Act*, informed the Commission that Curtis had transferred money from his brokerage account to an account with HSBC Bank Canada ("HSBC").
 28. The brokerage also produced documents called "Account Activity Reports", detailing trading activity in Mr. Curtis' accounts, and specifically referencing his private brokerage account number.
 29. The brokerage also provided the Commission with documents relating to an account with HSBC, held jointly by Mr. Curtis and his wife, including copies of blank cheques disclosing their address and bank account numbers.

30. On July 20, 2012, the Executive Director of the Commission issued a Temporary Order and Notice of Hearing (2012 BCSCCOM 294) pursuant to section 161 of the *Securities Act* (the "Temporary Order"). The Temporary Order had the effect of temporarily continuing a ban on trading in Forum National's shares.
31. The Notice of Hearing provided notice that the Commission would hold a hearing (the "Hearing") at which the Executive Director would tender evidence, make submissions and apply for an Order extending the temporary trading ban. The Notice of Hearing also named Daniel Clozza, Martin Tutschek and Grant Curtis as Respondents.
32. In support of its application for a Permanent Cease Trade Order, the Commission tendered, as evidence for the Hearing, an affidavit of Malki Haer sworn July 20, 2012 (the "First Haer Affidavit").
33. The First Haer Affidavit, both in the text of the affidavit and in the exhibits attached to it, discloses Private Confidential Information of and concerning the Shareholders including, without limitation:
 - (a) Curtis and his wife's HSBC bank account information and home address;
 - (b) Curtis' account information with his private brokerage firm;
 - (c) The home address, telephone number and social insurance number of Shareholder Elizabeth Clozza;
 - (d) Private brokerage account information of Elizabeth Clozza, including the name of her broker, her brokerage account number and details of trades of shares of Forum National securities; and
 - (e) Details of the private holdings of the Shareholders Dunn, Curtis, Lentsch, Tutschek, Elizabeth Clozza (and many others) held with a private brokerage, including account numbers, numbers of shares held, and value of holdings, some of which was subsequently published in the Vancouver Sun by David Baines.
34. The Hearing was convened before a panel (the "Panel") of three Commissioners, Brent Aitken, Kenneth Hanna and Shelley Williams, on July 31, 2012.
35. At or just prior to the commencement of the Hearing, the Commission tendered in evidence a further affidavit of the Mr. Haer sworn July 31, 2012 (the "Second Haer Affidavit").

36. The text of the Second Haer Affidavit, and the documents appended to it as exhibits, contained further Private Confidential Information of and concerning the Shareholders, including:
 - (a) All of the Private Confidential Information contained in the First Haer Affidavit;
 - (b) Addresses, Canadian passport numbers and telephone numbers for Grant Curtis, Mark Lentsch, Martin Tutschek, Jacqueline Dawydiuk and Robert Dunn;
 - (c) Home phone numbers, addresses and private financial information about Elizabeth Clozza; and
 - (d) Home addresses for Daniel Clozza and Martin Tutschek.
37. At the commencement of the Hearing, counsel for the Respondents submitted to the Panel that it was highly inappropriate to put the Private Confidential Information in the public record as part of the Haer Affidavits.
38. The Panel agreed and ordered that portions of the First and Second Haer Affidavits containing Confidential Private Information of and concerning the Shareholders be redacted from, and thus not form part of, the public record.
39. On September 14, 2012, Malki Haer commenced a civil action in the Supreme Court of BC (No. S126438) against Forum National Investments Ltd., and Daniel Clozza (The Haer Civil Action).
40. At a time which is at present unknown to the Applicants, but known to the Executive Director and Malki Haer, Haer provided copies of the First and Second Haer Affidavits to his counsel in support The Haer Civil Action. Haer provided these Affidavits to Gudmundseth Mickelson LLP, for the purpose of furthering The Haer Civil Action, and not for any purpose related to the *Securities Act*.
41. On November 21, 2012, Malki Haer, and on November 22, 2012, Malki Haer's counsel, as agents of the Commission, filed an affidavit in The Haer Civil Action. (the "Third Haer Affidavit").
42. The Third Haer Affidavit, as filed in the Supreme Court Registry, appends, as Exhibits, the First and Second Haer Affidavits, in un-redacted form.
43. In the result, all of the Private Confidential Information of and concerning the Shareholders that the Panel had ordered to be redacted from the public record has willfully and deliberately been made part of the public record in The Haer Civil Action.

