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Citation: *Bridging Finance Inc (Re)*, 2022 ONCMT 37

Date: 2022-12-06

File No. 2022-9

**IN THE MATTER OF BRIDGING FINANCE INC., DAVID SHARPE,
NATASHA SHARPE and ANDREW MUSHORE**

REASONS FOR DECISION

(Section 25.0.1 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22)

Adjudicators: Timothy Moseley (chair of the panel)
Sandra Blake
Dale R. Ponder

Hearing: By videoconference, November 28, 2022; written submissions
received November 30, 2022

Appearances: Mark Bailey For Staff of the Ontario Securities
Johanna Braden Commission
Erin Pleet For the receiver of Bridging Finance Inc.
Melissa MacKewn For David Sharpe
Naomi Lutes
Alexandra Grishanova
Lawrence E. Thacker For Natasha Sharpe
Jonathan Wansbrough For Andrew Mushore

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REASONS FOR DECISION

1. OVERVIEW

- [1] On November 28, 2022, the parties to this enforcement proceeding attended a hearing to address various scheduling issues. On December 2, 2022, we issued an order, for reasons to follow, providing that:
- a. motions brought by the respondents David Sharpe and Natasha Sharpe seeking disclosure will be heard on January 30, 2023, with a schedule for the exchange of materials in advance of that hearing;
 - b. motions brought by David Sharpe and Natasha Sharpe to stay this proceeding will be heard on May 23, 2023; and
 - c. the merits hearing in this proceeding is scheduled to begin on June 26, 2023, and proceed intermittently for a total of 35 days, ending in mid-December 2023.
- [2] In making that order, we:
- a. accepted the Sharpes' submission that the stay motions should be heard before the merits hearing, because the efficiencies in doing so outweigh the risk of duplicated or wasted effort; and
 - b. rejected the Sharpes' submission that the hearing of the stay motions should await the final determination of a judicial review application brought by David Sharpe with respect to a decision of this Tribunal in another proceeding, because the issues in that application are insufficiently connected to this proceeding, and acceding to the Sharpes' request would risk significantly delaying this proceeding.

2. BACKGROUND

- [3] The factual background to this proceeding, and to other proceedings arising out of the same facts, is set out in greater detail in this Tribunal's recent reasons and decision in Tribunal file number 2021-15 (the **temporary cease trade**

proceeding).¹ The following summary highlights the most relevant facts for the purposes of these reasons.

- [4] On April 30, 2021, the Ontario Securities Commission ordered² that trading cease in securities of nine entities related to Bridging Finance Inc., which is a respondent in this proceeding. That same day, the Commission obtained an order from the Superior Court of Ontario, appointing a receiver over the various Bridging entities. Included in Staff's court application record was material that Staff obtained during its investigation using powers of compulsion pursuant to an order issued under s. 11 of the *Securities Act*.³
- [5] This Tribunal has, a number of times, extended the cease trade portion of the Commission's April 30 order. In support of Staff's first request to extend the order in May 2021, Staff filed an extensive record, which also includes the compelled material referred to above that was included in the court file.
- [6] On July 5, 2022, the Tribunal dismissed David Sharpe's request in the temporary cease trade proceeding that certain portions of the adjudicative record and written submissions in that proceeding be kept confidential.⁴ The Tribunal also dismissed David Sharpe's subsequent request to stay that July 5 decision.⁵
- [7] David Sharpe has applied to Divisional Court for judicial review of the Tribunal's July 5 decision dismissing his confidentiality request. That application is currently scheduled to be heard on February 16, 2023.
- [8] This proceeding was commenced on March 31, 2022, by Staff filing a Statement of Allegations. Three motions or sets of motions are pending in this proceeding:
- a. David Sharpe and Natasha Sharpe have moved to stay this proceeding entirely, based on their assertion of abuse of process, which we explain in more detail below;

¹ *Bridging Finance Inc (Re)*, 2022 ONCMT 35

² *Bridging Finance Inc (Re)*, (2021) 44 OSCB 3781

³ RSO 1990, c S.5

⁴ *Sharpe (Re)*, 2022 ONCMT 18

⁵ *Bridging Finance Inc. (Re)*, 2022 ONCMT 35

- b. David Sharpe and Natasha Sharpe have moved for an order requiring Staff to make further disclosure that they submit would be relevant to the stay motions or to any alternative measures that might be adopted for the merits hearing; and
- c. Mushore has moved for an expedited hearing of the allegations against him, a motion that is scheduled to be heard on December 15, 2022.

[9] At the November 28 hearing giving rise to these reasons, we addressed three principal questions:

- a. whether the Sharpes' stay motions should be heard before the commencement of the merits hearing (as the Sharpes suggested) or at the conclusion of the evidentiary portion of the merits hearing (as Staff suggested);
- b. if the Sharpes' stay motions were to be heard before the merits hearing, then whether those motions should be heard as soon as reasonably possible (as Staff suggested) or following determination of David Sharpe's judicial review application (as the Sharpes suggested); and
- c. when the hearing on the merits of the Statement of Allegations should take place.

[10] Near the end of the November 28 hearing, we asked counsel for all parties to provide to the Registrar their availability from February 2023 to February 2024, so that we could schedule the stay motions and the merits hearing. All counsel responded.

3. ANALYSIS

3.1 Introduction

[11] The first question to be decided was whether the stay motions should precede the merits hearing. The other elements of our order (apart from the agreed-upon schedule for the disclosure motions that would proceed in January 2023 in any event) would flow from how that question was resolved.

[12] We decided that the stay motions should precede the merits hearing. We therefore had to consider next whether those motions should await

determination of David Sharpe's judicial review application. We decided that they should not.

3.2 Should the stay motions precede the merits hearing?

3.2.1 Nature of the Sharpes' stay motions

[13] We begin our analysis of when the Sharpes' stay motions should be heard with a review of the grounds for those motions.

[14] The Sharpes refer to these motions as "abuse of process" motions. They point to the Tribunal's finding⁶ that the Commission ought to have obtained an order from the Tribunal under s. 17 of the *Securities Act* before the Commission included the compelled material in its application record in court. They also note that six of the witnesses on Staff's list for the merits hearing in this proceeding were interviewed by Staff after the date on which the compelled material was published.

[15] The Sharpes say that the Tribunal ought to stay this proceeding because:

- a. a stay would be an appropriate denunciation of the Commission's failure to obtain a s. 17 order; and
- b. it is impossible for the Sharpes to have a fair hearing, because Staff's intended witnesses at that hearing had an opportunity to review the compelled evidence before they gave their own evidence as part of the investigation, thereby tainting their own testimony during the investigation and that they might give at the merits hearing.

[16] We emphasize that at this stage we neither have nor need any evidence about whether any of the witnesses have in fact reviewed any of the compelled evidence.

[17] Bearing in mind the framework of the Sharpes' motions, we now review the parties' positions about when the stay motions should be heard.

⁶ *Sharpe (Re)*, 2022 ONSEC 3 at para 5

3.2.2 Analysis about whether the stay motions should precede the merits hearing

- [18] The Tribunal has previously held⁷ that in considering at what stage motions of this kind should be heard, it is useful to ask three questions. If the answer to one or more of these questions is “yes”, that suggests that the motions should be heard before the merits hearing.
- [19] The first of the three questions disposes of this matter: Can the issues raised by the motions be fairly, properly or completely resolved without regard to evidence to be presented at the merits hearing? This question, which we answer “yes”, strikes at the heart of the disagreement between Staff and the Sharpes.
- [20] Staff submits that the Sharpes do not raise a discrete issue of misconduct that can properly be severed from the conduct of the hearing. The Sharpes respond that they are indeed raising a discrete issue of misconduct; namely, the Commission’s failure to obtain a s. 17 order, leading to what the Sharpes claim is the consequent improper availability of the compelled evidence.
- [21] We agree with the Sharpes that in the stay motions, they raise a discrete issue. We disagree with Staff’s contention that the merits hearing panel will need to hear the testimony at that hearing in order to assess whether the unfairness that the Sharpes allege exists at all, and if so, whether it is sufficient to justify the extraordinary remedy of halting the entire proceeding.
- [22] In this case, the stay motions present two main issues; namely, whether any alleged unfairness arising from the Commission’s failure to obtain a s. 17 order is sufficient to:
- a. justify halting the proceeding as a denunciation of that conduct; or
 - b. conclude that the Sharpes cannot possibly obtain a fair merits hearing.
- [23] We conclude, as did the panel in *Azeff (Re)*,⁸ that the Tribunal will be able to resolve, before the merits hearing begins, the two issues that the stay motions present. For both of those issues, the conduct complained of is complete, not

⁷ *Mega-C Power Corporation (Re)*, 2007 ONSEC 4 at paras 34-35

⁸ 2012 ONSEC 16 at paras 385-386

continuing. There is no apparent overlap between the issues to be addressed at the merits hearing (as defined by the Statement of Allegations) and the issues raised by the stay motions. The two evidentiary records will be different and distinct.

