

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

Citation: Re Forum National, 2020 BCSECCOM 285

Date: 20200721

**Forum National Investments Ltd., Daniel Clozza and
Douglas Corrigan**

Panel	Suzanne K. Wiltshire Commissioner George C. Glover, Jr. Commissioner
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Submissions Completed July 14, 2020

Date of Ruling July 15, 2020

Date of Reasons July 21, 2020

Submissions

James Torrance Chris Cairns	For the Executive Director
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Patricia Taylor	For Daniel Clozza
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Douglas Corrigan	For Douglas Corrigan
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Reasons for Ruling

I. Introduction

- [1] These are our reasons for our July 15, 2020 ruling (*Re Forum National*, 2020 BCSECCOM 266) dismissing the following applications:
- Application of Daniel Clozza, dated and filed on July 7, 2020, for a general adjournment of the hearing on the merits of the allegations set out in the June 15, 2018 amended notice of hearing (2018 BCSECCOM 181) in this matter; and,
 - Application of Douglas Corrigan, filed on July 10, 2020 but dated July 11, 2020, also for a general adjournment of the hearing on the merits in this matter.
- [2] The merits hearing is scheduled to commence on July 28, 2020 and is set down for 12 hearing days ending August 21, 2020.
- [3] The grounds set out in the respective applications raise issues in relation to concerns arising from the COVID-19 public health emergency in the context of the holding of the merits hearing. The grounds raised by each of the applicants can be summarized as follows:

- The applicants are entitled to an in-person merits hearing given the seriousness of the allegations against them.
- They intend to have their witnesses attend in person to give viva voce evidence on which the panel will be asked to make determinations of credibility that can only be made where the panel and the respondents can see and hear the witnesses in the hearing room. With virtual hearings there is a possibility that the witness is being coached, making evidence obtained in that manner unreliable.
- It is unsafe to conduct an in-person hearing until such time as the Commission's hearing room is considered safe. The Commission has not provided notice that the Commission hearing rooms were assessed to ensure that they meet the health and safety requirements established by the Provincial Health Officer and WorkSafeBC such that the Commission hearing rooms are declared safe for in-person hearings. It also appears Commission staff are required to work from home to protect them against COVID-19 and the same safety measures should be afforded to the parties at the merits hearing.
- Clozza intends to call witnesses from the United States (US witnesses) who Clozza says are currently prohibited from travelling to British Columbia to attend the hearing in person because of border restrictions and would in any event have to quarantine if they were permitted to travel into British Columbia.
- Clozza intends to call a BC resident as a witness who Clozza says is immune compromised due to a condition that poses life threatening consequences if the witness is exposed to COVID-19.
- Corrigan says he has underlying medical conditions that put him at a higher risk of serious illness were he to contract COVID-19.
- The panel chair has directed that no paper evidence will be accepted during the course of the merits hearing. Clozza says this compromises the ability of respondents to tender documents in reply to the executive director's case, if such evidence becomes relevant, and this is unfair.
- Corrigan, in reference to his settlement discussions with the executive director and the amount of the fine sought, says the Commission will spend significantly more having the hearing under necessary COVID-19 restrictions.

[4] The executive director opposed both applications submitting, in summary, that:

- The applicants have provided no law, evidence or valid reason why it would be unfair to proceed with the merits hearing on July 28, 2020 as scheduled, noting that the Commission has put in place hearing room precautions and procedures to address safety concerns associated with COVID-19 and that witnesses may attend the hearing by video conference and a party may also attend by video conference.

- The allegations are serious and must be dealt with. There is a significant public interest in the merits hearing proceeding as scheduled.
- [5] The hearing of the applications proceeded as a hearing in writing. In making our ruling we considered: the applications; the executive director's written responses of July 10 and 13, 2020, respectively, to each of the applications; the July 14, 2020 letter of Clozza in reply to the executive director's response to Clozza's application and in response to Corrigan's application; and the July 14, 2020 reply of Corrigan to the executive director's response to Corrigan's application. No submissions were filed by Forum National Investments Ltd. (Forum).

