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

Citation: Re Forum National, 2020 BCSECCOM 316 Date: 20200812

Forum National Investments Ltd., Daniel Clozza and Douglas Corrigan

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner
Submissions Completed	July 31, 2020	
Date of Ruling	July 31, 2020	
Date of Reasons	August 12, 2020	
Submissions		
James Torrance Chris Cairns	For the Executive Director	
Daniel Clozza	For himself	
Douglas Corrigan	For himself	

Reasons for Ruling

Introduction

[1] The applicant, Daniel Clozza, made a preliminary application (Application) orally on July 28, 2020, requesting that the panel members (the panel) recuse themselves.

[2] Although Clozza is represented by counsel in these proceedings, both Clozza and his counsel confirmed that Clozza was representing himself with respect to the Application and that his counsel was not representing him in relation to the Application.

[3] The executive director upon hearing the Application, stated that he had no prior notice of the Application, opposed the Application and requested two days to provide submissions in response. The panel directed the executive director to file any written submissions by 4:30 pm on the following day, July 29, 2020, to be followed on July 30 at 10:00 am by the hearing of the executive director's oral submissions, if any, and Clozza's oral reply submissions, if any.

[4] The hearing on the merits, which had been scheduled to commence on July 28, 2020, did not proceed, pending the panel's ruling on the Application.

[5] The executive director filed written submissions on July 29 and also made summary oral submissions on the morning of July 30.

[6] Clozza then made oral reply submissions on the morning of July 30. Following his oral submissions, Clozza was also given the opportunity to file a written reply by 4:30 pm on July 30 and did so, consisting of a list of authorities he had said he would be able to produce if given some time.

[7] On the morning of July 31, the executive director made brief oral submissions in response to Clozza's written reply.

[8] Corrigan supported the Application. Forum did not appear or file any position on the Application.

[9] On July 31, 2020, the panel, having considered the Application and submissions made, dismissed the Application with reasons to follow.

[10] These are our reasons for our ruling dismissing the Application.

Grounds

[11] On July 27, 2020, Clozza and the other respondents in this matter filed a Notice of Civil Claim in the Supreme Court of British Columbia (Civil Claim) naming numerous parties as defendants, including the Commission, Commission staff and the panel (Commissioners Wiltshire and Glover).

[12] On July 28, 2020, in making the Application, Clozza referred to the Civil Claim and then stated that the reason behind the Application was "we are now in an adversarial position". He later added, "I am not asking you to admit bias, I am just asking you to consider that you can't be happy with the fact down deep that you're being named in an action by myself, Mr. Corrigan and Forum National Investments, and I don't know how you can maintain your objectivity under these circumstances. And we very much would like to have a new three-member panel oversee the allegations and the merits of the hearing against us."

[13] His other stated ground for the Application was "the bias you have showed in your decision making and your treatment and the out-of-hand decisions you have made for the Executive Director leave us with no faith whatsoever that we had a fair hearing".

Response submissions of the executive director

[14] The executive director submitted, in summary, that the Application should be dismissed for the following reasons:

(a) The panel is presumed to be impartial. The law requires the applicant to demonstrate a reasonable apprehension of bias. Clozza has failed to demonstrate a reasonable apprehension of bias.

(b) Clozza cannot rely on his own actions to create an apprehension of bias (i.e. by filing the Civil Claim).

(c) The Application is an apparent attempt to manufacture yet another adjournment of the merits hearing. This attempt to derail the proceedings should be dismissed.

(d) The Civil Claim is a separate proceeding with its own remedies.

[15] The executive director referred to a number of cases in support of his submissions. These are reviewed below under the heading "Law".

Reply Submissions of Clozza

[16] Clozza stated that the authorities referenced by the executive director in his submissions looked like the very same authorities that counsel for the executive director asked Justice Leask to consider when making the argument for Justice Leask's removal in connection with an earlier contempt application brought by the executive director in this matter in the British Columbia Supreme Court. Clozza added that Justice Leask found a way to remove himself from the contempt application not on the basis of bias but for reasons only known to him.

