Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen Ouest, Toronto ON M5H 3S8

Citation: First Global Data Ltd (Re), 2020 ONSEC 23
Date: 2020-09-11
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

Hearing: September 2, 2020

Decision: September 11, 2020

Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
Appearances:	Rebecca Shoom	For Global Bioenergy Resources Inc.
	Alysha Shore	For Nayeem Alli
	Robert Stellick	For Maurice Aziz
	Harish Bajaj	Self-represented
	Kevin Richard	For Andre Itwaru
	Mark Bailey Charlie Pettypiece	For Staff of the Ontario Securities Commission

No one appearing for First Global Data Ltd.

TABLE OF CONTENTS

REASONS FOR DECISION

I. OVERVIEW

[1] The merits hearing in this enforcement proceeding is set to begin on October 5, 2020. Due to the COVID-19 pandemic, the Ontario Securities Commission is not currently holding in-person hearings. The Commission's standard practice at this time is to proceed with electronic hearings (by videoconference or teleconference), although any decision as to whether to do so is made on a case-by-case basis, depending on the particular circumstances of the case.

[2] The respondents in this case (other than First Global Data Ltd., which has not participated in the proceeding in recent months) object to the Commission's intention to conduct the merits hearing by videoconference. They argue that doing so would be unfair to the respondents for various reasons, including that it would be slower and more expensive, and that it would not permit an adequate assessment of credibility, which is in issue in this proceeding.

[3] After hearing submissions about this issue on September 2, 2020, I advised the parties that, for reasons to follow, the merits hearing will proceed as scheduled by videoconference. I issued an order to that effect.[1] These are the reasons for my decision.

[4] Proceeding by videoconference under the current circumstances is consistent with the important goal, set out in Rule 1 of the *Ontario Securities Commission Rules of Procedure and Forms* (**Rules**),[2] of conducting Commission proceedings in a just, expeditious and cost-effective manner. The respondents have failed to establish that a videoconference will cause them to suffer significant prejudice or that it will deprive them of their right to a fair hearing.

II. BACKGROUND

[5] Staff of the Commission alleges that all of the respondents, or some of them, directly or indirectly defrauded investors, distributed securities without a prospectus or an exemption, engaged in the business of trading in securities without being registered or being exempt from registration, made prohibited representations, and filed misleading and improper financial statements.

[6] This proceeding was commenced by Staff filing its statement of allegations, and the Secretary issuing a notice of hearing, on May 31, 2019. The parties originally estimated that the merits hearing, which will involve approximately 25 witnesses, will require about 40 hearing days. The hearing is scheduled to begin on October 5, 2020, and conclude in mid-January 2021.

[7] On March 19, 2020, the Commission's Office of the Secretary published an advisory, indicating that the Commission would not be holding in-person hearings until at least April 30, 2020. On April 27, 2020, the Office of the Secretary published a second notice, indicating that the Commission would not be holding in-person hearings until further notice. On July 31, 2020, the Office of the Secretary published a third advisory, to the same effect. That advisory

[1] (2020) 43 OSCB 6902
[2] (2019) 42 OSCB 9714

indicated that the Office of the Secretary would contact parties with hearings scheduled up to and including November 30, 2020, "to determine if a hearing may proceed via videoconference, teleconference or in writing should an in-person hearing still not be possible."

[8] At the request of the parties, a brief teleconference hearing took place on August 13, 2020. At that attendance, the parties advised that there was disagreement between Staff and the respondents about whether the merits hearing should proceed by videoconference. I invited the parties to make written submissions in advance of the final interlocutory attendance, already scheduled for September 2, 2020. I indicated that I would hear oral submissions at that time.

III. ANALYSIS

A. Introduction

[9] This hearing presented one principal issue: should the merits hearing proceed by videoconference, or would doing so cause any party significant prejudice?