44. At the time the Third Haer Affidavit was filed in the Supreme Court Registry, Forum National and Clozza were unrepresented by counsel.
45. On December 20, 2012, Clozza attended at the offices of the Commission to complain about the disclosure of the Private Confidential Information in the Third Haer Affidavit.
46. On December 20 and 21, 2012, Mr. Clozza asked the Commission and its counsel to take immediate steps to protect the privacy of Forum National's Shareholders.
47. The Commission, Malkli Haer, and his counsel brushed off Mr. Clozza's complaints as being spurious and unworthy of their attention until after the "holiday break".
48. On January 4, 2013, Malki Haer and the Commission, through their counsel, formally responded to Mr. Clozza, to advise that Mr. Haer and the Commission would consent to the same redactions that were made at the Hearing, but advising Mr. Clozza that he would have to be the one to apply to the court for these measures, even though it was Mr. Haer and the Commission who had breached the privacy rights of the Shareholders by disclosing the Private Confidential Information in the Haer Civil Action in the first place.
49. On January 4, 2013, Forum National and Clozza retained counsel.
50. On January 9, 2013, counsel for Forum National and Clozza wrote to counsel for Mr. Haer and the Commission, asking that they take immediate steps to seal the First and Second Haer Affidavits, to protect the privacy rights of the Shareholders.
51. Initially, Mr. Haer and the Commission, through their counsel, indicated that they were prepared to consent to an order sealing the First and Second Haer Affidavits; later, however, they withdrew that consent.
52. Initially, Mr. Haer and the Commission opposed Forum National's application for a sealing order, which nevertheless was granted by Mr. Justice Burnyeat on January 11, 2013.
53. Mr. Haer and the Commission's refusal to take steps to protect the Private Confidential Information of and concerning the Shareholders, their refusal to assist Mr. Clozza, while he was unrepresented, in obtaining an Order to protect the Private Confidential Information, and their subsequent opposition to Forum National's application to seal the Haer Affidavits, reflects the highhanded, arrogant attitude of the Commission towards Forum National and its Shareholders throughout these proceedings and the investigation which led to the Hearing before the Panel on July 1, 2012.

The Commission does not have procedures in place to properly use Section 148

54. In March 2010 Section 148(1) of the *Securities Act* was amended by the Finance Statutes Amendment Act, 2010, S.B.C. 2010, c 4.

The Previous language of Section 148

148 (1) Without the consent of the commission, a person must not disclose, except to the person's counsel, any information or evidence obtained or sought to be obtained or the name of any witnesses examined or sought to be examined under section 143, 144, or 145.

(2) Subsection (1) applies despite any provision of the Freedom of Information and Protection of Privacy Act other than section 44(2) and (3) of that Act.

(3) Subsection (2) does not apply to personal information, as defined in the Freedom of Information and Protection of Privacy Act, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

The New language of Section 148

148 (1) For the purpose of protecting the integrity of an investigation authorized under section 142, the commission may make an order, that applies for the duration of the investigation, prohibiting a person from disclosing to any person the existence of the investigation, the inquiries made by persons appointed under section 142, or the name of any witness examined or sought to be examined in the course of the investigation.

(1.1) An order made under subsection (1) does not apply to the disclosure of information between a person and the person's lawyer.

(2) An order made under subsection (1) applies despite any provision of the Freedom of Information and Protection of Privacy Act other than section 44 (1) (b), (2), (2.1) and (3) of that Act.

(3) [Repealed 2010-4-61.]

55. On July 24, 2012, Commission Investigator Lana Jardine sent a Demand for Production to Mr. Mariano Banting of Computershare Limited, attached to this Demand for Production was the previous language of Section 148, despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.

