# Simply the best (evidence): Capital Markets Tribunal rules on read-ins

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On Dec. 23, 2024, the Capital Markets Tribunal (CMT) released its decision in *TeknoScan Systems Inc. et al. (Re)*, 2024 ONCMT 32, in which it made important rulings on the use of transcripts of compelled examinations in enforcement hearings.

The CMT held that read-ins from transcripts of compelled examinations of the respondent, when they are admissions against interest, are inadmissible where that respondent has properly invoked the protections against self-incrimination contained in section 9 of the *Evidence Act*, R.S.O. 1990, c. E.23 (*Evidence Act*).[1]

This marks a departure from precedent[2], as well as from the standard practice of the CMT to allow read-ins of compelled evidence against respondents at hearings where the respondent elects not to testify.

The CMT also held that a party seeking to tender transcript evidence of a non-party to the proceeding must adduce evidence that the transcript evidence is necessary and reliable. The CMT highlighted that, since oral evidence is the "best evidence," a party should make efforts to summon non-party witnesses prior to attempting to tender their transcript evidence.

## What you need to know

- An investigation commenced under Part VI of the *Securities Act*, R.S.O. 1990, c. S.5 (the *Act*), and an enforcement proceeding under s. 127 of the *Act*, are not two parts of the same proceeding. They are two distinct proceedings for the purpose of the right against self-incrimination under section 9 of the *Evidence Act.*
- The Ontario Securities Commission (OSC) does not have a presumptive right to read-in transcript evidence from a compelled examination if a respondent elects not to testify.
- A respondent's compelled examination transcript is inadmissible at an enforcement hearing if the respondent has properly invoked their rights against self-incrimination under the *Evidence Act*.
- Oral evidence is the "best" evidence. The CMT is not likely to allow read-ins of transcript evidence of a witness if they could have been summonsed to testify.

# Brief background

In connection to a share purchase transaction, TeknoScan, a trace chemical detection technology company, sent a notice to all of its shareholders (the Notice), announcing that it was in negotiations with an investor who intended to acquire up to 50 per cent of the common shares held by TeknoScan shareholders at US$20.00 per share (the Share Purchase Transaction). The Notice advised preferred shareholders that, if they wished to participate in the transaction, they could convert their preferred shares to common shares on a 1:1 basis. The Notice omitted that the Share Purchase Transaction was a non-arm's length transaction, and that the investor was an unsophisticated party who lacked funding for the Share Purchase Transaction. The Share Purchase Transaction ultimately did not take place.

The OSC brought enforcement proceedings against TeknoScan and three of its directors and officers, Samuel Hyams, Phillip Kai-Hing Kung, and Soon Foo (Martin) Tam in connection with the Share Purchase Transaction. At the merits hearing, the CMT found that, contrary to s. 126.1(1)(b) of the *Act,* the respondents perpetrated a fraud on TeknoScan's preferred shareholders who opted into the Share Purchase Transaction by omitting certain information that rendered the Notice dishonest and misleading, and that, contrary to s. 126.2(1) of the *Act*, TeknoScan made a materially misleading statement to shareholders, which would reasonably be expected to have a significant effect on the value of TeknoScan's common shares.

# Use of compelled transcripts in CMT proceedings

During the merits hearing, the CMT heard two motions for leave to tender into evidence all or part of various transcripts of examinations conducted by the OSC under s. 13 of the *Act*, all but one of which were compelled. The CMT dismissed both motions. Leave of the CMT was required to read in the transcripts, as examination transcripts are hearsay evidence and therefore presumptively inadmissible. The CMT has general discretion to admit hearsay evidence that might otherwise be inadmissible in a proceeding[3], pursuant to s. 15 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22.

## 1) The OSC's motion to read in the evidence of Kung and Tam

Prior to the closing of its case, the OSC brought a motion for leave to "read in" excerpts from the transcripts of compelled examinations that it conducted of Kung and Tam pursuant to summonses issued under Part VI (Investigations and Examinations) of the *Act*. The OSC tendered the excerpts as admissions against interest by Kung and Tam as individual respondents, and as against TeknoScan. At the time of the OSC's motion, counsel for Kung and Tam had made clear that their clients would not testify at the enforcement hearing.

The OSC argued that, unless Kung and Tam undertook to testify at the hearing, the OSC had a presumptive right to read in compelled evidence against them. The OSC relied on a broad reading of s. 17(6) of the *Act*,which allows the disclosure of evidence obtained during compelled examinations in connection with a proceeding commenced under the *Act*. Based on *Sextant (Re)* and *Agueci (Re)*, the OSC argued that the practice of reading in transcript evidence against respondents had become standard.

In *Sextant (Re)*, the Panel allowed the OSC to read in excerpts of those respondents' transcripts, on the basis that this was permitted under s. 17(6) of the *Act*. In coming to this conclusion, the Panel found that that an investigation under the *Act* and the subsequent enforcement hearing were not separate proceedings, but rather stages in one proceeding.[4] In *Agueci (Re)*, the Panel also found that s. 17(6) of the *Act,* when construed liberally and purposively, permitted the OSC to produce compelled testimony at an enforcement hearing.[5] The Panel in *Agueci (Re)* likewise concluded that an investigation under Part VI is a "stage" of a proceeding, as is the enforcement or "adjudicative" stage.[6]

In response, the respondents argued that Kung and Tam had asserted the protection of s. 9 of the *Evidence Act* during their Part VI examinations, and that therefore the answers given on those examinations could not be used against them. Pursuant to s. 9(1) of the *Evidence Act,* a witness shall not be excused from answering any question on the ground that the answer criminates the witness or tends to establish his or her liability to a civil proceeding. However, under s. 9(2), any answers to questions tending to criminate the witness are not to be used or received in evidence against the witness in any proceeding.