[10] I begin my analysis by setting out the legal framework relevant to this decision, and the need to balance the respondents' interests against the desirability of conducting Commission proceedings efficiently and expeditiously. I then discuss the parties' disagreement as to whether I was hearing a request by the respondents to adjourn the merits hearing. Finally, I review each of the concerns raised by the respondents about a videoconference merits hearing.

[11] For convenience in these reasons, I describe submissions made by one or more respondents as having been made by "the respondents". While there were some subtle differences between submissions made on behalf of Mr. Itwaru and Mr. Aziz, these differences were not material. The other respondents (other than First Global Data Ltd., which did not appear) adopted the submissions of Messrs. Itwaru and Aziz.

B. Legal framework

[12] The *Statutory Powers Procedure Act*[3] (**SPPA**) governs proceedings before the Commission. Several provisions of the SPPA are relevant to the disposition of this matter.

[13] The definitions set out in s. 1(1) contemplate three types of hearing:

a. an "oral hearing", which means "a hearing at which the parties or their representatives attend before the tribunal in person" (for clarity in these reasons I refer to these hearings as "in-person hearings");

b. an "electronic hearing", which means "a hearing held by… [a] form of electronic technology allowing persons to hear one another", and which includes a videoconference hearing (for clarity in these reasons I often refer to videoconference hearings); and

c. a "written hearing", which is not relevant here.

[14] The Commission is authorized to hold videoconference hearings, by virtue of s. 5.2(1) of the SPPA and the fact that the Commission's rules deal with

[3] RSO 1990, c S.22

electronic hearings.[4] It is for the Commission to determine its own practices[5] and to decide whether or not to hold an electronic hearing in a proceeding; however, the SPPA provides that a tribunal "shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is *likely to cause the party significant prejudice*" [emphasis added].[6] The emphasized words define the test I must apply here.

[15] I note, for completeness, that I asked the parties to address the effect, if any, of the *Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020*,[7] which came into force on March 25, 2020, and which gives some tribunals additional powers to control their processes. The parties submitted, and I agree, that the statute is of little or no consequence here, given authority the Commission already has that derives from the SPPA. No part of my decision or my reasons relies on the *Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020*.

[16] Finally, I refer to Rule 23(1) of the Commission's Rules, which states that unless otherwise provided in the Rules or ordered by a panel, all Commission hearings shall be "oral hearings, which term includes hearings by telephone, videoconference and other electronic means."

C. Balancing the respondents' interests against the desirability of conducting Commission proceedings efficiently and expeditiously

[17] The respondents start with two main propositions:

a. hearings involving witness testimony ought to be in person where possible; and

b. there would be no harm in delaying the merits hearing until it could be conducted in person.

[18] I reject both of these propositions, when put as categorically as they are.

[19] With respect to the first, the respondents provided no persuasive authority in support. They cited a labour arbitration award written by a single arbitrator who described in-person hearings as "the gold standard" that ought to be followed where possible.[8] The award is dated April 20, 2020. More than four months have elapsed since the date of the award, during which time many courts and tribunals, including this Commission, have had considerable experience conducting hearings by videoconference. As discussed below, videoconference hearings (or parts of hearings) may have cost and other advantages over in-person hearings.

[20] The respondents say that they would prefer an in-person hearing. I have no reason to doubt that. However, the Commission's decision depends on the appropriate legal tests, and not on the parties' preferences.

[21] With respect to the second proposition (*i.e.*, that there would be no harm in delaying the merits hearing) I disagree, for the following reasons.

---

[4] Rules, r 23(1)
[5] SPPA, s 25.0.1
[6] SPPA, s 5.2(2)
[7] SO 2020, c 5, Sch 3
[8] *Toronto Transit Commission v Amalgamated Transit Union, Local 113*, 2020 CanLII 28646 (ON LA) at para 15

[22] The objective set out in the Rules, of conducting Commission proceedings expeditiously and cost-effectively, is consistent with the Commission's statutory mandate to protect investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.[9] A delayed merits hearing would, by definition, be less expeditious. Delayed hearings are likely to be more expensive, because of the additional time required to refresh memories of those involved. Finally, delayed hearings exacerbate the problem of witnesses' fading memories.

[23] In this case, it is unknown how long the merits hearing would have to be postponed if it must await an in-person hearing. The Commission has suspended in-person hearings until further notice. The delay could be lengthy.

[24] The respondents submit that expediency and cost-effectiveness cannot override a respondent's right to a fair and just hearing. I agree, but while these objectives may at times be competing, they are not mutually exclusive, and the concepts of expediency, cost-effectiveness, fairness and justice are not absolute. They must be balanced against each other.

[25] In balancing these factors in this case, I do not accept the respondents' submission that the parties are being "rushed" to a merits hearing. The merits hearing is scheduled to begin about eighteen months after the statement of allegations was filed and the notice of hearing was issued. That eighteen-month period is longer than in most other cases that come before the Commission. While the nature of this case, including the number of respondents and the high number of documents involved, may justify that longer period, this case is by no measure being "rushed".

D. This decision does not arise from an adjournment request by the respondents

[26] Staff argues that in essence, the respondents seek an adjournment of the merits hearing for an indeterminate time. Accordingly, Staff submits, the onus is on the respondents to satisfy the test for an adjournment, set out in Rule 29(1) of the Rules, *i.e.*, that every "merits… hearing in an enforcement proceeding… shall proceed on the scheduled date unless a Party satisfies the Panel that there are exceptional circumstances requiring an adjournment."

[27] The respondents submit that this is not a motion requesting an adjournment, but rather a determination by the Commission as to whether it is fair and just for the merits hearing to proceed via videoconference.

[28] I agree with the respondents' submission. While the merits hearing would undoubtedly be delayed if the respondents were to be successful in objecting to a videoconference hearing, I consider that simply to be an unavoidable consequence of the Commission's decision not to provide in-person hearings at this time.

[9] *Securities Act*, RSO 1990, c S.5, s 1.1

E. Respondents' concerns

1. Introduction

[29] The respondents cite a number of concerns that they say compel a conclusion that the merits hearing should not proceed by videoconference.

[30] These submissions must be considered against a backdrop of developments during the pandemic, including decisions of Ontario courts that offer important guidance.

[31] In *Association of Professional Engineers v Rew*, the Divisional Court held that "[t]he court is faced with an unprecedented challenge maintaining the institutions essential for the continuation of the Rule of Law in the face of the COVID-19 crisis, and recourse to electronic hearings is a key aspect of the court's response."[10] I respectfully adopt those words to apply to Commission proceedings.

[32] In *Arconti v Smith*, the Superior Court of Justice held that "use of readily available technology is part of the basic skillset required of civil litigators and courts… [T]he need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency."[11] Again, I respectfully adopt those words to apply to Commission proceedings.

[33] The respondents correctly point out that neither of the above two cases involved in-court testimony by witnesses. I address the implications of that distinction below.

[34] An additional and important element of the backdrop is the experience to date of the Commission in conducting videoconference hearings, including with witnesses and unrepresented parties. At the hearing of this issue, the respondents agreed that I may take notice of that experience (an approach supported by s. 16of the SPPA). While that experience has not been without some challenges, those challenges have been isolated and relatively minor, and have diminished over the past six months.

[35] I turn now to the specific concerns raised by the respondents.

2. Does the seriousness of the allegations require an in-person hearing?

[36] The respondents submit that the merits hearing will be very significant and that it may have serious consequences, including the potential loss of a respondent's livelihood. This is a relevant consideration, since the importance of the decision to those affected is a significant factor in determining the content of the duty of fairness owed to the parties.[12] In this case, therefore, the duty of fairness is toward the higher end of the spectrum.

---

[10] 2020 ONSC 2589 at para 7
[11] 2020 ONSC 2782 at para 33
[12] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 25

[37] However, it does not follow that only an in-person hearing would suffice. The respondents must still demonstrate that a videoconference hearing would deprive them of the fair hearing to which they are entitled.

3. Do the complexity and length of this proceeding and of the merits hearing require an in-person hearing?

[38] The respondents argue that hearings that deal with complex issues and that are expected to be lengthy are unsuitable for videoconferences. Once again, the respondents provided no persuasive authority to that effect. The respondent Mr. Itwaru submitted that an April 7, 2020, decision of the Ontario Labour Relations Board[13] supports the proposition. However, that decision:

a. discusses the merits of Skype, a video platform that is different from the platform used by the Commission;

b. expresses its finding on this point as a conclusory statement, without any analysis in support; and

c. relies on a 2018 decision of the Ontario Labour Relations Board,[14] which in turn cites an earlier decision that notes that the Board's use of Skype was in its infancy at the time.

[39] With respect, I do not find any of those decisions as being helpful, let alone binding or persuasive.

[40] As Staff notes, even prior to the pandemic the Commission conducted electronic hearings (part or all of which were by videoconference), including in complex matters with serious allegations.[15]

[41] When pressed, the respondents were unable to identify anything about a long or complex hearing that would make it less suitable for a videoconference hearing than a shorter or less complex hearing. When compared to a shorter hearing, a longer hearing is simply more of the same, whether in person or by videoconference. As for complexity, the respondents asserted that complex issues should be addressed in an in-person hearing, but they provided no reason why that should be so.

[42] Indeed, as the Superior Court of Justice held in *Miller v FSD Pharma, Inc.*, "[t]here is nothing about a remote procedure, whether large, complex, and potentially final, or small, straightforward, and interim, that is inherently unfair to either side. This is particularly so now that the legal community has had time to digest the use of virtual hearing technology."[16]

4. Where credibility is an issue, is an in-person hearing required?

[43] The respondents assert, and I accept, that credibility of witnesses will be an issue in the merits hearing.

---

[13] *Gail Paterson v Her Majesty the Queen in Right of Ontario*, 2020 CanLII 28031 (ON LRB) at para 6
[14] *Velimir Raskovic v Bend All Automotive Inc.*, 2018 CanLII 107003 (ON LRB) at para 4
[15] For example, *Natural Bee Works Apiaries Inc (Re)*, 2019 ONSEC 23; *Sino-Forest Corporation (Re)*, 2017 ONSEC 27
[16] 2020 ONSC 3291 at para 10

[44] The respondents submit that a witness's demeanour is the most valuable way of determining that witness's credibility, and that an assessment of credibility is therefore more reliable in person.

[45] I emphatically reject that submission. It is precisely contrary to established authority on the point.

[46] In an oft-quoted Superior Court of Justice decision, Newbould J. cited with approval the following from a British Columbia Court of Appeal decision:

> The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.[17]

[47] Further, the Court of Appeal for Ontario has referred to "a growing understanding of the fallibility of evaluating credibility based on… demeanour", and noted that:

> It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom.[18]

[48] This Commission has applied these principles in numerous cases.[19]

[49] As for the impact of proceeding by videoconference, the Superior Court of Justice has specifically rejected the submission that hearing testimony by videoconference would affect the court's ability to make findings about the credibility of a witness.[20]

[50] I reject the related submission that allowing a witness to testify remotely, instead of in a hearing room, brings an informality that makes the testimony less reliable. I am not persuaded by the one labour arbitration procedural award cited by the respondents, in which the arbitrator makes a statement to that effect.[21] The arbitrator's statement is unsupported by any evidence or by any reasoning that would justify the taking of "administrative notice" without evidence. In my respectful view, it is contrary to the authorities cited above.

[51] Finally, the respondents argue that a videoconference hearing will be prone to interruptions, and that those interruptions may unfairly cause a witness to appear less credible than is deserved. I cannot accept that baseless submission.

---

[17] *Springer v Aird & Berlis LLP*, 2009 CanLII 15661 at para 14, citing *R v Pressley*, 1948 CanLII 353 at para 12

[18] *R v Rhayel*, 2015 ONCA 377 at para 85

[19] See, *e.g.*, *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 at para 78; *Hutchinson (Re)*, 2019 ONSEC 36 at para 77; *Meharchand (Re)*, 2018 ONSEC 51 at para 60; *Innovative Gifting Inc. (Re)*, 2013 ONSEC 30 at para 209

[20] *Davies v The Corporation of the Municipality of Clarington*, 2015 ONSC 7353 at para 35; *Chandra v CBC*, 2015 ONSC 5385 at paras 20-25

[21] *Sunnybrook Health Sciences Centre v Ontario Nurses' Association*, 2018 CanLII 39866 (ON LA) at para 26

Interruptions are not unique to videoconference hearings. They can and do occur during in-person trials and hearings. An adjudicator can and should ignore those interruptions when assessing credibility or submissions.

5. Will a videoconference hearing be too slow, lengthy, inefficient or costly?

[52] The respondents submit that the large number of participants in this merits hearing (panel members, Registrar, court reporter, parties, counsel, witnesses, and possibly an interpreter) makes a videoconference impractical. The respondents do not persuasively explain why this would be so.

[53] The respondents point out that each witness will need to learn how to use the Commission's remote hearing software. This may be true. However, the Commission provides no-cost training sessions in advance of videoconference hearings, and dedicates qualified staff to ensure that participants have the necessary technology and that they are comfortable using the platform.

[54] Signing on to the platform requires no special skill or software – it is as simple as following a link using any standard browser. It requires a device with a camera and a microphone, common to almost every modern device. These are not onerous requirements.

[55] The training sessions are not time-consuming. They are similar to the training sessions that the Commission has offered for years to help parties, counsel and witnesses comply with the Commission's *Practice Guideline*,[22] which provides that all enforcement merits hearings shall use the tribunal's electronic document management system.

[56] There is no basis to conclude that the additional time required to complete a training session for a videoconference hearing would be any greater than the cumulative time required for parties, counsel and witnesses to travel to and from the Commission's hearing room every day. Indeed, the opposite is almost certainly true, especially for a longer hearing.

[57] The respondents also submit that a videoconference hearing will inevitably be slower (and therefore more costly). Once again, the respondents offer no reliable basis for this assertion. The respondents speculate that technological glitches may interfere with the smooth conduct of the hearing, and that this risk is magnified given the large number of participants. As a result, say the respondents, the hearing could "balloon far beyond" its scheduled time.[23]

[58] As noted above in paragraph [34], this speculation is inconsistent with the Commission's actual experience. In addition, the Commission has published a *Guide to Virtual Hearings Before the OSC Tribunal*, which addresses many of the concerns identified.

[59] Finally, the respondents submit that whereas one counsel could manage all the necessary tasks in a hearing room (including the management of documents), those tasks in a videoconference hearing would in most cases require a second counsel, thereby increasing the cost to the party. I heard no clear explanation of why this would be so. I cannot accept the submission.

---

[22] (2019) 42 OSCB 9736

[23] *Written submissions of Maurice Aziz*, para 11

6. Is a videoconference hearing inconsistent with trial practices before the Courts or the practices of other regulatory bodies?

[60] The respondents argue that a merits hearing is akin to a trial and that few Canadian courts are conducting trials by videoconference.

[61] The respondents offered no evidence to show how prevalent (or rare) videoconference trials are, or how many trials are being deferred because in-person facilities are not currently available.

[62] Even if such evidence had been adduced, it is unclear how it would be persuasive. Under current circumstances in light of the COVID-19 pandemic, the assessment of how safe it is for a number of people to be in a courtroom for a prolonged period of time is highly fact-specific. What are the dimensions of the room? How does the ventilation work; *i.e.*, what airflow does it generate? Will plexiglass meaningfully reduce the risk of transmission, and does the answer to that question depend on whether the plexiglass is floor-to-ceiling? What is the incidence of COVID-19 in the geographic area in which the courtroom is situated? How available, timely and effective are tests for COVID-19 in that jurisdiction?

[63] In my view, these and other questions preclude an "apples to apples" comparison between a courtroom and the Commission's hearing rooms, without comprehensive studies that are not available, cannot practically be done, and would quickly be stale-dated or obsolete even if they could be done. As a result, no relevant conclusion can be drawn from the number of trials being conducted in Canada.

[64] Similarly, and contrary to the respondents' submission, no relevant conclusion can be drawn from the fact that the British Columbia Securities Commission and the Alberta Securities Commission have recently announced that some in-person hearings will resume. The same impediments to a proper comparison are present.

[65] I therefore attach no weight to the fact that some courts and some tribunals are offering in-person hearings. What is important is that the Commission is not doing so at this time.

7. Is a videoconference hearing inconsistent with past Commission practices?

[66] The respondents argue that the Commission has, in the past, always required merits hearings to be in-person. Nothing, they submit, should change as a result of the pandemic.

[67] The respondents are incorrect. As noted above, the Commission has on numerous occasions over the past several years conducted portions of merits hearings by videoconference. Even if that were not the case, I was not directed to any principle or authority that would prevent the Commission from adapting its process to suit today's technology and today's environment.

[68] While the respondents do correctly note that the Commission has never conducted an entire merits hearing of this length by videoconference, they did not explain why that should preclude this merits hearing from proceeding in that manner. As discussed above, it should not be presumed, without a persuasive

basis for the presumption, that a videoconference hearing cannot be successfully concluded or that it will be unfair. The respondents offered no such basis.

8. Is a videoconference hearing appropriate for a self-represented respondent?

[69] Respondents other than Mr. Bajaj, who is self-represented, argued that the fact that he is self-represented makes a videoconference hearing inappropriate. Mr. Bajaj did not himself identify any reason why that would be so, and the respondents who made that argument did not have any persuasive basis for the concern. Instead, they made the unsupported and arguably demeaning assertion that it is inappropriate to assume that a self-represented litigant has the necessary technical equipment and skill to participate.

[70] I reject the submission. To the contrary, the Commission has successfully conducted videoconference merits hearings with self-represented parties.[24] Mr. Bajaj did not identify any impediment, let alone one that could not be satisfactorily addressed prior to the hearing.

9. Is a videoconference hearing appropriate where translation services may be required?

[71] Finally, the respondents point to the fact that an interpreter may be required for one or more witnesses. They assert that the presence of an interpreter would make a videoconference hearing inappropriate.

[72] Once again, this assertion is baseless. The respondents offered no evidence in support. I strongly suspect that the evidence on this point would run counter to the respondents' assertion. There is no reason to believe that the presence of an interpreter would be any more complicated in a videoconference hearing than it is in an in-person hearing. I reject the submission.

IV. CONCLUSION

[73] In summary, the respondents have failed to show that it is likely that proceeding by way of videoconference would cause any of them any appreciable prejudice, let alone "significant prejudice" (to quote the test specified in s. 5.2(2) of the SPPA).

[74] The respondents' speculation about difficulties that may arise is not consistent with the Commission's recent experience. I attach more weight to that real-life experience than I do to the speculation. Should any issues arise during the videoconference merits hearing in this proceeding, the panel can address those issues at the time. The panel would be facing real, rather than imagined, concerns, and would make the appropriate decision based on real, rather than imagined, circumstances.

[24] *Natural Bee Works Apiaries Inc. (Re)*, 2019 ONSEC 23 at paras 2 and 34; *Paramount (Re)*, 2020 ONSEC 12 at para 22 [the evidence portion of the merits hearing in that proceeding has since concluded]

[75] For these reasons, I ordered that the merits hearing proceed as scheduled, by videoconference.

Dated at Toronto this 11th day of September, 2020.

"*Timothy Moseley*"
Timothy Moseley