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: *TeknoScan Systems Inc (Re)*, 2024 ONCMT 7
Date: 2024-02-05
File No. 2022-19

IN THE MATTER OF
TEKNOSCAN SYSTEMS INC, H. SAMUEL HYAMS, PHILIP KAI-HING KUNG and SOON FOO (MARTIN) TAM

REASONS FOR DECISION

(Rule 29(1) of the *Capital Markets Tribunal Rules of Procedure and Forms*)

Adjudicators:	Andrea Burke (chair of the panel) James Douglas	
Hearing:	By videoconference, November 7, 2023	
Appearances:	Eric Brousseau	For H. Samuel Hyams
	Sunil Joseph	For TeknoScan Systems Inc., Philip Kai-Hing Kung and Soon Foo (Martin) Tam
	Hanchu Chen	For Staff of the Ontario Securities Commission

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REASONS FOR DECISION

1. OVERVIEW

[1] These are our reasons for:

a. granting a motion by H. Samuel Hyams to adjourn the start of the merits hearing in this proceeding, scheduled to commence on November 14, 2023 (**Hyams Motion**);

b. granting a motion by TeknoScan Systems Inc., Philip Kai-Hing Kung and Soon Foo (Martin) Tam (**Second Motion**), in part, to vary deadlines previously set by the Tribunal for the respondents to serve a hearing brief on Staff of the Commission and to provide the Registrar a copy of the *E-Hearing Checklist* for the merits hearing; and

c. dismissing the relief sought in the Second Motion as it related to an adjournment of the merits hearing and a request that we order the parties to take part in a confidential settlement conference.[1]

[2] The merits hearing was scheduled to take place over 20 days between November 2023 and February 2024. All the respondents sought to adjourn the nine hearing days scheduled in November and December, 2023. Staff consented only to an adjournment of the November hearing dates.

[3] The bar for granting an adjournment is a high one. Only Hyams satisfied us that there were exceptional circumstances present applicable to him that justified adjourning the start of the merits hearing.

[4] We were satisfied that the circumstances, including the adjournment of the start of the merits hearing, justified extending filing deadlines that had previously been missed by the respondents.

[5] Lastly, we dismissed the request for a settlement conference as premature, but our decision is without prejudice to any party's ability to request a confidential conference or settlement conference in the future.

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[1] (2023) 46 OSCB 9001

2. BACKGROUND

[6] There has been no shortage of delays in this enforcement proceeding.

[7] Since the Statement of Allegations was issued on August 23, 2022 (later amended on March 28, 2023), the respondents have made several requests for extensions of deadlines, most of which have been granted by the Tribunal.

[8] Many of these requests, including the current motions, have centered around the representation status of the respondents.

[9] The following facts are those most relevant to our analysis on the motions, which we heard and decided together on November 7, 2023:

a. on March 23, 2023, the respondents, who until this time had all been jointly represented by Fogler Rubinoff LLP (**Fogler**), filed a motion seeking extensions of previously ordered deadlines because they intended to obtain new legal representation;

b. on May 25, 2023, the respondents notified the Tribunal that they were now represented by DLA Piper (Canada) LLP (**DLA Piper**);

c. on August 3, 2023, the merits hearing in this matter was scheduled to commence on November 14, 2023, and continue until February 2024[2] (certain of those dates were later rescheduled, but until the hearing of these motions, the evidentiary portion of the merits hearing was still scheduled for 20 days and set to commence on November 14 and end in February 2024);

d. also on August 3, 2023, the Tribunal set deadlines for the parties to serve every other party with a hearing brief (October 2) and to file an *E-Hearing Checklist* for the merits hearing (October 6);

e. on October 13, 2023, the Tribunal granted DLA Piper's motion filed on September 29, 2023, to be removed as representative of record for all respondents;[3]

[2] (2023) 46 OSCB 6601

[3] (2023) 46 OSCB 8425

f. on October 27, 2023, Staff made additional disclosure to the respondents, comprised of the transcripts of two individuals, neither of which is a proposed witness for the merits hearing, and notes of a November 1, 2023 telephone call to Staff from another individual. On November 3, 2023, Staff added this third individual to its witness list for the merits hearing;

g. on October 30, 2023, Hyams filed his motion for an adjournment to allow him time to prepare to represent himself at the merits hearing; and

h. on November 2, 2023, the remaining respondents filed the Second Motion, indicating that they were in the process of retaining new legal representation for the merits hearing.

3. ANALYSIS

3.1 Adjournment motions

[10] Rule 29(1) of the *Capital Markets Tribunal Rules of Procedure and Forms* (**Rules**) provides that every merits hearing shall proceed on the scheduled dates unless the party requesting an adjournment "satisfies the Panel that there are exceptional circumstances requiring an adjournment".

[11] The Tribunal has ruled that the standard set out in rule 29(1) 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". The objective must be balanced against the parties' ability to participate meaningfully in the hearing and present their case.[4]

[12] Staff consented to an adjournment of the four hearing dates in November 2023 because of concerns arising from Hyams' evidence that he had had difficulties receiving materials from his former counsel that were relevant to his ability to prepare for the merits hearing. Therefore, the parties' submissions focused largely on whether the hearing dates set in December 2023 ought to be adjourned in favour of the merits hearing commencing on the scheduled dates in

[4] *First Global Data Ltd (Re)*, 2022 ONCMT 23 (***First Global***) at paras 7 and 8

February 2024 or on new dates (subject to the parties' availability) as early as the last week of January 2024.

3.1.1 Hyams Motion

[13] Hyams submitted that there are three main reasons why, in his case, there are exceptional circumstances requiring an adjournment of the December hearing dates. These reasons are the fact that:

a. he is now going to represent himself at the merits hearing;

b. as of the hearing of his motion, he was still uncertain about whether he had access to material and work product that was supposed to have been transferred to the respondents by their prior counsel; and

c. the litigation landscape and dynamics have significantly shifted at the last minute, in that up until the removal of DLA Piper as representatives of record, Hyams was represented, along with the other respondents, jointly by the same counsel, whereas he must now mount his own defence, while all the other respondents will be jointly represented by new counsel in a defence group that does not include Hyams.

[14] Hyams submitted that these three reasons, considered together, amount to exceptional circumstances. He also submitted that his change in circumstances was not voluntary or of his own making. If the start of the merits hearing was delayed until the end of January 2024 or February 2024, he would be better able to prepare to defend himself and meaningfully participate in the hearing as a self-represented party. Hyams also submitted that granting the requested adjournment would not result in a significant delay to the conclusion of the evidentiary portion of the merits hearing.

[15] Staff submitted that the December dates ought to be maintained because:

a. Hyams' circumstances are of his own creation, and he should be treated no differently than the remaining respondents;

b. when DLA Piper were removed as representatives of record, they asserted that there was "very little that needs to be done by replacement counsel to be ready for [the hearing], given all of the transferable work product available";

c. there have already been a significant number of delays in this matter in connection with interlocutory steps and missed deadlines, and the public interest weighs in favour of having the merits hearing held expeditiously;

d. if the merits hearing were to begin in December 2023, Hyams (as well as the other respondents) would not have to present their evidence until February 2024 – giving them additional time to prepare for the merits hearing in the new year; and

e. the litigation landscape has not, in fact, changed for Hyams given that the nature of the proceeding and the core allegations that Hyams faces have not changed.

[16] A determination about whether to grant a request to adjourn a merits hearing is necessarily dependent on the particular facts and circumstances of the case.[5] We are satisfied that Hyams' unique circumstances satisfy the high bar required for an adjournment in this case.

[17] In this case, the change from Hyams being a represented party to being an unrepresented party on the eve of the merits hearing, coupled with the late-stage significant change to the litigation dynamics resulting in Hyams no longer being included in the joint defence group with the other respondents, collectively rise to the level of "exceptional circumstances" and justify a brief adjournment of the merits hearing. Contrary to Staff's submissions, the relevant litigation landscape is not solely defined by the allegations against a respondent. The potential that all respondents may not be aligned in interest is extremely significant to respondents and to how they may carry out their defence.

[18] A significant component of our finding that these changes collectively rise to the level of "exceptional circumstances" was our conclusion that Hyams' new status as an unrepresented party was not "voluntary". We find that this change was outside his control and was not anticipated by him.

[5] *First Global* at para 8; *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 35 at para 19

[19] DLA Piper brought their motion to be removed as the respondents' representative of record on grounds that they were no longer being paid. Hyams' unchallenged evidence was that:

a. TeknoScan was responsible for paying DLA Piper's fees on behalf of all the respondents (and had been responsible for paying counsel's fees for all the respondents since the outset of the proceeding);

b. he was not the person who dealt primarily with DLA Piper, and he was not aware of the state of the relationship with DLA Piper "until it was too late"; and

c. importantly, he had expected to be represented by lawyers at the merits hearing until only very recently.

[20] Our decision should not be taken to mean that any circumstances resulting in a previously represented respondent becoming unrepresented will necessarily meet the "exceptional circumstances" test.

[21] These changes in circumstances did not appear to have occurred for any improper tactical purpose or with any intention of Hyams to delay the proceeding. Indeed, Hyams proposed that if his adjournment request were granted, he would be agreeable to the new merits hearing start date being made "peremptory" (that is, not subject to further change at his request). Hyams also indicated that he was available for all the possible dates that we canvassed with the parties at the outset of the hearing of the motions as potential substitute merits hearing dates if we granted the requested adjournment.

[22] We are not particularly sympathetic to Hyams' argument that the requested adjournment is also justified because he could not find DLA Piper's work product and had been unable to confirm whether he had received it as of the date of the hearing of the motions, despite the fact that by that time approximately five weeks had passed since DLA Piper had been removed as representatives of record. Self-represented respondents must take responsibility and agency for their own affairs. Hyams' submissions about the unavailability of DLA Piper's work product were not part of our reasons for granting the adjournment request.

[23] While Staff may be correct that even if the merits hearing were to begin in December 2023, Hyams would not have to present his evidence until February 2024 (because Staff will require all the December hearing dates to present its evidence and call its witnesses), we do not see this as a viable answer to the exceptional circumstances established by Hyams. Hyams would still be expected to cross-examine Staff's witnesses in December 2023 and cross-examination is an important aspect of the adversarial process. Given the exceptional circumstances Hyams has established, we are satisfied that his ability to cross-examine Staff's witnesses might be compromised if he were required to do so starting in December 2023.

[24] Staff placed significant reliance on DLA Piper's assertion that there was "very little that needs to be done by replacement counsel to be ready for [the hearing], given all of the transferable work product available". Given that Hyams is now self-represented we discounted this argument by Staff, as we recognize the difficulty that a newly self-represented party may have in reviewing and digesting former counsel's work product.

[25] In balancing the public interest in having the merits hearing proceed in a timely fashion with Hyams' ability to prepare for and defend himself at the merits hearing, we decided to delay the start of the merits hearing until the last week of January 2024. With the scheduling of additional hearing days, the conclusion of the evidentiary portion of the merits hearing will only be delayed by approximately five weeks. This relatively insignificant delay weighed in favour of our decision to grant the Hyams Motion.

3.1.2 Second Motion: adjournment request

[26] The Second Motion failed to satisfy us of the required exceptional circumstances for granting an adjournment of the merits hearing. The remaining respondents did not provide any evidence in support of their adjournment request. They relied primarily on claims unsubstantiated by evidence that they were actively working on retaining new legal representatives and those new legal representatives would require additional time to properly prepare for the merits hearing.

[27] The remaining respondents submitted that an adjournment of the November and December 2023 merits hearing dates is required because:

a. the allegations against these respondents are serious and will have a significant and permanent impact on them;

b. these respondents are entitled to put forward a full answer and defence to the allegations;

c. these respondents are close to formally retaining new counsel, who will need time to prepare for the merits hearing, including to consider the issue of whether they should waive privilege over certain aspects of TeknoScan's retainer of Fogler;

d. Staff recently produced new material evidence including the transcripts of two individuals, neither of which is a proposed witness for the merits hearing, and notes of a November 1, 2023 telephone call to Staff from another individual;

e. granting the requested adjournment will have a minimal impact on the date for completion of the evidentiary portion of the merits hearing; and

f. only 16 days, instead of the scheduled 20 days are required for the merits hearing, such that an adjournment of the November and December 2023 hearing dates can be readily addressed by adding no more than five additional hearing days.

[28] In addition to Staff's submissions noted above in subparagraphs 15(b) to 15(d) that also applied to the Second Motion, Staff objected to the requested relief given the complete lack of evidence filed in support.

[29] While it is true that the allegations in this matter are serious and the respondents are entitled to make full answer and defence, this alone does not place the respondents in a different position from any other respondent. Parties are entitled to make full answer and defence but are not entitled to unlimited time to prepare for merits hearings.

[30] Leading up to the filing and hearing of the Second Motion, the remaining respondents repeatedly advised us that the retainer of new counsel was imminent. As of the date of the hearing of the Second Motion, the Tribunal had

not been advised of any new counsel for these respondents. These respondents' claims about the imminence of a new retainer and the time required for new counsel to prepare for the merits hearing are unsupported by any evidence and we give them little weight. While parties generally need not explain their choice about how they are represented, when a party seeks an adjournment based solely on that choice the party bears the burden of demonstrating the exceptional circumstances that warrant the adjournment.[6]

[31] The Tribunal has previously held that the mere fact of a change in counsel does not, in and of itself, rise to the level of "exceptional circumstances".[7] These respondents offered no evidence by way of explanation or justification that would amount to exceptional circumstances. Furthermore, the attempt to justify the adjournment because of the need for time to consider whether TeknoScan should waive privilege was not compelling given that we understood from prior interlocutory attendances that this had been an open issue for some time.

[32] We concluded that Staff's recent production of transcripts of two individuals (not proposed as witnesses at the merits hearing) and notes of a recent call with another individual also did not amount to exceptional circumstances. While in some circumstances particularly voluminous or significant disclosure shortly before the merits hearing may justify an adjournment request, the remaining respondents did not offer any rationale or details as to why such production by Staff warranted the requested adjournment in this case.

[33] With respect to the number of days necessary for the merits hearing, we posed this question to all parties and there was no consensus that the hearing could be completed in less than 20 days. The parties were expecting to call more than 20 witnesses, including an expert witness, which will necessarily take time and require the scheduling of additional hearing days.

[34] For these reasons, we dismissed this part of the Second Motion. We understand that all the respondents reap the benefits of the Hyams Motion, as they sought

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[6] *First Global* at para 15

[7] *Valentine (Re)*, 2023 ONCMT 33 at para 19

the same relief. Hyams' circumstances warranted an adjournment, and we understand the implications that come along with that.

3.2 Second Motion: request to extend certain deadlines

[35] The Second Motion included a request to extend two deadlines that had previously been missed by the respondents: service of the respondents' hearing briefs and the filing of the *E-Hearing Checklist* for the merits hearing. Hyams did not ask for this relief in the Hyams Motion, but supported the request.

[36] The deadlines for both documents were set for early October. While Staff objected to us extending the deadlines, we were satisfied that the circumstances, including the adjournment of the start date for the merits hearing and Staff's recent additional disclosure, warranted allowing the respondents additional time to provide these materials.

3.3 Second Motion: request for a settlement conference

[37] The Second Motion also requested "that a Settlement Conference be scheduled for a date in December 2023 or January 2024, subject to Tribunal availability". Staff objected to this relief, submitting that a settlement conference at this point in the proceeding would be premature and a waste of resources.

[38] We agreed with Staff. A confidential settlement conference, under rule 32 of the Rules, requires the parties to a proposed settlement to jointly bring a proposed settlement to a panel of the Tribunal for consideration. The parties were not in a position to do so.

[39] We asked the representative for the remaining respondents if what they were really asking for was a confidential conference under rule 20 of the Rules. Rule 20(1) states that at any stage of a proceeding, a party may request or a panel may direct that the parties participate in a confidential conference to consider multiple issues, including the settlement of any or all of the issues, the simplification of issues, agreed facts, and other matters that might make the proceeding more efficient. The representative was not able to confirm whether this was correct.

[40] We declined to order that the parties participate in a confidential settlement conference but advised them that it was still open to any party to request a

confidential conference under rule 20(1) or a confidential settlement conference under rule 32 in the future.

4. CONCLUSION

[41] For these reasons, we:

a. adjourned the first eight scheduled days of the hearing (and vacated one date due to Tribunal availability), and rescheduled those dates to occur in 2024, such that the evidentiary portion of the merits hearing in this proceeding will begin on January 29, 2024 and continue until April 9, 2024;

b. extended the deadlines for all the respondents to serve their hearing briefs and provide a copy of their *E-Hearing Checklist* for the merits hearing to the Registrar to December 15, 2023; and

c. dismissed the balance of the relief requested in the Second Motion.

Dated at Toronto this 5th day of February, 2024

"Andrea Burke"	*"James Douglas"*
Andrea Burke	James Douglas