- [24] The first of the two issues is completely unrelated to how the testimony at the merits hearing would unfold. The second of the two issues does suggest a connection to the testimony to come, but the issue is framed as a binary and absolute question – the alleged misconduct either is or is not sufficient to determine now that no fair hearing would be possible at all.
- [25] Our decision must also consider the implications on the efficiency of the proceeding. Staff correctly points out that if the Tribunal hears the stay motions before the merits hearing and resolves the motions in Staff’s favour, then the respondents might still ask, during and after the merits hearing, that consequences flow from the alleged misconduct. For example, the Sharpes might ask that the panel attach lesser weight to the testimony of one or more witnesses.
- [26] That is a possibility, but it would happen only if the panel hearing the stay motions:
- a. rejects the Sharpes’ denunciation request (because if the panel grants the denunciation request, that ends this proceeding);
 - b. but determines as a threshold matter that the potential availability of the compelled evidence to some of Staff’s witnesses may at least be problematic (because that leaves open the question of what should flow from that);
 - c. but determines that the circumstances are insufficient to conclude that it is impossible to hold a fair hearing at all.
- [27] If that eventuality results, then there will have been some additional consumption of time and resources by the parties to prepare for and argue the motions, but the work done in connection with the motions, and the Tribunal’s decision on those motions, will continue to be relevant as the issues arise during the merits hearing.

- [28] We therefore conclude that while there is some risk of wasted effort in connection with the stay motions, the extent of that risk is small. In contrast, if the stay motions are heard before the beginning of the merits hearing, and the Sharpes are successful, either because there should be a denunciation or because the Sharpes cannot obtain a fair merits hearing, then all parties and this Tribunal will avoid a lengthy and costly hearing, including significant preparation time. The savings in time and resources greatly outweigh the potential loss of time and resources associated with the opposite result, as described above. Further, hearing the stay motions before the merits hearing affords the parties an opportunity to make submissions about possible alternative measures that should apply in the merits hearing if the stay motions are dismissed.
- [29] It would therefore be more consistent with the objectives of an efficient, expeditious and fair hearing to have the stay motions heard before the merits hearing. We return to discuss scheduling of these motions below, after we consider the appropriate timing of the stay motions in light of the judicial review application.

3.3 Should the stay motions await the determination of the judicial review application?

- [30] Staff submits that the stay motions should not await the determination of David Sharpe's judicial review application. We agree.
- [31] That judicial review application asks the court to review a decision of this Tribunal from a different proceeding. The central question in the judicial review application is whether the adjudicative record in that other Tribunal proceeding should be kept confidential. This Tribunal has already decided that the answer to that question is "no".
- [32] We recognize the risk that the Divisional Court will grant the judicial review application, and either send the matter back for reconsideration by this Tribunal, or make a finding that could have consequences in this proceeding. In our view, that risk is too indirect and too hypothetical at this stage. We weigh that risk against the risk that the Divisional Court's determination takes some considerable time following the hearing, and that if the court dismisses the application, David Sharpe appeals that decision. It is in the public interest for

this proceeding to continue as expeditiously as reasonably possible, and for it not to be suspended for an indeterminate time that could extend to many months and possibly a year or more.

[33] We also note that following the oral portion of the hearing before us, and while we were awaiting written submissions from counsel about their availability for various stages in this proceeding, the Tribunal received from David Sharpe a motion within the judicial review application, seeking a stay of the Tribunal's July 5 decision relating to the confidentiality of the adjudicative record in the temporary cease trade proceeding.

[34] Taking all of these facts together, we see no compelling reason to await the determination of the judicial review application before the stay motions are heard. Before the currently scheduled hearing date of those motions, there may or may not be other developments in the judicial review application that will influence the motions' hearing date or the outcome of the motions, but even if not, the public interest in moving ahead with this proceeding outweighs any contrary interests.

3.4 Scheduling of the disclosure and stay motions

[35] The Sharpes' disclosure motions are a preliminary step towards the stay motions. By agreement of all parties, the disclosure motions are to adhere to the following schedule:

- a. Natasha Sharpe is to deliver her motion record by December 2, 2022 (David Sharpe has already delivered his motion record);
- b. Staff is to deliver its responding motion record (if any) by December 16, 2022;
- c. the Sharpes are to deliver their reply records (if any) and submissions by January 6, 2023;
- d. Staff is to deliver its submissions by January 18, 2023;
- e. the Sharpes are to deliver their reply submissions (if any) by January 24, 2023; and
- f. the motions are to be heard on January 30, 2023.