II. Background

- [6] On July 20, 2012, the executive director issued a temporary order and notice of hearing against Forum, Clozza and two others (2012 BCSECCOM 294). That notice of hearing did not allege any of those respondents contravened any specific provisions of the *Securities Act*, RSBC 1996 c.418 (the Act) instead describing the conduct of those respondents as contrary to the public interest. In August 2012, a panel of the Commission dismissed the executive director's application to extend the temporary order (2012 BCSECCOM 315). The investigation which had commenced in 2012 continued.
- [7] On June 15, 2018, the executive director issued the amended notice of hearing against Forum, Clozza, Corrigan and two others. The proceedings against the two others were discontinued in March 2020.
- [8] The amended notice of hearing alleges that Forum, Clozza and Corrigan, directly or indirectly, engaged in conduct relating to shares of Forum that they knew, or reasonably should have known, resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, Forum's shares, contrary to section 57(a), the market manipulation section of the Act. The allegations relate to conduct that took place in 2011 and 2012.
- [9] The merits hearing has been adjourned several times for various reasons since it was first set to be heard in February 2019. At a hearing management meeting on March 27, 2020, and with the agreement of all parties, the Commission reset the merits hearing for this matter for July 28 – 31, August 12 – 14 and 17 – 21, 2020. This is the fifth set of dates for the merits hearing in this matter.
- [10] On June 17, 2020, a hearing management meeting (HMM) was held, via teleconference, to prepare for the merits hearing.
- [11] At the HMM, Commissioner Wiltshire confirmed that the Commission proposed to proceed with the merits hearing scheduled to commence July 28, 2020. She advised that the hearing would be held in person in the Commission's main hearing room with precautions and procedures in place, such as physical distancing, plexiglass screening, cleaning and sanitation, as required to do so in a COVID-19 compliant manner and that

guidelines were in the process of being finalized and would be provided to the parties when completed.

- [12] Clozza raised most of the same issues at the HMM as those raised in his application. At the HMM, Commissioner Wiltshire advised the parties that the Commission has video-conferencing capabilities and that witnesses living out of the country or others having reasonable concerns regarding attending in person because of their own health situation could attend the hearing by video conference.
- [13] At the HMM, Corrigan indicated that, while not enthusiastic about attending the hearing in person, he would attend the hearing and that it was his preference to do so. Corrigan has vision issues that were also discussed. The Hearing Officer confirmed that during the hearing she could maximize the size of the documents on the presentation screen as a way to address Corrigan's vision issues.
- [14] In a letter of June 23, 2020, summarizing the discussions at the HMM, the Commission confirmed the merits hearing would proceed as scheduled as an in-person hearing in the Commission's main hearing room with some witnesses potentially attending via video conference. The parties were referred to section 8.2 of BC Policy 15-601 – *Hearings* (Hearings Policy) providing for attendance of parties and witnesses by video conference and advised that the Commission would permit the attendance of witnesses via video conference where reasonably necessary. Parties were requested to apply to the Hearing Office as early as possible to facilitate the process.
- [15] The HMM letter of June 23, 2020 also advised that the Commission was in the process of developing a facility for parties and witnesses to attend hearings online remotely that would permit the display on their remote monitors of the presentation screen on which exhibits and other documents are brought up by the Hearing Officer, permitting witnesses and parties to attend the hearing remotely and to also see the exhibits and documents. The Commission said it anticipated this would be available by commencement of the merits hearing and that it would advise the parties further upon implementation of this facility.
- [16] On July 10, 2020, the Hearing Office provided a copy of the finalized *Commission Tribunal COVID-19 Procedures and Guidelines* to each of the parties. The Hearing Office also confirmed that the Commission would be able to provide enhanced video attendance capabilities for parties and witnesses. Parties were provided with a list of equipment requirements and requested to apply if they or any of their witnesses wished to attend via video conference.
- [17] On July 14, 2020, the Hearing Office provided to each of the parties a copy of the Commission's finalized guidelines entitled *Participating in Remote Hearings at the Commission* for those wishing to participate remotely.

III. Submissions of the Executive Director

[18] With respect to the applicants' grounds that they are entitled to an in-person merits hearing and to have all witnesses attend in person, the executive director made the following submissions:

- The applicants have provided no law to support their position that determinations on credibility can only be made by a panel when a witness appears in person. That is not the law. There is no absolute right for a party to examine a witness in person. In *R. v. Jeanes*, 2014 BCSC 944 (CanLII), Justice Verhoeven permitted a complainant in an assault matter to testify via video. In his reasons, he quoted the Ontario Court of Appeal's decision in *R. v. Levogiannis*, 1990 CanLII 6873 (ON CA) (affirmed by the Supreme Court of Canada: *R. v. Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 SCR 475 at p. 27:

...I do not think that, by reason of the absence of face to face confrontation, any principle of fundamental justice has been infringed in such a trial. ...

