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Citation: *First Global Data Ltd (Re)*, 2022 ONCMT 24  
Date: 2022-09-15  
File No. 2019-22

**IN THE MATTER OF  
FIRST GLOBAL DATA LTD., GLOBAL BIOENERGY RESOURCES INC.,  
NAYEEM ALLI, MAURICE AZIZ, HARISH BAJAJ  
and ANDRE ITWARU**

**REASONS FOR DECISION ON A MOTION**

**Adjudicators:** Timothy Moseley (chair of the panel)  
Lawrence P. Haber  
Mary Anne De Monte-Whelan

**Hearing:** In writing; last submissions received November 30, 2021

**Appearances:** Mark Bailey For Staff of the Ontario Securities  
Charlie Pettypiece Commission  
Vincent Amartey  
Nayeem Alli For himself

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## REASONS FOR DECISION

### 1. OVERVIEW

- [1] After the evidentiary portion of the merits hearing in this proceeding was concluded, and after the parties had delivered their written closing submissions, but while our decision on the merits was under reserve, the respondent Nayeem Alli moved for a stay of the proceeding against him on the basis of alleged misconduct by counsel for Staff of the Ontario Securities Commission.
- [2] The conduct that Alli complains of occurred in the period before Staff filed a Statement of Allegations to begin this proceeding. Alli claims that counsel for Staff at the time (outside counsel who withdrew from the file early in the proceeding) was in a conflict of interest. Alli asserts that this fact motivated Staff counsel to concoct a contemplated fraud allegation against him, and to include that contemplated allegation in an Enforcement Notice delivered to him well before the proceeding was commenced, but to exclude that allegation from the Statement of Allegations, all in an effort to bully Alli into a settlement.
- [3] No settlement was ever concluded.
- [4] Staff brought a motion seeking dismissal of Alli's motion on a preliminary basis. We heard that motion in writing and issued an order granting Staff's motion and dismissing Alli's motion.<sup>1</sup> We dismissed Alli's request for a stay because:
- a. of his significant delay in bringing the motion;
  - b. the motion sought to address irrelevant issues; and
  - c. Alli failed to meet the high bar for the grant of a stay of proceeding, in that he failed to establish any of Staff's actions at the time complained of constituted misconduct.
- [5] Alli also sought a declaration, which he later conceded we have no authority to make. Finally, he sought an order requiring the Commission to report its Staff to the appropriate regulatory body. Again, we have no authority to issue such an

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<sup>1</sup> (2021) 44 OSCB 10375

order, and in any event, we find that there is no basis on which any member of Staff should be reported to any regulatory body.

- [6] Staff has requested an order striking certain portions of written submissions filed by Alli following the evidentiary portion of the merits hearing, as well as certain portions of an affidavit sworn by Alli and filed on this motion. We agree with Staff's submissions that the impugned portions of both documents improperly seek to introduce material that is irrelevant and/or privileged. We therefore included a provision in our order striking those portions.
- [7] In our order, we indicated that reasons for our decision would follow. These are our reasons, which are being released simultaneously with our reasons and decision resulting from the merits hearing.<sup>2</sup>

## **2. BACKGROUND**

- [8] In January 2021, during Alli's direct oral testimony in the hearing on the merits of Staff's allegations in this proceeding, Alli sought to testify about what he claimed was a conflict of interest involving Melissa MacKewn. Around the time that the Statement of Allegations was issued (May 2019), MacKewn was outside counsel acting for Staff in this matter.
- [9] Alli's concern was that MacKewn and her firm were also representing a group of First Global debenture holders at the same time as she was acting for Staff, until she recused herself from this file later in 2019. Her firm commenced an action in the Superior Court of Justice in December 2018 on behalf of that group of debenture holders. In that proceeding, the debenture holders alleged fraud against Alli. Alli believes that he has been unfairly treated as a result of MacKewn's involvement in both proceedings, for reasons we will explain further below.
- [10] When Alli began to testify about this topic, Staff objected. We upheld Staff's objection for four reasons:
- a. in his summary of anticipated evidence, delivered to the other parties before the merits hearing as required, Alli did not raise this issue;

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<sup>2</sup> *First Global Data Ltd (Re)*, 2022 ONCMT 25

- b. given the nature of Alli's concern, he ought to have raised it reasonably promptly after the concern arose, and not in the middle of the merits hearing more than a year and a half later;
- c. given that Alli expressly alleged that MacKewn engaged in professional misconduct, he ought to have raised the concern in a way that afforded MacKewn an opportunity to respond if she chose to do so; and
- d. Alli's concern, even if well-founded, was irrelevant to the issues before us at the time.

