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Final Consultation Draft October 1/20 – In-Person Hearing Practice Direction

FINANCIAL SERVICES TRIBUNAL OF ONTARIO

PRACTICE DIRECTION – IN-PERSON HEARINGS COVID-19

Background

1. Further to Rule 25.01 of the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (“Rules”), in April 2020 the Tribunal decided to adjourn all previously scheduled in-person motions/hearings before it due to ongoing COVID-19-related work and public safety restrictions. These in-person adjournments continue until further notice or until the Tribunal orders otherwise.
2. Also, until further notice, and subject to Tribunal orders under this practice direction or otherwise, all existing and new motions/hearings in a proceeding scheduled to be heard by the Tribunal will be held either in writing or electronically (by tele-conference or by video conference), as determined by order of the Tribunal pursuant to its Rules and practice directions in consultation with the parties to the proceeding.
3. The Registrar has contacted all affected parties to existing proceedings with respect to such adjournments and pre-hearing conference were arranged as necessary for the parties with their panel chair to discuss any required changes to proceeding arrangements, including new motion/hearing dates, as required.
4. Under Rule 2.04, the Tribunal may issue practice directions pertaining to certain types of proceedings or with respect to any matter the Tribunal deems appropriate.
5. In this regard, the Tribunal has prepared and posted on its website an electronic hearing practice direction to provide parties with a framework for motions/hearings to be conducted electronically by means such as tele-conferencing (telephone) or by video conferencing using Microsoft Teams. The

electronic hearing practice direction is of general application and is not limited to COVID-19-related circumstances. Under the electronic hearing practice direction the Tribunal retains the discretion in all circumstances to order the manner in which an electronic or virtual motion/hearing will be conducted (Rule 20, 21 and 22).

Discretionary In-Person Hearings

6. The Tribunal has prepared this Covid-19-focused in-person hearing practice direction to provide guidance in relation to the exercise of its discretion to order in-person hearings during the Covid-19-related adjournment described above.
7. The Tribunal may, in its discretion, and provided adequate health and safety precautions are in place, order that a matter be heard by way of in-person hearing, either on its own motion or if a party demonstrates that there are exceptional or special circumstances which justify an in-person hearing. Any request by a party for an in-person hearing must be made to the Tribunal by way of written motion under the Rules demonstrating that exceptional or special circumstances exist.
8. This practice direction applies to any part of a proceeding (i.e., pre-hearings, motions and hearings) and is subject to the Rules, the *Statutory Powers Procedure Act*, R.S.O. 1990, c 22 and other applicable legislation.
9. In considering whether to exercise its discretion to order that a matter be heard by way of in-person hearing during the COVID-19-related adjournment, the Tribunal must consider, as paramount criteria, the health and safety of participants, including Tribunal members and Tribunal staff, as well as the public, in the context of COVID-19 restrictions and best practices. However, the Tribunal, if satisfied that such safety and health concerns can be met, may consider exceptional or special circumstances supporting an in-person hearing which, for example, could include where a party demonstrates that irreparable harm will be caused to the party, the merits of its case, or its ability to present that case, unless an in-person hearing is held.
10. The agreement or consent of the parties that an in-person hearing is preferable or optimal does not, by itself, necessarily constitute exceptional or special circumstances. The Tribunal expects that exceptional or special circumstances will be rare and based on the unique circumstances of the parties involved. If the Tribunal determines that exceptional or special circumstances do exist, and all safety and health concerns can be met, the in-person hearing may be ordered and scheduled by the Registrar of the Tribunal, on dates set in consultation with the parties, subject to strict compliance with COVID-19-related restrictions in place at the Tribunal premises, and as ordered by the Tribunal.

11. If the Tribunal decides to hold an in-person hearing, it may, in its discretion, impose such conditions as may be required to ensure public health and safety, including that of all participants. Such measures will be determined in the exercise of the Tribunal's sole discretion and may include, but are not limited to:

- a. limiting in-person attendance to those persons whose physical presence is deemed to be essential, in the sole discretion of the Tribunal;
- b. ordering in-person attendees to comply at all times with all health and safety measures or other restrictions put in place at Tribunal premises;
- c. requiring masks be worn;
- d. requiring electronic copies of documents be filed with the Registrar instead of filing paper copies of documents during the hearing;
- e. restricting what may be brought into the hearing room;
- f. organizing the hearing room to ensure that appropriate social distancing takes place;
- g. requiring nonessential or other attendees to participate by way of video conference or tele-conference;
- h. posting security at the door to ensure that measures are followed; and
- i. limiting in-person public attendance at the hearing in favour of public electronic access.

12. This practice direction is issued having regard to ongoing COVID-19 restrictions, including current public health guidance and the Tribunal's operational capacity. It will be reviewed periodically, as circumstances warrant, in the ongoing process of gradually resuming the Tribunal's ability to hold in-person hearings on a regular basis.

October, 2020