56. On July 24, 2012, Commission Investigator Lana Jardine sent a Demand for Production to Forum National Investments Ltd, attached to this Demand for Production was the previous language of Section 148, despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.
57. On July 25, 2012, Commission Investigator Lana Jardine sent a Demand for Production to Tammy Lawrence, at HSBC Bank Canada, again attaching the previous language of Section despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.
58. On July 25, 2012, Commission Investigator Malki Haer signed a Summons to Attend before an Investigator requiring Dan Clozza to attend an investigative interview, only 2 days later, on July 27, 2012. Attached to this summons was the previous language of Section 148, despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.
59. On July 25, 2012, Commission Investigator Malki Haer signed a Summons to Attend Before an Investigator requiring Martin Tutschek to attend an investigative interview, only 2 days later, on July 27, 2012. Attached to this summons was the previous language of Section 148 as a relevant provision of the Securities Act, despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.
60. On July 25, 2012, Commission Investigator Malki Haer signed a Summons to Attend before an Investigator requiring Grant Curtis to attend an investigative interview, only 2 days later, on July 27, 2012. Attached to this summons was previous language of Section 148 as a relevant provision of the Securities Act, despite the fact that there was no Section 148 order in place. Adding Section 148, notwithstanding it was the old language, was misleading to the recipients.
61. All of these examples are made as part of only one file Commission Staff are currently investigating. It is unknown to the Applicants how widespread this abuse is as it relates to other investigative files within the Commission. It is however clear that Staff of the Commission are unaware, or uneducated on the current language and appropriate use of Section 148, or in the alternative, they are fully aware but prefer the previous language to further promote the activity of intentionally

misleading recipients that they are subject to a non-existent Non Disclosure Order.

62. On July 31, 2012, a hearing was held before the Commission. On page 41 of the Transcript, Staff Investigator Malki Haer is asked questions about some of the demands that were sent out in this file.

21 MR. BOYLE:
22 189 Q So, Mr. Haer, page 182, Exhibit E of your second
23 affidavit the dated July 31st, on the first page
24 is a demand for production dated July 24th, 2012
25 addressed to Computer Share. Do you see that?
00099
1 A Yes.
2 190 Q Is there a Section 148 nondisclosure order in this
3 matter?
4 A I don't know.
5 191 Q Are you aware that all of the demand for
6 productions that you have issued in this matter
7 contain Policy 15-501 and a section of the
8 Securities Act 148 that is no longer in force, are
9 you aware of that?
Page 41

31jul12.txt
10 A No.
11 192 Q In any event, you issued a demand for production
12 to Computer Share and have they responded to your
13 demand for production?
14 A Yes.

63. It is clear that the Commission continues to use Section 148 to misrepresent and mislead recipients that there may be a Section 148 Order in place when in fact there is not. It is clear in this example that Mr. Haer is not even aware that the Section of the act he was using was no longer in force. In addition to Mr. Haer, at least one other investigator, Lana Jardine, did not understand the changes of Section 148.
64. Staff of the Commission do not understand the correct use of Section 148. Clear policies and guidelines are needed in relation to the use of Section 148, and whether or not it should be attached when sending out Demands and Summons, especially in the case when a Section 148 order does not exist.

Why an Order is necessary.

65. Whether or not there are policies or procedures governing the issuance of Summons and Demands, and which provisions of the Securities Act is attached to those Summons or Demands, is unknown to the applicant. If there is, the applicants request disclosure on such policies and encourage

- the panel to order the Executive Director to make such policies or procedures public.
66. Despite not having a policy, or if there is one it is unknown to the applicant, many of the applicants shareholders have received Summons and document demand notices as a result of the current Investigation into the applicant.
67. Some of Forum's shareholders that have received summons and demands in relation to this investigation are as follows, this is a partial and non complete list.
- William Genge
 - Dan Clozza
 - Martin Tutschek
 - Grant Curtis
 - Logan Dunn
 - Ryan Hamel
 - Chris Mallinson
 - Nicolette Mainardi
 - Carina Van der Walt
 - Mark Lentsch
 - James Sargent
 - Doris San Vito;
 - Many others
68. All of these shareholders received Summons and Demands with Section 148 attached as a relevant provision of the Securities Act containing the old language of Section 148. At the time of these Summones, there was no Section 148 order in place.
69. Specifically speaking about Mr. Grant Curtis, when HSBC received the Freeze Orders relating to his accounts, despite the fact that no Section 148 Order was issued at that time, HSBC was under the impression there was, because the Freeze Order contained Section 148 as relevant provisions of the *Securities Act*. Because of this false impression, HSBC refused to explain to Mr. Curtis why his accounts were frozen, and why his credit line was removed and why his cheques were bouncing including his mortgage payment.
70. In fact, any attachment of Sections of the Act to a Summons or Demand is inappropriate, unless there is clear and concise language explaining its relevance.

71. If a Non disclosure Order has not been granted in connection to an investigation, having an individual receive a Summons or Demand that includes Section 148 causes the recipient confusion and sends the wrong message to the recipient. Doing so clearly implies that the evidence is not to be disclosed when in fact if a Non disclosure Order has not been issued the opposite is true and Section 148 does not apply. Attaching it unnecessarily is a deliberate high handed attempt to make the recipient believe they are subject to a gag order under section 148 when they are not.

Part 3: LEGAL BASIS

NOTICE

JURISDICTION TO GRANT RELIEF SOUGHT

72. Section 171 of the *Securities Act*, gives the BCSC the discretion to revoke a decision of the Executive Director:

Discretion to revoke or vary decision

171 If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an Order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

73. The BCSC also has the jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions: *Securities Act*, section 4.1; *Administrative Tribunals Act*, S.B.C. 2004, c. 45, section 43(1).
74. The Applicants seek the orders above on the basis that their rights to procedural fairness and natural justice have been violated and further on the grounds that section 148 of the *Securities Act* is unconstitutional.

NON-DISCLOSURE ORDER

75. Section 148 of the *Securities Act* provides as follows:

Evidence not to be disclosed

148 (1) For the purpose of protecting the integrity of an investigation authorized under section 142, the commission may make an Order, that applies for the duration of the investigation, prohibiting a person from disclosing to any person the existence of the investigation, the inquiries made by persons appointed under section 142, or the name of any witness examined or sought to be examined in the course of the investigation.

(1.1) An Order made under subsection (1) does not apply to the disclosure of information between a person and the person's lawyer.

(2) An Order made under subsection (1) applies despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1) (b), (2), (2.1) and (3) of that Act.

(3) [Repealed 2010-4-61.]

76. A violation of section 148 is an offense punishable by a fine of up to \$3,000,000.00, imprisonment for up to three years, or both (per section 155 of the *Securities Act*).
77. Section 143 of the *Securities Act* gives BCSC investigators powers that are extremely broad in scope. In particular, in respect of the person who is the subject of an investigation, an investigator is authorized to broadly investigate, inquire into, inspect and examine all manner of the affairs, records, property, assets and relationships, investments and interests of that person.
78. In addition, pursuant to section 144 of the *Securities Act*, an investigator exercises the same power as the Supreme Court has for the trial of a civil action to Summon and enforce the attendance of witnesses, compel witnesses to give evidence on oath or compel witnesses to produce records. The exercise of such jurisdiction requires the BCSC, the Executive Director and the investigator as his or her proxy, to ensure that the process is just and fair and conducted in accordance with the law.

TIMING OF AND PROCESS USED TO OBTAIN THE NON-DISCLOSURE ORDER

79. Section 148(1) specifically states that a Non-Disclosure Order is to be granted to protect “the integrity of an investigation”. Yet, this investigation has been ongoing and publically disclosed since July 2012 without the existence of the Non-Disclosure Order.
80. Despite requests made, the BCSC has refused to provide any disclosure in regards to the facts and evidence relied upon, or the policies and foundation for the granting of the Non-Disclosure Order, or the reason why such an order is necessary to protect the integrity the investigation while minimally impairing the rights of persons subject to the order, long after the investigation was made public.
81. There is no policy or procedure and insufficient (or any) evidence or any principled basis upon which the BCSC approved the Non-Disclosure Order. No such policy or directives from the BCSC have been published. As such, secret Orders promulgated under this section are abusive and unjust.
82. The Non-Disclosure Order should be set-aside pursuant to section 171 of the *Securities Act*.