[17] Clozza referenced the May 2019 applications of the respondents, including Clozza, for a stay of the proceedings against them because of delay. With respect to the ruling dismissing those applications (*Re Forum National,* 2019 BCSECCOM 257), Clozza submitted that "…any reasonable person would have found the hearing should have been stayed permanently". Clozza challenged the executive director's submission that leave to appeal that ruling was not granted. Clozza submitted that the British Columbia Court of Appeal had not made a ruling but simply said the British Columbia Securities Commission was entitled to its processes and the applications were premature until the Commission hearing has run its course.

[18] With respect to the Civil Claim, Clozza submitted that he had not manufactured conflict, but that the actions of the executive director and Commission staff had left the respondents "with no alternative than to call out the injustice we have identified so that others will not suffer the same fate". Clozza later added that the Civil Claim, in addition to alleging that the panel is biased in their decision-making, raises a competence issue.

[19] Clozza again submitted that the panel's decisions are biased and then referred to the Commission moving forward with the merits hearing before adjudicating the outstanding applications filed with respect to the non-disclosure order (NDO) issued under section 148 of the *Securities Act*, RSBC 1996, c. 418 (Act). In this regard, Clozza later also queried the panel's expertise in relation to constitutional law issues raised in those applications in relation to section 148. He referred to perception of bias in the context of the panel judging the NDO legislation constitutionally and stated that recent rulings on tribunals had indicated they should "stay in their own lane". He added that, given time, he could produce the authorities he had referred to. As noted above, Clozza was given time to provide his list of authorities and subsequently provided a list of decisions involving proceedings between the New Brunswick Financial and Consumer Services Commission and Pierre Emond and Armel Drapeau. Those decisions are discussed below under the heading "Law".

[20] Clozza also submitted that tribunal means three panel members and said that while the law may permit the proceedings in this matter to continue with only two panel members, he thinks that is not fair given that the merits hearing has not yet commenced.

Law

[21] In *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 (CanLII) (*Taylor*), the British Columbia Court of Appeal identified the leading case on recusal to be *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259 (*Wewaykum*) and set out the following principles from *Wewaykum* related to the reasonable apprehension of bias concept:

a) a judge's impartiality is presumed;

b) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

c) the criterion of disqualification is the reasonable apprehension of bias;

d) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

e) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

f) the test requires demonstration of serious grounds on which to base the apprehension; and

g) each case must be examined contextually and the inquiry is fact-specific.

[22] In *R. v. M.P.S.*, 2013 BCSC 1905 (CanLII) (*R. v. M.P.S.*) at paras 18 and 19, Romilly J., in refusing to recuse himself, cited Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, stating:

> [18] At para. 109, Cory J. stated that the appropriate test to be applied is "whether the particular conduct gives rise to a ***reasonable*** apprehension of bias." (emphasis added). As well, the person considering the bias must be reasonable and informed. Actual bias need not be established but mere suspicion is insufficient. Cory J. further stated at para. 113 that:
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> > Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of a real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

> [19] Cory, J. noted that there is a presumption that judges will carry out their oath of office.

[23] Romilly J. then referred to these further principles:

a) the test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision- maker], whether consciously or unconsciously, would not decide fairly." (*R. v. M.P.S.* at para. 20);

b) there is a strong presumption in favour of the impartiality of a trier of fact (*R. v. M.P.S.* at para. 21); and

c) determining whether a reasonable apprehension of bias arises requires a highly fact-specific inquiry (*R. v. M.P.S.* at para. 22).

[24] At para 25 of *R. v. M.P.S.* Romilly J. stated:

> [25] One could only imagine the chaos that would occur if a judge had to recuse himself or herself from a trial every time he or she makes a ruling that is adverse to one of the parties to the court proceeding.

[25] In *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176 (CanLII) (*Boardwalk Reit*), (leave to appeal refused by the Supreme Court of Canada), at para. 72*,* the Alberta Court of Appeal addressed the issue of litigants who try to rely on their own acts to create an apprehension of bias:

> [72] Other litigants have sometimes tried to rely upon their own acts as creating a conflict of interest or bias, and asked the judge in question to step aside as a result. Sometimes the litigant has revealed a fact, sometimes made an accusation against the judge, or sometimes tried to have the judge disciplined by the appropriate judicial council. Such litigants' attempts at self-help by engineering perceived conflicts are firmly rejected, for obvious reasons of justice and policy. [citations omitted]

[26] In *Littler v. Howie*, 2013 NSSC 84 (CanLII) (*Littler*), at para. 19, the Nova Scotia Supreme Court commented on the manufacturing of a recusal:

> [19] Complaints to the Judicial Council do not automatically result in a finding of bias or a reasonable apprehension of bias [citations omitted]. Public policy and administration of justice concerns dictate that a litigant should not succeed in a recusal motion for reasons that he/she manufactured. …

[27] In *Natural Bee Works Apiaries Inc. (Re)*, 2019 ONSEC 31 (CanLII) (*Natural Bee)*, the Ontario Securities Commission (OSC) ruled on a preliminary application by the respondents in that matter for the recusal of the panel chair (also the Vice Chair) on the grounds of bias. The Vice Chair summarized the position of the respondents as "…they viewed the findings in the Merits

Decision and evidentiary rulings as being so contrary to their positions that they believed that it pointed to bias on my part".

[28] At para. 17 of *Natural Bee*, the Vice Chair referred to an OSC "*Adjudication Guideline*" setting out the standard to be satisfied and process for considering bias by a panel member, as follows:

> 2(2) Panel Members have a duty to conduct hearings and render decisions in a fair and impartial manner. The ability to discharge that duty is undermined by actual bias or a reasonable apprehension of bias. The test to be applied in determining whether a reasonable apprehension of bias exists is "would a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — conclude that there is bias on the part of the Panel or individual Panel Members impairing their duty to fairly and impartially adjudicate the matter?"

The test set out in the OSC Adjudication Guideline is substantially the same as that articulated in *Wewaykum.*

[29] At para. 18 of *Natural Bee,* referring to several cases, including OSC cases *Fawad ul Haq Khan (Re)*, 2014 ONSEC 3 (CanLII) at paras. 25 to 29 and *Re Norshield Asset Management (Canada) Ltd.*, 2009 ONSEC 4 (CanLII) (*Norshield*), the Vice Chair adopted several principles:

a) The applicable test that should be applied is the reasonable apprehension of bias test (*Norshield*, para. 53) which has been set out as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".
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> (*Norshield,* at para. 55), citing *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394)

b) The test contains a two-fold objective element. The person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in all the circumstances of the case (*Norshield* at para. 60, citing *S.(R.D.)* at para. 111).

c) When assessing whether a reasonable apprehension of bias exists, the "test is that of a reasonable person informed of all the relevant circumstances; that is, a person who is fully informed of any safeguards in place at the Commission" (*Norshield*, para. 68).

d) The threshold for finding real or perceived bias is high – pure conjecture, insinuations or mere impressions are not sufficient – because a finding of a reasonable apprehension of bias calls into question an element of judicial integrity (*Norshield,* para. 62).

e) Commissioners are presumed to act "fairly and impartially in discharging their adjudicative responsibilities" (*Norshield,* para. 64). This presumption will stand, unless there is any evidence to the contrary (*Norshield,* para. 64, aff'd *Re Norshield Asset Management (Canada) Ltd.*, 2011 ONSC 4685 (CanLII), 2011 O.N.S.C. 4685 (Div. Ct.)).

f) The applicants have the onus of proving that a reasonable apprehension of bias exists (*Norshield,* para. 61).

[30] At para. 19 of *Natural Bee*, the Vice Chair found that, applying the case law and the test set out in the OSC Adjudication Guideline, "a reasonable and informed person, viewing the matter realistically and practically -- and having thought the matter through -- would conclude that the panel is not biased. A reasonable person would see a panel making findings and rulings based on the evidence before it and the arguments that it has heard at the merits hearing without bias".

[31] Further the Vice Chair found, at para. 20, that "… the Respondents' arguments on the motion are disagreements with factual findings and evidentiary rulings made at the merits hearing…" and, at para. 22, that "Disagreements with a finding in the Merits Decision or an evidentiary ruling does not constitute bias."

[32] Clozza provided a list of authorities[1] in support of the Application. He advised the panel, in particular, that the authorities were supportive of the proposition that tribunals "should stay in their own lane" and not assert jurisdiction over matters outside their expertise, including constitutional matters. The executive director submitted that none of these authorities was relevant to the issues raised in the Application. We agree. The authorities do not speak to the issue of bias or the appropriateness of tribunals considering constitutional, or other, matters. Rather, these authorities address issues concerning adjournments and delays in that matter which resulted in the New Brunswick Court of Appeal first directing the tribunal to proceed with the merits hearing in that matter and then staying the proceedings following further delay. Clozza did not provide further guidance on what use he proposed the panel should make of his authorities. We find they are not relevant to the questions before us on the Application.

Analysis

[33] The criterion for recusal is reasonable apprehension of bias.

[34] Considering the principles in *Taylor* related to reasonable apprehension of bias and the other cases cited by the executive director and reviewed above, the panel finds that Clozza has failed to establish reasonable apprehension of bias.

[35] As in the case of a judge, an adjudicative tribunal member's impartiality is presumed. Clozza has not provided any evidence to refute the presumption that the panel is impartial.

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[1] *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2015 NBFCST 10; 2015 NBFCST 11; 2016 NBFCST 3; 2016 NBFCST 4; 2016 NBFCST 7; 2016 NBFCST 8; 2017 NBFCST 5; and 2019 NBFCST 1; and *Financial and Consumer Services Commission v. Emond et al.*, 2017 NBCA 28 and 2020 NBCA 42

[36] Simply put, Clozza's ground alleging that the panel is biased in its decision-making is based on his disagreement with the panel's rulings and their reasons for such rulings on applications he has brought. Those applications were preliminary; the hearing on the merits having not yet commenced. In each case, Clozza was represented by counsel, submissions were received from all parties who wished to make them and the application, submissions and supporting evidence, if any, were considered by the panel who then ruled on the application and provided written reasons. Clozza had an opportunity to seek leave to appeal any of those rulings to the British Columbia Court of Appeal. Clozza did not seek leave to appeal any of the panel's preliminary rulings with which he says he disagrees except for the panel's decision to dismiss his May 2019 application for a stay. That application for leave to appeal was dismissed (see *Forum National Investments Ltd. v. British Columbia (Securities Commission)*, 2019 BCCA 402).

[37] Clozza also suggested in his reply submissions that failing to consider the applications relating to the constitutionality of the NDO prior to commencing the merits hearing is evidence of bias. Clozza has raised the issue of the NDO before in this proceeding in his May 2019 application for a stay. The British Columbia Court of Appeal, in its decision denying leave to appeal the Commission's refusal to grant the stay, held that the issue could be dealt with after the merits hearing concluded, if it was relevant. Clozza and Forum National Investments Ltd. each have outstanding applications challenging the validity of section 148 of the Act, under which the NDO was issued. The Attorney General of British Columbia has joined as a party to those applications. It is a normal practice in dealing with constitutional challenges to hear them at the end of proceedings, to avoid interfering with the hearing on the merits and to base consideration of the constitutional questions on the facts of the matter. It is also within the panel's discretion to decide generally when to hear applications before it. The Attorney General of British Columbia and the executive director are in agreement with the approach of hearing the constitutional applications after the evidentiary portion of the merits hearing on liability has concluded. Counsel for Clozza is aware that the constitutional applications will be heard at that time in conjunction with submissions on liability. The respondents will have an opportunity following that to seek leave to appeal any decision relating to the constitutionality of section 148 or on the merits.

[38] Clozza also queried whether it is appropriate for the panel to consider constitutional matters in relation to section 148 of the Act and referred to tribunals staying "in their own lane". Under section 4.1(c) of the Act, section 43 of the *Administrative Tribunals Act*, SBC 2004, c. 45 (ATA) applies to the Commission. Section 43(1) of the ATA states that the Commission tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

[39] While not relevant to the issue of apprehension of bias, Clozza also questioned the fairness of the panel continuing as a panel of two rather than three commissioners as a tribunal panel is usually three members. We note the panel was reduced to two members as a consequence of the departure of former Vice Chair Cave from the Commission. The constitution of the panel, including its size, is not a matter of fairness but a matter left to the discretion of the Chair. Pursuant to section 6(3) of the Act, a panel consists of two or three members of the Commission appointed by the Chair of the Commission. The panel is therefore properly constituted as a panel of two.

[40] Regarding Clozza's other ground of bias, he says that the panel members are in an adversarial position and will not be able to maintain objectivity now that the respondents have filed the Civil Claim. However, any adversarial position is the result of the filing of the Civil Claim by Clozza and the other respondents.

[41] Clozza brought the Application that the panel recuse themselves on the first day set for the merits hearing in this matter after a number of previous adjournments of the merits hearing, one day after the filing of the Civil Claim, and with a request for a new panel comprised of three different commissioners. Courts have rejected applications for recusal in circumstances such as these where the applicant has manufactured the circumstances.

[42] We reject Clozza's suggestion that because he filed the Civil Claim, there is now a reasonable apprehension of bias on the part of the panel. The Civil Claim is a separate proceeding with its own remedies. The only allegations in the Civil Claim related to the panel are that the incompetence and bias of the panel is obvious in its decisions and reasons and that Commissioner Wiltshire has been observed sleeping during hearings, appears disconnected and exhibits poor recall of events.

[43] We agree with the executive director that if Clozza's and the other respondents' actions in filing the Civil Claim could require recusal of the panel, there would be endless opportunities for mischief in administrative proceedings. Indeed, as stated in *Boardwalk Reit* and *Littler*, public policy and administration of justice concerns dictate that recusal must be rejected in circumstances such as those existing here.

[44] In summary, Clozza has not identified anything in our rulings and reasons to demonstrate a reasonable apprehension of bias. He merely disagrees with our rulings and reasons. His suggestion that the panel cannot be objective because he filed the Civil Claim is nothing more than his opinion. It is not "proof" that the panel would not decide fairly.

[45] The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through conclude. Would they think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.

[46] Such a person would know that the tribunal function of the Commission is separate and independent from the investigation and enforcement functions of the Commission and that, as panel members performing an adjudicative function, we are separated from any involvement in the investigative and enforcement functions of the Commission. Such a person would know that Commission panel members are presumed to be impartial. Such a person would know that a variety of preliminary applications had been made by Clozza and others, that the hearing on the merits had been adjourned a number of times and had yet to commence at the time these rulings were made, that the panel ruled on these applications with reasons after considering the applications, submissions and relevant evidence, that Clozza could have sought leave to appeal any of these rulings and that he had sought leave to appeal the ruling dismissing his May 2019 application but leave to appeal was denied. Such a person would also know the context in which the Civil Claim was filed and the Application for recusal of the panel members was made.

[47] The answer is that such a person would conclude that in making their rulings and delivering their reasons, the panel was discharging its duty without bias as members of the adjudicative tribunal of the Commission empaneled to hear this matter and that it would continue to do so. Such a person would not think that it is more likely than not that the panel, whether consciously or unconsciously, would not decide fairly.

[48] Clozza has failed to establish a reasonable apprehension of bias. There is no reason for the panel to recuse itself.

Conclusion

[49] We dismissed the Application for the above reasons.

August 12, 2020

For the Commission

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner