

Application

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

Securities Act, RSBC 1996, c. 418

Panel	Nigel P. Cave George C. Glover, Jr. Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
Date of Application	July 11, 2014	
Date of Decision	August 14, 2014	
Date of Reasons	October 1, 2014	
Submissions filed by		
James Torrance	For the Executive Director	
Anjalika Rogers		
Jeff Bowser	For Forum National Investments Ltd.	

Reasons for Decision

I Introduction

- ¶ 1 This was an application by the Executive Director to remove Jeff Bowser as a representative of Forum National Investments Ltd. in this proceeding.
- ¶ 2 This application proceeded in writing. The Executive Director and Forum provided written submissions. The remaining respondents either took no position on the application or did not provide any response to the application.
- ¶ 3 We dismissed the application by an order dated August 14, 2014. These are our reasons.

II Background

- ¶ 4 On July 20, 2013, the Executive Director issued a temporary order and a notice of hearing under section 161(2) of the *Securities Act*, RSBC 1996, c. 418 against Forum, Daniel Clozza, Martin Tutschek and Grant Curtis (2012 BCSECCOM 294).
- ¶ 5 On July 31, 2013, the Executive Director applied to the Commission for the temporary order to be extended until a hearing and a decision is rendered.

- ¶ 6 On August 8, 2013, a panel of the Commission dismissed the Executive Director's application to extend the temporary order.
- ¶ 7 Forum was represented by legal counsel at the temporary order extension hearing.
- ¶ 8 Bowser first appeared before the Commission on behalf of Forum at a hearing management meeting held on May 13, 2014.
- ¶ 9 On June 4, 2014, Forum filed an application with the Commission that was signed by Bowser on behalf of Forum as "Director Securities Compliance, Forum National Investments Ltd.". Forum also filed an affidavit of Bowser in which he affirmed that he was both an officer and director of Forum. This evidence was unchallenged by the Executive Director.
- ¶ 10 On July 11, 2014, the Executive Director filed the current application to remove Bowser as Forum's representative in this proceeding.

III Facts

- ¶ 11 Bowser is a former employee of the Commission. He worked at the Commission, but for a brief leave of absence, from September 2002 through April 2013. He held a number of positions within the organization, including, between March 2011 and August 2012, as a Compliance Officer in the Corporate Finance Division of the Commission.
- ¶ 12 The Compliance Department of the Corporate Finance Division commenced an investigation of Forum in June 2012. On July 9, 2012, the first investigation order in the investigation was issued by the Commission. It named a number of Compliance Officers including Bowser and several other Compliance Officers with whom Bowser worked and whose offices were near Bowser's work station within the Commission offices. There is no suggestion that Bowser participated in the investigation.
- ¶ 13 On July 12, 2012, the Commission issued an amended investigation order. Bowser was not named in the amended order. Two staff members who were appointed under the amended investigation order and participated in the investigation had offices that were close to Bowser's work station. The Executive Director suggests it is possible that Bowser overheard or saw confidential information pertaining to the investigation.
- ¶ 14 Notwithstanding that Bowser did not take part in the investigation into Forum, computer records indicate that, while at the Commission, he briefly accessed three documents between June 27, 2012 and July 12, 2012 specifically related to the Forum investigation and received one e-mail connected to the investigation.
- ¶ 15 There was a suggestion in the Executive Director's reply submissions to this application that those documents or that e-mail contained confidential information. Even if they did, the Executive Director filed them as exhibits in this application and therefore they are no longer confidential.

IV Issues

- ¶ 16 The Executive Director's application to remove Bowser as Forum's representative in this proceeding is founded on two distinct arguments:
1. BC Policy 15-601 *Hearings*, Part 7.1 states that a party or a witness may hire a lawyer to represent them at a hearing of the Commission; as Bowser is not a lawyer, he cannot represent Forum; and
 2. as a former Commission employee, who had access, or potentially had access, to confidential information, Bowser has remaining obligations (including a duty of loyalty) to the Commission and is in a conflict of interest by representing Forum.
- ¶ 17 Bowser says that he is simply representing Forum as a senior officer of the company. He also argues that he has no duty of loyalty to the Commission. He says his only remaining obligation to the Commission is that of confidentiality as set out in section 11(1) of the Act. He says he has not violated that obligation and is not in a position of conflict of interest.