Justice Verhoeven held at para. 43 that "the use of the video and voice technology in this case will not, in any way, jeopardize or prejudice the right of the accused to a fair trial and to make full answer and defence to the charges".

- The applicants have not provided any precedent to support their claim that they are entitled to an in-person hearing. The Hearings Policy provides rules for Commission hearings. In part 1.2 *General Principles*, the policy states, in part, "The Commission's goal is to conduct its proceedings fairly, flexibly and efficiently. ... Where the circumstances require a variation of the procedures set out in this policy in order to achieve this goal, the Commission may do so." And in Part 2.1, the Policy explains the procedures, stating "...the Commission is the master of its own procedures, and can do what is required to ensure a proceeding is fair, flexible and efficient."
- Part 8.2 of the Hearings Policy permits parties and witnesses to attend by telephone or video conference upon application if unable to attend in person.
- A panel may decide to have witnesses appear remotely. There is nothing unusual or unfair about this. Courts permit witnesses to appear by video in criminal and civil matters. See the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 714.1 which permits a court to order that a witness give evidence by means of technology that permits the witness to testify elsewhere in the virtual presence of the parties and the court. See also the Supreme Court Civil Rules, rule 23-5 which permits video conferencing.
- The Supreme Court of Canada in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, 1997 CanLII 386 (SCC), [1997] SCR 793, at para. 73, defined the basic principles underlying "natural justice" referred to in part 2.1 of the Hearings Policy as:

...first, that no man be condemned unheard (*audi alteram partem*), and second, that no man be judge in his own cause (*nemo iudex in sua causa*).

- The panel has provided guidelines for a procedurally fair and safe hearing of this matter. The panel can make determinations in relation to credibility of witnesses who testify by video. In effect, the applicants' argument is that the hearing can never take place until every witness that they want to call can attend in person. That position is far beyond the requirements of procedural fairness and should be rejected.

[19] With respect to the grounds relating to hearing room safety procedures and hearing room precautions, the executive director made the following submissions:

- COVID-19 safety measures were canvassed at the June 17, 2020 HMM and the Hearing Office emailed the *Commission Tribunal COVID-19 Procedures and Guidelines* to all parties on July 10.
- The BC Supreme Court has specifically addressed attendance other than in person, directing that prior to any pre-hearing conference, "counsel or parties must determine if any potential witness is reluctant to attend court due to health-related concerns or for other reasons related to the public health emergency" and providing that the court is unlikely to require the witness to attend in such circumstances and the pre-hearing conference "will address the question of whether the witness can give evidence by other means, such as ... by telephone or videoconferencing, etc." See Supreme Court of British Columbia, Notice to the Profession, the Public and the Media, *COVID-19: In Court Measures During the Pandemic*, *COVID-19 Notice No 27*, June 5, 2020.
- The panel has made it clear witnesses may attend by video conference.
- Paragraph 9 of the Clozza complaint is not factually correct as Commission staff can be, and have been, working in Commission offices.

[20] With respect to Clozza's intention to call US witnesses and a BC witness who is immune compromised, the executive director submitted that Clozza can call the witnesses referred to by video conference. Further, the executive director noted that Clozza has provided no evidence that these witnesses are available to testify, are willing to testify or have relevant evidence to give or that he made any efforts or enquiries to the provincial or federal governments in relation to the US witnesses being allowed to travel to Canada to testify.

[21] With respect to the "possibility that the witness is being coached" where giving testimony by video conference referenced in Clozza's application, the executive director confirmed that he is only calling one witness and that witness will be attending in person. The executive director noted the only respondent at this point who may be calling witnesses by video conference is Clozza and submits that it is nonsensical to suggest the hearing be

adjourned because Clozza is concerned that someone is coaching his own witness. Further, in the unlikely event that the issue arises it can be addressed through cross-examination and submissions.

[22] With respect to the tendering of paper exhibits, and Commissioner Wiltshire's direction at the HMM that "no paper evidence will be accepted during the course of the merits hearing", the executive director submits that this can be simply addressed by standing the hearing down and having counsel email copies of any paper documents to all parties. The executive director noted further that the respondents are required to provide the executive director with any documents they rely on by July 13, 2020.

[23] With respect to Corrigan and those additional points raised in his application relating to COVID-19 and the underlying medical conditions he describes as putting him at a higher risk of serious illness were he to contract COVID-19, the executive director makes the following submissions:

- The *Commission Tribunal COVID-19 Procedures and Guidelines* provided to the parties address safety concerns with respect to COVID-19 and take into consideration guidelines provided by the province of British Columbia. These guidelines include practices for tribunal staff, the panel, for parties attending the hearing room and for the public attending hearings. Further details are set out in Appendix "A" to the guidelines.
- If Corrigan does not want to attend the hearing in person due to concerns about COVID-19, then he can attend by video conferencing.
- With respect to Corrigan's reference to privileged "without prejudice" settlement communications, the executive director's position is those communications are subject to settlement privilege and are also irrelevant to the adjournment application.