- [36] As for the stay motions that would follow the disclosure motions, David Sharpe has asked us to accommodate the schedule of some of the lawyers who act for him in this proceeding. He has retained two law firms to represent him – the firm of Crawley MacKewn Brush (the **Crawley firm**) has primary carriage of this proceeding, and the firm of Greenspan Humphrey Weinstein (the **Greenspan firm**) has also been retained. We have been repeatedly advised during this proceeding that the Greenspan firm’s focus is the judicial review application, the stay motions, and any *Charter* issues that may arise.
- [37] Based on the Greenspan firm’s availability, the earliest that the stay motions can be heard is May 23, 2023. In our view, that date leaves more time than desirable between the hearing of the disclosure motions and the hearing of the stay motions. The objective described above, of potentially saving significant time and resources if the stay motions are successful, will not be as fully realized as it should be with almost a four-month lag between the two sets of motions.
- [38] Having said that, on the basis of material presented to us from counsel, we are not prepared at this time to force the stay motions on for an earlier date. We therefore ordered that the stay motions be heard on May 23. However, recognizing that litigators’ commitments change frequently, we have done so provisionally, and we urge counsel to confer among themselves to determine whether a solution can be found so that the motions can be heard earlier. If counsel are unable to agree on an earlier date, the matter may be spoken to upon request by any party to the Registrar, failing which it will be addressed at the January 30 hearing of the disclosure motions, at which time the stay motions may be scheduled for an earlier date.
- [39] We also note that of the two lawyers with carriage of this matter on behalf of Mushore, one advises that he is unavailable throughout May. Delaying the stay motions further in order to accommodate both of Mushore’s lawyers would defer the hearing of the stay motions for another two months, until June 26, 2023. It would be contrary to the public interest to do so, and given Mushore’s tangential connection to the Sharpes’ stay motions, we cannot accommodate the conflict.
- [40] We turn now to the final matter that was the subject of our December 2 order, *i.e.*, the timing of the merits hearing in this proceeding.

3.5 Timing of the merits hearing

- [41] The parties estimate that the merits hearing will take somewhere between 25 and 45 hearing days. Staff is generally available beginning in early spring of 2023. The Crawley firm is not available until May 23, 2023. The Greenspan firm has no availability before mid-May 2023, and very limited availability throughout the rest of 2023.
- [42] At the hearing leading to this decision, David Sharpe’s counsel expressed a preference for the merits hearing to be scheduled at a time when the Greenspan firm could be available for “the first few weeks”. We cannot quite accommodate that request. Doing so, taking into account the availability of all other parties and a Tribunal panel, would result in the merits hearing extending well into 2024, almost two years after this proceeding was commenced. That is too long, and it is not reasonable to expect that a significant portion of a long hearing will accommodate the schedules of at least four lawyers at two firms, all acting for one respondent.
- [43] The dates we have selected for the merits hearing accommodate the schedules of all counsel, with two constraints:
- a. only the first ten (not fifteen) hearing days fall within windows provided by the Greenspan firm; and
 - b. the first five days of the hearing are during a vacation of one of the two counsel who has appeared for the receiver during this proceeding, a situation that is unfortunate but that we do not consider will cause unfairness to the receiver.
- [44] In our view, the above is appropriate under the circumstances, and necessary given the many date conflicts counsel have identified. Parties are free, of course, to seek specific adjustments to the schedule now that the dates have been ordered. Counsel are requested to confer with all other parties before any such requests are made.
- [45] Taking all the above considerations into account, the merits hearing will proceed by videoconference on the following dates (all in 2023), each day beginning at 10:00 a.m., and all subject to further order of the Tribunal:

- a. June 26, 27, 28 and 29;
- b. July 24, 25, 26, 27, 28 and 31;
- c. September 12, 13, 14, 26, 27, 28 and 29;
- d. October 2, 3, 4, 5, 23, 24, 25 and 26; and
- e. December 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15.

4. CONCLUSION

[46] For the above reasons, we issued an order on December 2, 2022, providing that:

- a. the disclosure motions will be heard on January 30, 2023, with the schedule for the exchange of materials as set out in paragraph [35] above;
- b. the stay motions will be heard on May 23, 2023; and
- c. the merits hearing will commence on June 26, 2023, and continue on the dates set out in paragraph [45] above.

[47] Finally, we note that there are some matters normally addressed at the attendance from which this decision results (as contemplated by the Tribunal's *Practice Guideline*) that were not addressed, given the uncertainties associated with the overall schedule, and given this pending decision. We ask that counsel now confer with each other and attempt to arrive at an agreed-upon schedule for those matters, in light of our order. If counsel are unable to agree, a further attendance may be arranged through the Registrar at the request of any party. Failing a resolution by January 30, 2023, the outstanding matters will be addressed at the hearing that day, and counsel are expected to be fully prepared to speak to any outstanding scheduling issues.

Dated at Toronto this 6th day of December, 2022

"Timothy Moseley"
Timothy Moseley

"Sandra Blake"
Sandra Blake

"Dale R. Ponder"
Dale R. Ponder