[11] The hearing on the merits continued without any testimony from Alli on the topic.

[12] On June 29, 2021, at the conclusion of the evidentiary portion of the hearing on the merits, Alli filed his written closing submissions (the **Alli Closing Submissions**). In those submissions, Alli addressed the issue mentioned above. On July 29, 2021, Staff wrote to the Registrar (with a copy to all parties) seeking our assistance. Staff advised that it had asked Alli to file revised submissions that excluded mention of the issue, but Alli had declined to do so.

[13] We responded to the parties by asking that Staff file a redacted version of Alli's submissions that would, in Staff's view, resolve the issue. Following that, Alli would have an opportunity to make submissions about whether that version should replace the one he originally filed.

[14] Staff filed a redacted version, but Alli did not respond with any submissions. Instead, on August 9, 2021, he brought a motion to stay this proceeding and for certain declaratory relief. In his motion, he elaborated on his concern. He alleged that MacKewn "weaponised" this proceeding against him by "concocting a fraud allegation... to bully... Alli into a settlement". Alli alleged that Staff intentionally inflicted mental suffering on him without regard for his serious medical conditions.

[15] As Alli notes, the Statement of Allegations in this proceeding contains no allegation of fraud against him. However, he implies, although does not state, that there is a connection between MacKewn's retainer on behalf of the debenture holders and the removal of a fraud allegation against him in this

proceeding. We note that the Statement of Allegations in this proceeding has never been amended. Alli's reference to removal of an allegation refers to an Enforcement Notice that Staff provided to him in August 2018, months before this proceeding was commenced.

[16] In correspondence after Alli filed his motion, Staff raised a number of concerns about the motion and its contents. At an attendance before a single-member panel on August 18, 2021, the Tribunal heard submissions from the parties. After hearing Staff's position, Alli advised that he wished to review the transcript of the attendance and that he would then decide how to proceed.

[17] Alli took no formal steps to advance his motion. On October 25, 2021, Staff brought a motion seeking to dismiss Alli's motion. On consent of Staff and Alli, we ordered that Staff's motion be heard in writing.<sup>3</sup>

[18] Staff delivered a motion record that contained a motion form and the affidavit of Sherry Brown sworn October 21, 2021.<sup>4</sup> Alli responded on November 8, 2021, with his own affidavit sworn November 7, 2021 (the **Alli Affidavit**).<sup>5</sup>

[19] On November 18, 2021, Staff delivered written submissions. In those submissions, Staff supplemented its dismissal request by asking that we strike certain portions of the Alli Affidavit. The impugned portions related to the same topic mentioned above.

[20] Alli delivered responding submissions on November 30, 2021.

[21] On December 16, 2021, we issued our order granting Staff's motion and dismissing Alli's motion.

### **3. ANALYSIS**

#### **3.1 Introduction**

[22] Staff's motion to dismiss, as supplemented by the request Staff made in its written submissions, raises three main issues, which we will address in turn:

- a. whether we should dismiss Alli's request for a stay;

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<sup>3</sup> (2021) 44 OSCB 8971

<sup>4</sup> We have marked Staff's motion record as Exhibit 1 in this hearing

<sup>5</sup> We have marked the Alli Affidavit as Exhibit 2 in this hearing

- b. whether we should dismiss Alli's request for declaratory relief; and
- c. whether we should strike portions of the Alli Affidavit and the Alli Closing Submissions.

## **3.2 Alli's request for a stay**

### **3.2.1 Introduction**

[23] Staff contended that we ought to dismiss Alli's request for a stay because:

- a. without satisfactory explanation, Alli is significantly late in bringing the motion, and failed to proceed with it once it had been brought;
- b. the issues raised by the motion are irrelevant to the proceeding, and the motion is therefore frivolous or abusive; and
- c. a stay of a proceeding is an extreme remedy that is reserved for only the most egregious of cases, and a stay is not warranted in this case.

[24] Our authority to dismiss Alli's motion derives from the Tribunal's authority to control its own process.<sup>6</sup> In reaching our decision, we were guided by the imperative that we conduct proceedings in a just, expeditious and cost-effective manner.<sup>7</sup>

### **3.2.2 Delay in bringing the motion and in proceeding with it**

[25] Staff correctly submits that Alli is significantly late in moving for a stay. Alli alleges an improper process between the August 2018 delivery by Staff of an Enforcement Notice (containing Staff's preliminary views and setting out contemplated allegations were a proceeding to be commenced) and the May 2019 issuance of the Statement of Allegations (the document that Staff files with the Tribunal to commence a proceeding). Alli does not rely on any events that occurred after the Statement of Allegations was issued. Accordingly, Alli knew by May 2019 of all the facts on which he now bases his motion for a stay.

[26] Alli does not satisfactorily explain why he waited until January 2021, more than a year and a half later, and after Staff had already completed its evidentiary

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<sup>6</sup> *Statutory Powers Procedure Act*, RSO 1990, c S.22 (**SPPA**), s 25.0.1; *Prasad v Canada (Minister of Employment & Immigration)*, 1989 CanLII 131 (SCC) at para 46

<sup>7</sup> *Rules of Procedure and Forms*, r 1

portion of the merits hearing, to raise this issue with the Tribunal, *i.e.*, by way of his testimony during the merits hearing.

- [27] Similarly, Alli does not satisfactorily explain why he waited until August 9, 2021, more than two years after the issuance of the Statement of Allegations, to bring this motion. This further delay is especially noteworthy given the panel chair's admonition on January 12, 2021, during the merits hearing, that if Alli intended to make conflict of interest allegations against MacKewn or her firm, he should alert them as soon as possible. To our knowledge, Alli never did so.
- [28] Finally, Alli does not satisfactorily explain why he did not take the necessary steps to proceed with his motion once filed. At the attendance on August 18, 2021, Alli heard Staff describe its concerns about his motion. He advised that he wished to review a transcript of the attendance and that he would respond in writing to the issues raised. Staff attempted to contact Alli numerous times over the weeks that followed, but Alli either did not respond or advised that he needed more time.
- [29] Alli does offer explanations, but we do not find them persuasive. In his submissions on this motion, Alli cites two factors: (i) that he is self-represented; and (ii) that he has been experiencing critical medical conditions.
- [30] As to the first factor, Alli is self-represented now, but he was represented by counsel for the entire period between the delivery of the Enforcement Notice and the issuance of the Statement of Allegations. He was also represented by counsel for most of this proceeding, including at preliminary attendances and motion hearings between the issuance of the Statement of Allegations and the commencement of the merits hearing. He had ample opportunity to move for a stay or seek other relief well before the merits hearing began. The fact that he is self-represented now is irrelevant.
- [31] As to the second factor, we have no proper basis to assess Alli's claim of critical medical conditions. We can note only that Alli fully participated in the lengthy merits hearing. We cannot conclude that his medical conditions, however serious they may have been, precluded him (or his counsel on his behalf) from bringing this motion at any time between May 2019 and the beginning of the merits hearing.



- [32] In addition, Alli states, without evidence in support, that it was his counsel's oversight in not bringing the motion earlier. We cannot accept this unsubstantiated submission.
- [33] By failing to bring the motion until after the evidentiary portion of the merits hearing had concluded, and after the parties had delivered their closing submissions, Alli denied the parties and the Tribunal the opportunity to determine at an early stage whether to exclude evidence related directly to him and thereby to shorten the hearing and expend fewer resources. He also denied the Tribunal the opportunity to consider whether alternative remedies might have adequately addressed his concern, if we concluded that his concern was well-founded.
- [34] In addition, Alli's delay is at odds with the purpose a stay is meant to achieve. A stay is not meant to right a past wrong. Instead, underlying the grant of a stay is the "critically important" assumption that the prejudice caused to the party will be manifested, perpetuated or aggravated by continuing with the proceeding.<sup>8</sup>
- [35] The timing of Alli's motion fundamentally undermines any argument that proceeding with the merits hearing would manifest, perpetuate or aggravate any prejudice to him. This conclusion holds despite the facts that:
- a. our decision and reasons on the merits hearing had not been released at the time of Alli's motion; and
  - b. the sanctions and costs hearing has yet to occur, especially given that the evidentiary portion of the merits hearing took place over more than thirty hearing days, and any sanctions and costs hearing is likely to take far less time.
- [36] For these reasons, a motion seeking a stay of a proceeding must be brought promptly after the facts giving rise to the concern come to light, absent reasonable explanation for the delay. There was no sufficient explanation in this case. Accordingly, we would dismiss Alli's motion on this basis alone. For

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<sup>8</sup> *R v Regan*, 2002 SCC 12 at para 54

completeness, however, we proceed to consider our other two grounds for dismissing the motion.

### **3.2.3 Irrelevance of Alli's allegations**

- [37] Alli's concerns relate to actions of the Commission's enforcement staff in the last stage of its investigation, and before Staff made a final decision about which allegations would be included in the Statement of Allegations.
- [38] The Supreme Court of Canada has held that prosecutorial discretion "is especially ill-suited to judicial review" and that courts should intervene only where there is conspicuous evidence of improper motives or of bad faith.<sup>9</sup> Similarly, this Tribunal has held that Staff's decision-making about the contents of a Statement of Allegations "should not lightly be subjected to review" on a motion for a stay.<sup>10</sup>
- [39] These are important considerations on this motion. Alli seeks to introduce extensive evidence about matters that are outside the scope of the Statement of Allegations. Considering that evidence would require the resolution of issues of privilege, relating both to solicitor-client communications and to without prejudice discussions involving respondents and Staff that came before the commencement of the proceeding.
- [40] Permitting Alli to introduce that evidence and raise those issues would subject the Tribunal and all parties to significant expenditure of time and resources, particularly because on Alli's own description, some of the relevant discussions involved all other respondents.
- [41] Because the substance of Alli's concern relates to matters that are irrelevant in the proceeding before us, we conclude that his motion is frivolous. It is therefore appropriate for us to dismiss his motion at this preliminary stage. We concluded that we should accede to Staff's request that we do so.

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<sup>9</sup> *R v Power*, 1994 CanLII 126 (SCC) at paras 12, 34

<sup>10</sup> *Azeff (Re)*, 2012 ONSEC 16 (**Azeff**) at para 211

### **3.2.4 Alli's failure to meet the necessary standard for a stay of the proceeding**

- [42] Our third reason for dismissing Alli's request for a stay is that he failed to meet the necessary standard.
- [43] A party who seeks the drastic remedy of a stay of a proceeding faces a high bar. The party must establish that the proceeding is oppressive or vexatious, and that it violates the fundamental principles of justice underlying the community's sense of fair play and decency.<sup>11</sup> The evidence of improper behaviour must be overwhelming and must demonstrate clearly that the proceeding is unfair and contrary to the administration of justice. A stay should be granted only in the clearest of cases.<sup>12</sup>
- [44] Not only does Alli's complaint not meet this standard, it does not approach it. By Alli's own description, Staff at one time contemplated the possibility of a fraud allegation against him, but ultimately when Staff filed its Statement of Allegations, Staff elected not to include such an allegation. If anything, Alli benefited from the Enforcement Notice process and the opportunity for discussions and negotiation prior to the commencement of the proceeding. That process is a healthy part of Staff's enforcement work, and it contributes to both real and reasonably perceived justice for intended respondents.<sup>13</sup>
- [45] Alli contends that Staff concocted the fraud allegation to bully him into a settlement. We do not understand that submission. There was no settlement. Alli has not pointed to any relevant step taken or decision made that was caused or influenced by the matters that are the subject of his concern. Further, it is an important part of the process that Staff would reconsider all contemplated allegations before making those allegations formal and public.
- [46] Alli has failed to explain how this development worked against him or how Staff's conduct rendered the proceeding unfair and contrary to the administration of justice.