[24] In conclusion, the executive director submits it would be clearly contrary to the public interest to adjourn the hearing on the merits in this matter generally. There is a strong public interest in this merits hearing proceeding. The executive director requests the applications be dismissed.

IV. Reply/Response Submissions of the Applicants

[25] In his reply/response submissions of July 14, 2020, Clozza made the following submissions:

With respect to the executive director's submissions

- Law and evidence are not the only reasons for adjourning a hearing. The health of the parties ought to carry a greater weight.

- Given the decision of July 8, 2020 dismissing Clozza’s application for further disclosure, Clozza will need to call five US witnesses and border restrictions have been extended until at least August 21, 2020.
- Viva voce testimony with live witnesses is required to achieve the goal set out in the Hearings Policy to conduct its proceedings fairly, flexibly and efficiently.

With respect to Corrigan’s application

- Clozza and his counsel cannot assure Corrigan that he is safe to give evidence in their presence. Each of Clozza, his counsel and Corrigan are in their own separate bubbles. Although Commission staff may feel safe to be in each other’s bubbles, it is reckless to force Corrigan into the position of being in the bubbles of others in the hearing room.
- Corrigan’s vision issues make his giving evidence in the hearing room preferable. Because of Corrigan’s vision issues, the immune compromised conditions of Corrigan and the BC witness, and the inability of the US witnesses to appear in person, the merits hearing should be adjourned until such time as a vaccine is made available or the pandemic no longer poses the current risks.
- The fact that the panel is currently operating beyond their initial appointment is not an impediment to rescheduling the merits hearing. A new panel could be empaneled when the timing is appropriate without prejudice to the parties.

[26] In his reply submissions to the executive director’s submissions, Corrigan made the following submissions:

- After every preventative measure is taken, the Commission cannot ensure or guarantee a COVID-19 free environment in the hearing room.
- Part 8 of the Hearings Policy refers to parties and witnesses participating via video conference. As a self-represented litigant, he is not being offered the same treatment or respect as other respondents using legal counsel when the executive director says “I should stay home and watch my trial on TV”.
- He chose to defend himself in this case and its reasonable that the merits hearing be adjourned.

V. Analysis

[27] As stated by the panel in a previous ruling (*Re Forum National*, 2019 BCSECCOM 257) in this matter in relation to an earlier adjournment application:

[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?

- [28] The issue in these applications is about hearing fairness and the need to balance this with the public interest in having the merits hearing proceed.
- [29] Clozza is correct in asserting that fraud is a serious allegation. The allegation in this case that the respondents have engaged in market manipulation is an allegation akin to fraud.
- [30] It is in the public interest to resolve allegations of market manipulation: one result (dismissal) removes serious allegations hanging over a respondent; the other result (findings of market manipulation) establishes serious misconduct. Investor confidence in the integrity of the capital markets and the Commission's ability to protect the public diminishes as the merits of this matter continue to be unheard (as currently scheduled the merits hearing will start some seven to eight years after the alleged misconduct commenced).
- [31] It is in the public interest for the Commission to maintain its tribunal function, including timely resolution of matters to be heard before it.
- [32] To this end, the Commission has prepared for a return to the hearing room by implementing guidelines that follow BC Public Health guidance and are consistent with provincial guidelines, including WorkSafeBC guidelines. The Commission has also implemented enhanced video-conferencing capabilities to enable parties, their representatives and witnesses they may wish to call to attend and participate in the hearing remotely if they wish to do so. The parties have been provided with both the *Commission Tribunal COVID-19 Procedures and Guidelines* and the guidelines for *Participating in Remote Hearings at the Commission*.
- [33] The Commission is a designated essential service provider. The executive director is correct that a number of staff have continued to work from the Commission offices throughout the public health emergency. The applicants are also correct that most Commission staff have worked from home. We can add that with the announcement of the BC Restart Plan on May 19 and the further easing of restrictions in Phase 3 beginning in June, the Commission has been planning for and is now starting the staged return of more staff to the Commission offices, with appropriate COVID-19 safety procedures and protections in place.
- [34] The other consideration in this case is the ability of the applicants to participate fully and fairly in the merits hearing.
- [35] The parties were advised on June 17, 2020 at the HMM and as summarized in the HMM letter that the Commission was taking steps to enable the merits hearing to proceed commencing on July 28 as scheduled with appropriate safety procedures and protections being taken in the hearing room with respect to COVID-19 and that parties and witnesses, where needed or appropriate, could attend via video conference with the

expectation that facilities with enhanced capabilities would be implemented prior to the commencement of the hearing.