## The CMT's decision

The CMT dismissed the OSC's motion to read in Kung and Tam's examination transcripts, finding that *Sextant (Re)* and *Agueci (Re)* were wrongly decided. The CMT found that the decisions "[…] were predicated on the erroneous premise that a Part VI investigation is part of, or one and the same as, an administrative enforcement proceeding under s. 127 of the Act."[7] The CMT commented that the *Act* contains no support for the suggestion that an investigation under Part VI initiates, or is part of, a subsequent administrative proceeding brought under s. 127. In contrast, a Part VI investigation may have a number of possible outcomes, including an administrative proceeding under s. 127, an application under s. 128, the initiation of a prosecution in respect of breaches of s. 122, or the delivery of a privileged report to the Chair of the Commission pursuant to s. 15 of the *Act*.

The CMT found that Kung and Tam had properly invoked s. 9 of the *Evidence Act,* and that, as a result, their answers to questions that may tend to criminate them or establish their liability could not be used against them in any proceeding. The CMT expressly rejected the OSC's argument that an inability to read in transcript evidence "weakens the Commission's enforcement powers," holding that its conclusion "simply means that where a respondent has properly invoked the protections of s. 9 of the *Evidence Act* and makes the election not to testify in their defence at a s. 127 proceeding, the Commission may have to present its case in a different way."[8] The CMT also noted that, if the OSC required evidence from Kung or Tam to prove its case, it was open to the OSC to summons one or both of them to give oral evidence, which the OSC elected not to do.

## 2) The respondents ' motion to read in the evidence of non-parties

The CMT also dismissed the respondents' motion to read in the evidence of certain non-parties. Prior to the enforcement hearing, the respondents sought leave to file the complete transcripts of the examinations conducted of Stephen Richardson (Richardson) and Gary Jefferson (Jefferson), both of whom were involved in efforts to secure third-party funding for the Share Purchase Transaction. Richardson was

examined on a voluntary basis, and declined to be sworn or affirmed for the examination. Jefferson was examined by the U.S. Securities and Exchange Commission at the request of the OSC. The OSC opposed the respondents' motion, on the basis that the respondents had not adduced any evidence of necessity respecting the transcript of either witness, nor had they made any effort to secure either witness's oral evidence.

### The CMT's decision

The CMT found that, in deciding whether to exercise its discretion to admit the transcripts into evidence, the CMT may consider the necessity and reliability of the evidence. The CMT held that the respondents had failed to provide any evidence of necessity regarding the admission of the Richardson or Jefferson transcripts, nor had they asked either witness to testify at the hearing. The CMT agreed with the OSC that the "best evidence" from Richardson and Jefferson would be their oral evidence at the hearing, which would allow the OSC to cross-examine the witnesses, and the CMT to better assess their credibility.

## Takeaways

The CMT's decisions on read-ins are welcome clarifications to the law of evidence in the securities regulatory context.

1. The CMT's decision with respect to a respondent's compelled examination transcript emphasizes the importance of a respondent's right against self-incrimination, and clarifies the applicability of s. 9 of the *Evidence Act* to compelled examinations under the *Securities Act*.
2. With respect to the evidence of non-parties, the decision emphasizes that the best evidence from a witness is likely to be oral evidence that can be tested through cross-examination.

These decisions are likely to affect the way that both OSC counsel and respondents' counsel conduct enforcement hearings in the future, and may lead to more frequent summonsing of both respondents and non-party witnesses at hearings before the CMT.

## Contact us

For more information on this Capital Markets Tribunal decision or on investigations in the securities regulatory sphere, please reach out to the key contacts below, or to any lawyer from BLG's Securities Disputes or White Collar Criminal Defence and Corporate Investigations groups.

## Footnotes

[1] In order to invoke the right against self-incrimination, the respondent must object to a question asked on the grounds in subsection 9(1) of the *Evidence Act,* after which the question is treated as it if was ordered to be answered.

[2] *Sextant Capital Management Ltd., (Re)*, 2010 ONSEC 25 at paras. 12-16, and *Agueci, (Re)*, 2013 ONSEC 45 at paras. 123-125.

[3] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s.15.

[4] *Sextant Capital Management Ltd., (Re)*, 2010 ONSEC 25 at paras. 7-10.

[5] *Agueci, (Re)*, 2013 ONSEC 45 at paras. 108-110.

[6] *Agueci, (Re)*, 2013 ONSEC 45 at paras. 124-125.

[7] *TeknoScan Systems Inc., (Re)*, 2024 ONCMT 32 at para. 64.

[8] *TeknoScan Systems Inc., (Re)*, 2024 ONCMT 32 at para. 66.

**Par**

David Di Paolo, Caitlin Sainsbury, Maureen Doherty, Graham Splawski, Natalia Vandervoort, Natalia Paunic

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## Bureaux BLG

**Calgary**
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

**Vancouver**
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

**Montréal**

1000, rue De La Gauchetière Ouest
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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