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<sup>11</sup> *R v Scott*, 1990 CanLII 27 (SCC) at paras 69-70

<sup>12</sup> *Glendale Securities Inc (Re)*, (1996) 19 OSCB 3874 at 8; *R v Sandhu*, 2020 ONCA 479 at para 74

<sup>13</sup> *Azeff* at paras 259-260

### **3.2.5 Conclusion on Alli's request for a stay**

[47] For each of the three reasons cited above, Alli fails to establish that he is entitled to a stay. Indeed, we conclude that it would undermine public confidence in the Tribunal's process if we were to grant the stay. We therefore dismissed his request.

### **3.3 Alli's request for declaratory relief**

[48] In addition to seeking a stay, Alli initially asked that we issue declarations that:

- a. the Commission breached its obligations to Alli by allowing Staff to conduct itself in the manner that it did, thereby contributing to severe medical harm to him; and
- b. the Commission self-report the misconduct of its Staff to Staff's professional regulators.

[49] In his written submissions, Alli correctly concedes that the Tribunal has no authority to issue a declaration.<sup>14</sup> In any event, we have rejected the underlying premise of Alli's request, since we have found that none of the actions complained of constituted misconduct on the part of Staff.

[50] The second request seeks not a declaration, but an order from the Tribunal that the Commission make a report to some other body. Once again, we have already rejected the underlying premise of this request. Further, the Tribunal is a statutory body with no inherent jurisdiction. It can order only what it is empowered to order. Nothing empowers the Tribunal to make the kind of order that Alli requests.

[51] We therefore dismissed the balance of Alli's motion.

### **3.4 Staff's request that portions of Alli's material be struck**

[52] Our order provided that the following portions of the Alli Affidavit be struck: paragraphs 2, 6, 8, 14, 15, 16, 17(2), 17(4), 17(5), 17(6), 17(7), 19, 20 and 22, and exhibits C, E, F, G, H, I and J. Our order also provided that paragraphs (a), (b) and (c) and footnote 1 on page 4 of Alli's Closing Submissions be struck.

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<sup>14</sup> *B (Re)*, 2020 ONSEC 21 at para 17

[53] Staff requested that those portions be struck because they improperly disclosed information that is privileged and that is irrelevant to the motions and to the proceeding generally. Staff submitted that the impugned portions improperly attempted to introduce evidence and arguments on the same topic as described above.

[54] We agree. The impugned portions contained details of settlement discussions and communications, and copies of documents relating to those discussions. Any such evidence is presumptively inadmissible before the Tribunal,<sup>15</sup> and for reasons set out above (*i.e.*, Alli's failure to demonstrate an abuse of process), no exception to that presumption applies. Accordingly, the impugned portions must be struck from any documents filed.

[55] We therefore granted Staff's request to strike the portions specified above. As noted above in paragraph [14], Staff had already filed a redacted version of the Alli Closing Submissions that reflected Staff's concerns. In accordance with our order of December 16, 2021, Staff filed a revised version of the Alli Affidavit that redacted the portions set out above. Only the redacted versions of the two documents shall be available to the public.

#### **4. CONCLUSION**

[56] On December 16, 2021, we ordered that Alli's motion for a stay of this proceeding, and for declaratory relief, be dismissed. We issued that order because:

- a. Alli delayed significantly the bringing of his motion and then failed to proceed with it expeditiously, all without reasonable explanation;
- b. Alli's motion purported to address issues irrelevant to this proceeding;
- c. Alli failed to meet the high bar necessary to justify a stay of this proceeding;

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<sup>15</sup> *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 12-13; *SPPA*, s 15(2)(a)

- d. we have no authority to make the declaration sought or to require the Commission to take the steps requested, and in any event, we found no misconduct on the part of Staff that would justify such orders; and
- e. the impugned portions of Alli's Affidavit and Alli's Closing Submissions improperly attempted to raise the issues described above.

Dated at Toronto this 15th day of September, 2022

*"Timothy Moseley"*

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Timothy Moseley

*"Lawrence P. Haber"*

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Lawrence P. Haber

*"Mary Anne De Monte-Whelan"*

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Mary Anne De Monte-Whelan