



Capital
Markets
Tribunal

Tribunal
des marchés
financiers

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Citation: *Nova Tech Ltd (Re)*, 2023 ONCMT 15

Date: 2023-05-01

File No. 2023-6

**IN THE MATTER OF
NOVA TECH LTD**

REASONS FOR DECISION

(Subsections 127(8) and 127(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicator: M. Cecilia Williams

Hearing: By videoconference, March 2, 2023

Appearances: Brian Weingarten For Staff of the Ontario Securities Commission
No one appearing for Nova Tech Ltd

TABLE OF CONTENTS

1.	OVERVIEW	1
2.	PRELIMINARY ISSUE: PROCEEDING IN THE ABSENCE OF THE RESPONDENT.....	2
3.	LAW AND ANALYSIS	2
3.1	Test for an extension of a temporary cease trade order	2
3.2	Should the Tribunal extend the Temporary Order?	3
3.3	What is the appropriate length of time to extend the Temporary Order?..	4
3.3.1	Transparency of Tribunal proceedings	5
3.3.2	Longevity of temporary cease trade orders	6
3.3.3	Investor protection	6
3.3.4	Control over Tribunal proceedings	8
3.3.5	Complexity of the investigation.....	9
3.3.6	Staff’s ability to amend a Statement of Allegations	9
3.3.7	Balancing of the factors	9
4.	CONCLUSION.....	10

REASONS FOR DECISION

1. OVERVIEW

- [1] Staff of the Ontario Securities Commission brought an Application before the Capital Markets Tribunal to extend a temporary cease trade order granted by the Commission against Nova Tech Ltd. Nova Tech is incorporated under the laws of St. Vincent and the Grenadines and has never been registered with the Commission in any capacity.
- [2] The issues before me in this Application were whether the Tribunal should grant the extension and, if so, for how long.
- [3] On February 16, 2023, the Commission issued a temporary order against Nova Tech (the **Temporary Order**) without notice to or argument from Nova Tech (*i.e.*, on an *ex parte* basis). The Temporary Order prohibited the trading in any securities by or of Nova Tech, as well as the acquisition of any securities by Nova Tech for a period of 15 days. It also provided that any exemptions contained in Ontario securities law would not apply to Nova Tech. At a hearing before me on March 2, 2023, Staff argued that the Tribunal should extend the Temporary Order up until the completion of a merits hearing, a sanctions hearing or a settlement with Nova Tech in an enforcement proceeding that Staff had not yet commenced.
- [4] I granted the extension of the Temporary Order but only until the earlier of 10 days after the issuance of a Statement of Allegations naming Nova Tech as a respondent, or 6 months after the issuance of this Extension Order.¹ I concluded that in this case it would not be in the public interest to extend the temporary order for a less definite, and possibly much longer, period of time. I indicated that my reasons would follow. These are the reasons for that decision.

¹ *Nova Tech Ltd (Re)*, (2023) 46 OSCB 1847 (**Extension Order**)

2. PRELIMINARY ISSUE: PROCEEDING IN THE ABSENCE OF THE RESPONDENT

- [5] At the outset of the hearing, I determined that we could proceed in the absence of Nova Tech. Staff outlined their service of Nova Tech in detail in the Affidavits of Rita Pascuzzi affirmed on February 24 and February 28, 2023.
- [6] The Tribunal may proceed in the absence of a party if the party was served with a Notice of Hearing and does not attend the hearing.²
- [7] The *Capital Markets Tribunal Rules of Procedures and Forms* (**Tribunal Rules**) permit several methods of service on unrepresented companies, including by electronic or personal delivery on a director or agent and, by courier or mail to a company's last known address.³ Staff's affidavits of service indicated that Staff served Nova Tech, its registered agent, and its sole director, shareholder, and beneficial owner with notice of, and materials associated with, this hearing. Staff attempted to effect service by email and courier at various addresses that appeared to be the last known addresses. While one such courier delivery was refused, there was no evidence before me that the other forms of service were not effective.
- [8] I therefore concluded that Nova Tech had been served with notice of this hearing and that I could proceed in its absence.

3. LAW AND ANALYSIS

3.1 Test for an extension of a temporary cease trade order

- [9] The *Securities Act* empowers the Commission to make a temporary order without notice if, in the opinion of the Commission, the length of time required to conclude a hearing could be prejudicial to the public interest.⁴ However, such temporary orders expire on the 15th day after their making, unless extended by the Tribunal.⁵ Subsection 127(8) of the *Act* provides that the Tribunal may extend a temporary order made by the Commission for such period as it

² *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 7(1); *Capital Markets Tribunal Rules of Procedures and Forms*, r 21(3)

³ *Tribunal Rules*, r 6(2)

⁴ *Securities Act*, RSO 1990, c S.5, s 127(5.1) (the **Act**)

⁵ The *Act*, s 127(6)

considers necessary.⁶ This authority helps to protect the capital markets by allowing the Tribunal to give effect to Staff's desire to take preventative action, in appropriate cases.⁷

[10] Staff must satisfy the Tribunal that there is sufficient evidence of conduct that may be harmful to the public interest. The evidence presented "may fall short of what would be required in a hearing on the merits" but must be "more than mere suspicion or speculation."⁸

[11] Once Staff has met its initial burden in support of the extension of a temporary order, subsection 127(8) of the *Act* shifts the onus to a respondent to provide "satisfactory information" to the Tribunal.

3.2 Should the Tribunal extend the Temporary Order?

[12] In this case Staff met its initial burden and Nova Tech adduced no information, let alone any satisfactory information. The Tribunal would therefore be justified in extending the Temporary Order. The questions are whether it should and, if so, for how long.

[13] The Temporary Order was issued because it appeared to the Commission that Nova Tech may have engaged in unregistered trading and illegal distribution of securities, contrary to subsections 25(1) and 53(1) of the *Act*.

[14] Staff submitted that their investigation demonstrates that the harm to Ontario investors continues as:

- a. investors are being deprived of the protection of the registration and prospectus requirements of the *Act*;
- b. Nova Tech's representations about returns on investments appear to be unreasonable and unsustainable; and
- c. Nova Tech recently froze all withdrawals from accounts but has continued to accept deposits.

⁶ The *Act*, s 127(8)

⁷ *Valentine (Re)* (2002), 25 OSCB 5329 at 5331

⁸ *Daley (Re)*, 2020 ONSEC 26 at para 15, citing *Watson (Re)*, 2008 ONSEC 2 at para 31

- [15] I reviewed Staff’s affidavit, including its exhibits. I found that Staff met the test for extending the Temporary Order as there appeared to be sufficient evidence that Nova Tech’s conduct may be harmful to Ontario investors and to the integrity of our capital markets, and that the conduct continues. By not participating in this proceeding, Nova Tech failed to meet its onus of providing satisfactory information that would argue against extending the Temporary Order. I therefore concluded it is in the public interest to extend the Temporary Order.
- [16] I now turn to the issue of the appropriate length of time for the Temporary Order to be extended.
- 3.3 What is the appropriate length of time to extend the Temporary Order?**
- [17] Staff argued that the Tribunal should extend the Temporary Order up until the completion of a merits hearing, a sanctions hearing or a settlement with Nova Tech in an enforcement proceeding that Staff had not yet commenced.
- [18] A temporary cease trade order is “an extraordinary remedy”, and the authority to issue this extraordinary remedy exists because it is essential that the Commission and the Tribunal be able to act quickly, at an early stage of an investigation, to protect investors from harm.⁹ The description of a temporary cease trade order as an extraordinary remedy recognizes that the order may include certain of the potentially significant sanctions set out in subsection 127(1) of the *Act* without the need for a Statement of Allegations, a merits hearing, or a sanctions hearing. A particular temporary order may become less justifiable over time, as the related investigation or proceeding progresses.¹⁰
- [19] In deciding the appropriate length of time to extend the Temporary Order, I considered the relevant circumstances as they existed at the time of the request, as well as the public interest in the context of this proceeding.
- [20] The *Tribunal Rules* reflect the Tribunal’s heightened interest in seeing proceedings concluded expeditiously. The objective of the *Tribunal Rules* is to

⁹ *Kotton (Re)*, 2016 ONSC 36 at para 13 (**Kotton**)

¹⁰ *Kotton* at paras 13-14

ensure that proceedings before the Tribunal are conducted in a just, expeditious and cost-effective manner.¹¹

[21] In the *Kotton* decision, the Tribunal lays out the factors to consider when determining the appropriate length of a Temporary Order.¹² These factors include the transparency of Tribunal proceedings; the longevity of temporary cease trade orders; investor protection; control over Tribunal proceedings; the complexity of the investigation; and Staff's ability to amend a Statement of Allegations. Staff submits that those factors should not govern in this instance. Rather, what should govern is the Tribunal's public interest jurisdiction based on the evidence before the Tribunal.

[22] I disagree. As indicated earlier, a temporary cease trade order is an extraordinary remedy, and a particular temporary order may become less justifiable over time, as the related investigation or proceeding progresses. As stated in *Kotton*, a decision to further extend a temporary cease trade order must determine what the public interest comprises based on the relevant circumstances existing at the time of the request. That determination requires a balancing of relevant factors.¹³

[23] I consider the relevant *Kotton* factors in turn next, including where applicable, Staff's submissions on those factors.

3.3.1 Transparency of Tribunal proceedings

[24] Staff submits that this Temporary Order proceeding is very transparent. More than 50 exhibits have been amassed from the investigation to date showing the scope of the evidence and the strength of Staff's case against Nova Tech. These exhibits are appended to the affidavits marked as exhibits in this proceeding. I share the view expressed in *Kotton* that, while affidavits are part of the public record, they are not easily accessible especially for those without financial

¹¹ *Tribunal Rules*, r 1

¹² *Kotton* at para 14

¹³ *Kotton* at para 14

resources or who do not reside in Toronto and who therefore cannot conveniently visit the Tribunal's offices.¹⁴

[25] A Statement of Allegations is, by its very nature, more transparent than affidavits and attached exhibits filed in support of a Temporary Order. It is a succinct statement of the allegations against the respondents and a high-level summary of the basis for those allegations. While it is not the Tribunal's role to interfere with Staff's discretion regarding the timing of a Statement of Allegations, Staff is encouraged, from a transparency perspective, to issue one earlier than later, rather than seeking to extend a less transparent Temporary Order for a lengthy period of time.

3.3.2 Longevity of temporary cease trade orders

[26] Staff was unable to provide any precedent for the length of Temporary Order extension requested in this case.

[27] Staff submits that the length of time the Temporary Order is outstanding is not a factor as either party can apply for an amendment to the order, should I grant the relief sought of extending the temporary order to the end of the merits and sanctions hearing in any future enforcement proceeding.

[28] This places an onus on respondents to be actively monitoring and pursuing Staff for updates regarding the status of Staff's investigation and the timing of a Statement of Allegations, which might not be realistic for non-represented or offshore respondents. This submission also decreases the weight accorded another important factor discussed below, the Tribunal's control over its own processes.

3.3.3 Investor protection

[29] Investor protection is one of the purposes of the *Act*¹⁵ that is achieved through a temporary cease trade order. The Tribunal's public interest jurisdiction is

¹⁴ *Kotton* at para 24

¹⁵ *The Act*, s 1.1

intended to be protective and preventive, to prevent likely future harm to Ontario's capital markets.¹⁶

[30] It would appear from the evidence before me that there is a *prima facie* case that:

- a. the Respondent has breached the *Act*,
- b. the prohibited activity is ongoing,
- c. current investors are at risk of losing their investments as Nova Tech has curtailed all withdrawals from existing accounts, and
- d. there is a risk of future harm to Ontario investors as Staff was able to open and fund an account with Nova Tech despite the restrictions placed on current accounts.

I concluded that investor protection remained an issue at the time of the request for an extension of the Temporary Order.

[31] Staff submitted that, in addition to the evidence supporting a *prima facie* conclusion that Nova Tech has breached the *Act*, no additional evidence uncovered by the ongoing investigation would undo the breaches that have already been identified by the evidence gathered to date.

[32] While the evidence gathered to date supports a conclusion that there is a risk to the public interest, that risk has not been proven in a merits hearing. The standard for granting and extending a temporary cease trade order is lower than what would be required in a hearing on the merits. While the potential breaches identified by Staff to date cannot be "cured", they can be defended. It is true that the evidence gathered to date is undisputed, as Nova Tech did not respond to the notice of this hearing. However, I have no way of knowing at this time how Nova Tech might react to a Statement of Allegations, were one to be issued, what defences or exculpatory evidence Nova Tech might submit, or whether Nova Tech would choose to participate at all. While it is not uncommon for offshore operations to not appear before the Tribunal in response to alleged

¹⁶ *Kotton* at para 18, citing *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42

breaches of Ontario securities law, there is no information before me to conclude that is what this Respondent would do were Staff to commence an enforcement proceeding.

3.3.4 Control over Tribunal proceedings

- [33] It is trite to say that the Tribunal is in control of its own proceedings. While it is not my role, and not my intent in this instance, to monitor or oversee how Commission enforcement staff manage their processes and decisions, I have a separate obligation to ensure the efficiency and expediency of proceedings before the Tribunal.¹⁷
- [34] While the decisions of whether and when to file a Statement of Allegations are matters of Staff's discretion, and not ordinarily the subject of review by this Tribunal, and while I engage in no such review in this matter, the Tribunal is charged with deciding upon each request to extend a temporary order and whether it is in the public interest to do so.¹⁸
- [35] I asked Staff what would happen if I were to extend the Temporary Order as requested and Staff did not proceed with a Statement of Allegations and into an enforcement proceeding; would the Temporary Order then exist in perpetuity?
- [36] Staff submitted that Staff have their own public interest obligation. Should the ongoing investigation identify evidence that was exculpatory for Nova Tech and might cause Staff not to proceed to a Statement of Allegations, they would have an obligation to ensure that the outstanding Temporary Order was addressed. Staff submitted that, based on the evidence gathered to date, such an outcome was unlikely.
- [37] While Staff may feel an obligation to not let an open-ended temporary cease trade order remain outstanding, there is nothing in the *Tribunal Rules* to require Staff to address such a situation. Nor is there any mechanism in the *Tribunal Rules* to allow the Tribunal to bring this matter forward, should it appear with the passage of time that Staff decides against commencing an enforcement proceeding. In my view, it is inconsistent with the Tribunal's objectives of

¹⁷ *Capital Markets Tribunal Code of Conduct*, s 8.6

¹⁸ *Kotton* at para 5

ensuring fair, efficient, and cost-effective hearings to have a proceeding pending indefinitely with no further steps scheduled.

3.3.5 Complexity of the investigation

[38] Staff submits that the investigation is complex. It is international in scope and further crypto asset trading techniques may be employed as the investigation progresses.

[39] I accept Staff's submission as there are international aspects to this investigation and as the investigation continues Staff may need to develop and deploy other crypto asset trading techniques.

3.3.6 Staff's ability to amend a Statement of Allegations

[40] A refusal to grant a lengthy Temporary Order does not mean that Staff is being unfairly rushed to issue a Statement of Allegations that would constrain them through the whole proceeding.¹⁹

[41] Rule 18 allows for a Statement of Allegations to be amended, unless the amendments would be unfairly prejudicial to a party.²⁰ This is a high bar for a respondent to meet.

[42] In my view this factor favours shorter Temporary Orders in the absence of a Statement of Allegations and encourages Staff to proceed with filing a Statement of Allegations with the knowledge that it can be rather easily amended should their continuing investigation uncover something new.

3.3.7 Balancing of the factors

[43] In cases such as these, Staff's clear discretion with respect to filing a Statement of Allegations cannot be disentangled from the Tribunal's obligation to decide whether it is in the public interest to extend a temporary order and the appropriate length of such an extension.²¹

[44] In this instance, the investor protection purposes of the Temporary Order remain undiminished. The fact that Staff has been able to amass what they describe as

¹⁹ *Kotton* at paras 33-35

²⁰ *Tribunal Rules*, r 18

²¹ *Kotton* at para 36

a significant amount of evidence to support allegations that the *Act* has been breached, which will not be impacted by any further evidence gathered, weighs in favour of not imposing what Staff refers to as an arbitrary time period on the Temporary Order. The concerns about transparency, the length of the period the Temporary Order is outstanding, and the Tribunal's ability to control its own processes will increase with time.

[45] I concluded that extending the Temporary Order for a reasonable period of time that is also potentially linked to the timing of the issuance of a Statement of Allegations, if any, provides the proper balance between these factors.

4. CONCLUSION

[46] For the above reasons, I ordered that all trading in any securities by or of Nova Tech, as well as the acquisition of any securities by Nova Tech, shall cease until the earlier of 1) 10 days after the issuance of a Statement of Allegations naming Nova Tech as a respondent, or 2) 6 months after the issuance of my March 2, 2023, Extension Order. During the same period, any exemptions contained in Ontario securities law shall not apply to Nova Tech.

Dated at Toronto this 1st day of May, 2023

"M. Cecilia Williams"

M. Cecilia Williams