VIOLATION OF THE CHARTER

1. *Section 148(1) Infringes Freedom of Expression*

83. The effect of section 148(1) of the *Securities Act* is to prohibit otherwise lawful speech in a manner inconsistent with the rights of free expression under section 2(b) of the *Charter*. The provision as applied to these Applicants is not demonstrably justified as required by section 1 of the *Charter*.
84. The communication by a client or their lawyer to any other person, other than their lawyer, of the existence of an Investigation, inquiries made by Investigators or the name of any witness examined or sought to be

examined in the course of the Investigation, is an activity that conveys or attempts to convey meaning and is *prima facie* within the guarantee of section 2(b) of the *Charter: Shapray v. British Columbia (Securities Commission)*, 2009 BCCA 322.

85. The restriction imposed is not simply a restriction on method or location of communication (*Shapray, supra*). It is established that section 148(1) of the *Securities Act* infringes section 2(b) of the *Charter*.

2. Section 148 is Void for Uncertainty

86. The legislature has imported into the amended section 148(1) a time limitation on Non-Disclosure Orders, such that the Non-Disclosure Order will only apply “for the duration of the investigation”. Yet there is no guidance on the meaning of “the duration of the investigation”.
87. On June 2, 2014, Forum National president Dan Clozza had a conversation with the Director of Enforcement where she told him that in fact Investigations are never formally closed. Such a policy directly contravenes the intent behind the legislated changes to Section 148.
88. This Non-Disclosure Order has been made “for the duration of the Investigation” but as made is in effect for an indeterminate amount of time as investigations are currently never formally closed. Further, this Non-Disclosure Order does not disclose any information about the “duration of the Investigation”.
89. The Applicants have not been advised if the Investigation remains ongoing or the manner in which they will be advised that the Investigation is complete. There is no policy or procedure to advise subjects of a BCSC Investigation that an investigation is at an end.

90. Without such policies or procedure to notify the Applicants that the Investigation is at an end, the Non-Disclosure Order has the effect of continuing in an unrestricted way indefinitely, despite the express time limitation in the legislation.

3. Section 148(1) is Not Saved by Section 1 of the Charter

91. Section 148(1) is not demonstrably justified in a free and democratic society as required by section 1 of the *Charter* unless persons subject to orders made thereunder have: (a) the right to know the basis upon which orders are granted, (b) the information upon which such orders are granted, and (c) a fair opportunity to challenge that basis.
92. The BCSC bears the onus of establishing each element of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and of showing that the law is a reasonable limit on *Charter* rights on a balance of probabilities: *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 291.
93. Following the British Columbia Court of Appeal's decision in *Shapray*, *supra*, rendering the previous version of section 148 unconstitutional, the legislation has been amended so that Non-Disclosure Orders are only made if requested by the Executive Director and the BCSC so orders. If so granted, the Court of Appeal has held that the procedure followed to obtain a Non-Disclosure Order must comport with the legal principles articulated in *Degenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, *R. v. Mentuck*, [2001] 3 S.C.R. 442 and *Toronto Star Newspaper v. Ontario*, [2005] 2 S.C.R. 188, as they apply to obtaining of publication bans.
94. Thus, in order for the Non-Disclosure Order to comply with the concerns pertaining to the constitutionality of section 148 as raised by the Court of

Appeal in *Shapray, supra*, it is incumbent on the BCSC to have in place a formal, explicit and documented procedure together with sufficient evidence and a principled basis upon which to assess that evidence, before a Non-Disclosure Order is made.

95. The Applicants have not been provided disclosure of any such policy or procedure and there is no such policy or procedure made publically available by the BCSC. The Applicants also do not have any information about the basis upon which the Executive Director sought the Non-Disclosure Order in this matter.
96. The amended section 148 of the *Securities Act*, as drafted or alternatively as applied, is not minimally impairing and not saved by section 1 of the *Charter*. The Non-Disclosure Order and section 148 of the *Securities Act* should be declared unconstitutional.

PUBLIC DISCLOSURE OF PRIVATE CONFIDENTIAL INFORMATION

97. The Applicants rely on section 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373, which provides that it is a tort, actionable without proof of damage, for a person, willfully and without claim of right, to violate the privacy of another.
98. By providing their counsel with unredacted copies of the First and Second Haer Affidavits, and by instructing counsel to file the First and Second Affidavits as exhibits to the Third Haer Affidavit in The Haer Civil Action, the Commission, willfully and without claim of right, violated the privacy of the Shareholders.
99. Under section 11 of the *Securities Act*, the Private Confidential Information of and concerning the Shareholders can only have been obtained in furtherance of the Commission's duties under that act, and by the same Section the Commission were required to keep the Private Confidential Information confidential.
100. The Commission has paid for and pursued the Haer Civil Action on behalf of its employee, Malki Haer, ostensibly to protect the latter's reputation.
101. Pursuing Mr. Haer's defamation claims extends far beyond the confines of section 11 of the *Securities Act* and, by providing Unredacted copies of the First and Second Affidavits to their counsel, and by instructing counsel to file the Third Haer Affidavit, including the Private Confidential

Information of and concerning the Shareholders as part of the exhibits to the Third Haer Affidavit, which is a public document, Malki Haer and the Commission breached section 11 of the *Securities Act*, and willfully and without claim of right violated the privacy of the Shareholders.

102. Further, or in the alternative, if the act of disclosing the First and Second Haer Affidavits to counsel, and instructing counsel to file the Third Haer Affidavit with its attachments did not, in first instance, constitute a willful violation of the Shareholders' rights of privacy, then the Commission's ongoing refusal to assist the unrepresented Clozza to protect that information, and their deliberate opposition to Forum National's application for a sealing order, each constitute ongoing, willful violations of the privacy of the Shareholders.

IT IS IN THE PUBLIC INTEREST TO AMMEND A NOTICE OF HEARING AND SET HEARING DATES AS SOON AS POSSIBLE

103. Once a Notice of Hearing has been issued, it is in the public interest to set dates for that hearing as soon as possible.
104. On July 20, 2012, the Executive Director issued a Notice of Hearing that contained no specific allegations.
105. In the 23 months since July of 2012, the Executive Director has continued its investigation. In almost two years of Investigating, in excess of 50 interviews, endless demands for information, numerous telephone interviews, information sharing with the SEC in the United States, the Executive Director has still not provided an Amended Notice of Hearing with any allegations. The Applicant does not know if the Executive Director will ever issue an Amended Notice of Hearing.
106. Given the amount of time passed since issuing a Notice of Hearing with no allegations, it is in the public interest for the Executive Director to withdrawal the existing Notice of Hearing, or in the alternative a Summary Decision from the Panel dismissing the current Notice of Hearing.

Part 4: MATERIAL TO BE RELIED ON

British Columbia Supreme Court Action No. S126438

1. Affidavit #1, 2 &3 of Malkinder Haer
2. Affidavit #1 of Scott A Turner sworn January 11, 2013
3. Affidavit#1 of Paul Borque sworn December 12, 2012
4. Affidavit #1 of Dan Clozza sworn December 6, 2012

2014 BCSECCOM 155

5. Transcript dated Feb 26, 2014
6. Ruling dated May 7, 2014

2012 BCSECCOM 315

7. Ruling dated August 8, 2012

2012 BCSECCOM 294

8. Notice of Hearing dated June 20, 2012
9. Such further and other material that counsel may advise and this tribunal shall permit.

The Applicant estimates that the initial order (Order #3 above) application for disclosure will take 1 hour.

The Applicant estimates that the rest of the application will take two (2) days.

Date: September 10, 2014


Applicant
Dan Clozza