- [36] The Commission is the master of its own procedures. Those procedures have long included the ability to have parties and witnesses attend by video conference.
- [37] The Commission has now confirmed that enhanced video conferencing has been implemented that will enable exhibits and other documents referred to during the hearing to be brought up on the monitors of those attending via video conference. This will enable parties and their representatives, whether attending remotely or in person, to participate fully, to hear and see those speaking and to be heard and seen when speaking themselves and to see the presentation screen on their own monitors if attending remotely when exhibits and other documents are displayed on the presentation screen.
- [38] The applicants' concerns can be addressed in the case of Clozza by having the US witnesses whose travel is restricted and the BC witness he has identified as being immune compromised attend remotely via video conference, and in the case of Corrigan by his own attendance remotely via video conference. In Corrigan's case, his vision issues would be addressed in the same way as if he attended in person in the hearing room by having the Hearing Officer enlarge the document on the presentation screen that would then appear on his own monitor remotely. Corrigan could also attend remotely via video conference on some days and in person on other days if he chooses. The applicants need to notify the Hearing Office so that attendance remotely by video conference can be facilitated by Commission staff in accordance with the guidelines for *Participating in Remote Hearings at the Commission* that have been provided to all parties. This should be done as much in advance of the hearing as possible.
- [39] We agree with the executive director's submissions that the applicants are not entitled to have an in-person hearing and to have all witnesses attend in person when, as in this case, the concerns as to the attendance of some parties and witnesses raised by the applicants can be allayed by their attending remotely via video conference. Echoing the words of Justice Verhoeven, the use of video conferencing technology in this case will not in any way jeopardize or prejudice the right of the respondents to a fair hearing and to make full answer and defence to the allegations against them.
- [40] With respect to the issue of credibility raised in the applications and the potential for coaching of witnesses attending remotely, we note that the executive director's only witness will attend the hearing in person.
- [41] Clozza has raised this issue of credibility in the context of the US witnesses and one BC witness he intends to call who may need to attend remotely via video conference. Corrigan echoes Clozza's concern, presumably with respect to the same witnesses, as to date Clozza appears to be the only party who might choose to call witnesses to attend remotely via video conference. We agree with the executive director's submissions that in Clozza's case, it does not seem to make sense that the hearing be adjourned because Clozza is concerned that someone may be coaching witnesses Clozza has himself called.

Presumably Clozza will advise any witnesses he calls remotely as to the inappropriateness of their permitting anyone to “coach” them during their testimony. Certainly the panel will do so, just as it regularly cautions witnesses to not discuss their testimony with anyone while they remain under cross-examination. We also agree with the executive director’s submission that in the unlikely event the issue of “coaching” were to arise it can be addressed through cross-examination and submissions.

- [42] Clozza has also raised as a ground the requirement to tender evidence electronically and not in paper. As set out in Part 3.7 of the Hearings Policy, parties have long been required to submit the records they intend to rely on in a hearing to the Hearing Office in an acceptable electronic format prior to the scheduled hearing start date. While documents have in the past been received by the panel in paper form, as a COVID-19 safety measure, parties will no longer be permitted to hand up paper documents during the course of the hearing. In the event a party intends to tender a document in the course of the hearing that has not been submitted in advance of the hearing to the Hearing Office, the party intending to do so should immediately upon forming such intention transmit the document electronically by email to all parties and the Hearing Office. As suggested by the executive director, the panel can stand the hearing down if necessary to permit the receipt and consideration of documents so tendered, just as it would have previously done when documents were tendered in paper form. It is only the medium of delivery that is changing, not the ability to tender documents during the course of the hearing.
- [43] We consider any settlement discussions Corrigan may have had with the executive director to be irrelevant to his application.
- [44] Taking into account the balancing of interests, we concluded the merits hearing can be conducted in a manner that is procedurally fair while at the same time satisfying the public interest in not further delaying the hearing on the merits of this matter for an uncertain period of time.
- [45] For the foregoing reasons, we dismissed the applications in our ruling of July 15, 2020.

July 21, 2020

For the Commission

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner