



## **REASONS FOR DECISION**

### **1. OVERVIEW**

- [1] Staff of the Ontario Securities Commission brought a motion to adjourn the merits hearing in this proceeding set to commence on September 29, 2023.
- [2] Staff seeks an adjournment because its lead counsel for this proceeding left the Commission and no longer represents Staff at the merits hearing. Staff retained new counsel, but that counsel is unavailable for the first five scheduled merits hearing dates. The respondent opposes delaying the start of the merits hearing.
- [3] We heard Staff's motion on September 6, 2023, and dismissed the motion with reasons to follow. These are our reasons.

### **2. BACKGROUND**

- [4] On March 23, 2022, the Commission issued a Notice of Hearing in this matter.
- [5] The merits hearing was scheduled to start on September 29, 2023, and to last 15 days.
- [6] On August 23, 2023, the parties attended the final interlocutory attendance in this matter. At that attendance Staff requested that the first five merits hearing dates be vacated and that five additional dates be scheduled in November or December of this year.
- [7] Senior Litigation Counsel assigned to this matter gave notice on July 21, 2023 and left the Commission on August 24, 2023. On August 9, 2023, Staff retained Polley Faith LLP (Andrew Faith and Ryan Lapensée) to act as external counsel for the merits hearing in this matter. Mr. Faith is unavailable for the first five hearing dates scheduled, and his unavailability was known at the time his firm was engaged.
- [8] The respondent objected to Staff's request and submitted that such a request required an adjournment motion, with attendant notice and filings, and further submitted that Staff must establish exceptional circumstances to justify the adjournment.

[9] The Tribunal agreed that a motion was required to adjourn the scheduled dates for the merits hearing and ordered that Staff's request proceed by way of an adjournment motion on September 6, 2023.

### **3. ISSUE AND ANALYSIS**

[10] The issue for this panel to determine is whether Staff's grounds for the adjournment constitute "exceptional circumstances".

[11] Rule 29(1) of the Tribunal's *Rules of Procedure and Forms* provides that every merits hearing shall proceed on the scheduled date unless the party requesting an adjournment satisfies the panel that there are exceptional circumstances requiring an adjournment. The standard set out in rule 29 is a "high bar" that reflects the important objective set out in rule 1, that Tribunal proceedings be conducted in a just, expeditious and cost-effective manner.<sup>1</sup>

[12] Staff submits that the change of counsel in these circumstances constitutes exceptional circumstances justifying an adjournment and notes that this is Staff's first request to adjourn any hearing dates. Staff submits that it is in the public interest and is necessary for procedural fairness that Staff's adjournment request be granted.

[13] The respondent submits that parties routinely change counsel and that in itself, a change in counsel is not exceptional.

[14] Staff submits that determining exceptional circumstances is a fact based exercise.<sup>2</sup> Staff distinguishes the facts of this adjournment request from other decisions of the Tribunal where motions for adjournments were denied on a change of counsel<sup>3</sup> on the basis that this adjournment request was brought expeditiously, rather than on the eve of the hearing, and that Staff has provided a full record of the circumstances surrounding its change of counsel. Staff further supports its request by noting that it has narrowed the issues in this matter, which could result in reducing the total hearing days required.

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<sup>1</sup> *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 (**Money Gate**) at para 54; *First Global Data Ltd (Re)*, 2022 ONCMT 23 (**First Global Data**) at para 7

<sup>2</sup> *Money Gate* at para 54

<sup>3</sup> See *Money Gate*; *First Global Data*

- [15] Staff submits that it would be seriously prejudiced if it were denied the right to counsel of its choice. Staff further submits that it honestly exercised its right to counsel of choice and diligently sought new counsel upon learning of the departure of assigned lead counsel. Staff notes that Mr. Faith was contacted by Staff within three business days of it receiving notice of the departure of its assigned lead counsel in this matter. In reply to questions from the Panel as to any steps taken by Staff to retain counsel with availability for all the scheduled hearing dates, Staff submitted that to provide any such details could be prejudicial and amount to a waiver of privilege.
- [16] The respondent submits that the right to counsel of choice is not absolute and that when the unavailability of chosen counsel is the basis for an adjournment request, the requesting party must explain and justify its decision with evidence to establish exceptional circumstances.<sup>4</sup> The respondent notes that there is no evidence before the Panel that Staff took any steps to avoid an adjournment. There is no evidence that Staff, among other potential options, considered an internal counsel from the Enforcement Branch of the Commission, asked the departing lead counsel to stay on, nor searched for another qualified external counsel who was available to proceed on the scheduled hearing dates. The Panel agrees that it has no evidence before it of any steps taken by Staff to address the unavailability of Mr. Faith for the commencement of the merits hearing.
- [17] Staff further submits that because it narrowed the issues in this matter, it anticipates that the evidence to be adduced at the hearing will be significantly reduced such that five of the total hearing dates would likely be unnecessary. The respondent does not agree that this is a likely nor assured outcome.
- [18] In the absence of agreement by the respondent to reduce the number of hearing days, the Tribunal proceeded on the basis that the hearing would still require 15 hearing days. The parties mutually agreed to five hearing dates in December should the adjournment request be granted by the Tribunal.
- [19] We conclude that the facts in this instance do not support exceptional circumstances warranting an adjournment of the merits hearing. It is our view

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<sup>4</sup> *Money Gate* at paras 52-64; *First Global Data* at paras 13-15; *Debus (Re)*, 2020 ONSEC 20 at paras 23-24; *Bridging Finance Inc. (Re)*, 2023 ONCMT 17 at para 19

that, in the circumstances, it was incumbent upon Staff to consider alternatives so that an adjournment could be avoided and that if no alternatives were available or acceptable, to provide an explanation to the Tribunal on this motion as to why that was the case. We believe that this could have been accomplished without providing information constituting a waiver of privilege. Absent such evidence, we cannot make a finding of exceptional circumstances warranting an adjournment.

**4. CONCLUSION**

[20] For these reasons, we dismissed Staff's motion with the result that the merits hearing commenced as scheduled on September 29, 2023.

Dated at Toronto this 5<sup>th</sup> day of October, 2023

*"Cathy Singer"*

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Cathy Singer

*"Dale R. Ponder"*

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Dale R. Ponder

*"James Douglas"*

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James Douglas