V Analysis

A. BC Policy 15-601

- ¶ 18 We do not agree with the Executive Director that BC Policy 15-601 prohibits Bowser from representing Forum. Corporations, by their very nature, must act through natural persons, whether that person is a director, officer or some other agent (including legal counsel) properly authorized to act on its behalf. In this case, Bowser has been appointed as a director and officer of Forum. He purports to represent Forum in that capacity and not as a lawyer. The Commission deals from time to time with corporate entities in its hearings that are similarly represented by individuals who are not lawyers.

B. Conflict of Interest

- ¶ 19 The Executive Director essentially argues that since he was a Commission employee who had access to confidential information, Bowser has remaining obligations (including a duty of loyalty) to the Commission and is in a conflict of interest and should not be permitted to represent Forum.
- ¶ 20 The Executive Director has directed us to the decision of *MacDonald Estate v. Martin*, [1990] S.C.J. No. 41. That case stands for the proposition that a lawyer should be prohibited from acting for a client where the lawyer is in a conflict arising from representing that client while retaining a duty of loyalty to a previous client.
- ¶ 21 *MacDonald Estate* sets out the following with respect to conflicts of interest:
1. the test for determining if a conflict of interest exists "must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (at para. 44);
 2. the test involves two questions:

- (a) did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?; and
- (b) is there a risk that it will be used to the prejudice of the client? (at para. 45);
3. in analysing the first question the court held “once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant” (at para. 46).
- ¶ 22 We find that *MacDonald Estate* is not applicable to the present application. It and the line of cases that follow it deal with a lawyer’s conflict of interest. Lawyers have different obligations imposed upon them by their governing self-regulatory organizations and by the common law from those imposed upon employees and former employees and upon unrepresented litigants. There are good reasons for this as the relationships of lawyer to client and the role of a lawyer in the legal system differ from the relationship between employer and employee and the role of a lay litigant. Lawyers have ethical obligations imposed upon them that are inapplicable outside the profession.
- ¶ 23 Here Bowser has confidentiality obligations imposed upon him under section 11 of the Act and also common law obligations of confidentiality to the Commission as a former employee, which may or may not be different from those found under section 11 of the Act (we do not need to determine that question in this matter). He may have other continuing contractual obligations related to confidentiality. He is not a lawyer and we do not believe he has an obligation to avoid conflicts akin to those found in *MacDonald Estate*.
- ¶ 24 Even if the principles in *MacDonald Estate* apply, there is no evidence that Bowser received or retained confidential information related to the Forum investigation.
- ¶ 25 *MacDonald Estate* focuses on the improper use of confidential information. In this case, the only evidence of possession of confidential information is the three documents and the one e-mail referred to above. Since the documents have now been filed in this proceeding, there can be no concern that they are confidential and would be used improperly.
- ¶ 26 We also would not have found that the rebuttable presumption of his having confidential information would arise in this case. Bowser did not take part in the Forum investigation. Neither his general awareness of Commission procedures nor his familiarity with specific investigators arising from his having worked with them on other unrelated matters is sufficient to establish receipt of confidential information. The physical proximity of his work station within the Commission offices such that he *might* have overheard or seen some information related to the Forum investigation is speculative at best. The right of Forum to choose its representatives cannot be overridden by mere speculation.

- ¶ 27 In short, the evidence does not establish that Bowser has or had confidential information that is “relevant to the matter at hand”.
- ¶ 28 Lastly, at its heart, this application is fundamentally based on a concern that a party to this hearing has had improper access to confidential information such that the integrity of our proceeding may be impugned. Ensuring the integrity of the hearing process is a continuing obligation of hearing panels. Should it become evident, at some future point in our hearing, that there is a misuse of confidential information then this can be addressed at that time and in that context.
- ¶ 29 For these reasons we dismissed the application.
- ¶ 30 October 1, 2014
- ¶ 31 **For the Commission**

Nigel P. Cave
Vice Chair

George C. Glover
Commissioner

Suzanne K. Wiltshire
Commissioner