



Capital
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Citation: *Hamlin (Re)*, 2023 ONCMT 1
Date: 2023-01-06
File No. 2022-16

IN THE MATTER OF MARK HAMLIN

REASONS FOR DECISION

Adjudicators: Andrea Burke (chair of the panel)
Timothy Moseley

Hearing: In writing; final written submissions received October 7, 2022

Appearances: Erin Hoult For Staff of the Ontario Securities
Commission
Steven I. Sofer For Mark Hamlin
Usman M Sheikh
Alex Zavaglia

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REASONS FOR DECISION

1. OVERVIEW

- [1] These reasons relate to a question about the interplay between the *Securities Act*'s¹ (the **Act**) protection of the confidentiality of investigations, and the Ontario Superior Court of Justice's response to a letter of request received from a U.S. court, the subject matter of which overlaps with an investigation in Ontario.
- [2] Mark Hamlin was examined as a witness in an investigation conducted using the compulsory powers contained in an order that the Ontario Securities Commission (**OSC**) issued under s. 11 of the *Act*. Hamlin is also a deposition witness in a U.S. court proceeding that arises from some of the facts underlying the OSC investigation. Hamlin applied to the Capital Markets Tribunal (the **Tribunal**) for authorization under s. 17 of the *Act* to make various disclosures in the context of the U.S. proceeding, because he is concerned that such disclosures would otherwise be prohibited by s. 16 of the *Act*.
- [3] In response to Hamlin's application, OSC Staff submitted its concern that the Ontario Superior Court of Justice (the **Ontario Court**), and not the Tribunal, has jurisdiction over the U.S. court's request to receive Hamlin's testimony and that the Ontario Court's jurisdiction displaces the Tribunal's jurisdiction under s. 17 of the *Act*.
- [4] We determined that before we can consider the merits of Hamlin's application, we must first determine that the Tribunal has jurisdiction to make the order that Hamlin requested. On October 12, 2022, we ordered, for reasons to follow, that the Tribunal does have that jurisdiction.² These are our reasons for that decision.

2. BACKGROUND

- [5] At the request of the U.S. Commodity Futures Trading Commission Division of Enforcement staff (**CFTC Staff**), the OSC issued a s. 11 investigation order

¹ RSO 1990, c S.5

² *Hamlin (Re)*, (2022) 45 OSCB 8962

authorizing certain members of CFTC Staff and of OSC Staff to investigate and inquire into possible violations of the U.S. *Commodity Exchange Act* and CFTC Regulations thereunder. Hamlin attended a compelled examination conducted by OSC Staff and CFTC Staff under s. 13 of the Act in May 2019.

- [6] In December 2019, the CFTC commenced an action in the United States District Court for the Southern District of New York (the **SDNY Court**) against Christophe Rivoire (the **SDNY Action**). Hamlin is not a party to the SDNY Action.
- [7] CFTC Staff provided the transcript of Hamlin's compelled examination to Rivoire in the SDNY Action during pre-trial discovery. CFTC Staff did not seek or obtain an order under s. 17 of the Act authorizing the disclosure of the transcript to Rivoire.
- [8] At Rivoire's request, the SDNY Court issued a letter of request to the Ontario Court to compel Hamlin's attendance at an examination by the parties in the SDNY Action. The SDNY Court's letter of request was recognized and enforced by the Ontario Court through an order that was issued on consent of the parties, including Hamlin, in March 2022.
- [9] CFTC Staff advised Hamlin that it intended to elicit testimony from him about his May 2019 compelled examination and transcript.
- [10] Hamlin then brought this application. He relies on, among other things, the exhibits contained in an affidavit of Matthew Coogan sworn July 8, 2022,³ contained in his application, as well as two emails sent by his counsel to the Tribunal on August 17, 2022,⁴ and September 16, 2022,⁵ regarding the status of the U.S. proceeding.
- [11] At a first attendance in this proceeding, we determined that the issue of whether the Tribunal has jurisdiction to make the requested order under s. 17 of the Act would be heard in writing.

³ We have marked the Affidavit of Matthew Coogan, sworn July 8, 2022 as Exhibit 1 in this proceeding.

⁴ We have marked the Email from Alex Zavaglia to the Hearings Registrar, dated August 17, 2022 as Exhibit 2 in this proceeding.

⁵ We have marked the Email from Alex Zavaglia to the Hearings Registrar, dated September 16, 2022 as Exhibit 3 in this proceeding.

[12] Following that first attendance, Hamlin attended an examination in the U.S. proceeding. Hamlin was asked, but refused to answer, questions about his May 2019 compelled examination. CFTC Staff then obtained an extension of the discovery deadline in the SDNY Action for purposes of re-examining Hamlin, and advised Hamlin that it wished to re-examine him about his May 2019 compelled examination.

3. ANALYSIS

3.1 Introduction

[13] The single issue for decision at this preliminary stage of Hamlin’s application was whether the Tribunal’s authority to issue s. 17 orders authorizing disclosure of protected material, is displaced in this case by the jurisdiction of the Ontario Court, given the Ontario Court’s role in responding to the letter of request. We decided that the Tribunal does have jurisdiction in this context.

[14] In their submissions, the parties addressed not only the question of whether the Tribunal has the necessary jurisdiction, but also whether the Tribunal should exercise that jurisdiction if it does have it. Because of our direction that at this stage we would consider only the preliminary question of whether the Tribunal has the jurisdiction, we do not address whether we should exercise that jurisdiction. That issue was to be resolved later in the proceeding. As we write these reasons, a differently constituted panel of the Tribunal has since determined that it should issue the s. 17 order, and did so, for reasons to follow.⁶

3.2 The parties’ submissions about the essential character of this application

[15] We begin our analysis by addressing the parties’ different positions about the essential character of Hamlin’s application.

[16] OSC Staff’s central submission as to why the Tribunal does not have jurisdiction to issue the requested s. 17 order relates to what it describes as the “essential character” of this application. OSC Staff says that this application arises because

⁶ *Hamlin (Re)*, (2022) 45 OSCB 9330

the Ontario Court ordered Hamlin to attend and give testimony for use in the SDNY Action, on the terms set out in the Ontario Court's order. Staff submits that this application is about the scope of an obligatory witness examination ordered by the Ontario Court for use in a foreign proceeding. OSC Staff submits that Hamlin's request for a s. 17 order from the Tribunal is in essence an assertion that the Ontario Court cannot or did not require, or permit, Hamlin to answer certain questions.

- [17] In contrast, Hamlin submits that the "essential character", if not the only character, of his application is to ensure that he does not breach s. 16 of the *Act* if he answers questions about his May 2019 compelled examination and other related matters. Hamlin further submits that only the Tribunal is statutorily authorized to provide the relief he seeks, that such relief is granted only where the Tribunal considers that it would be in the public interest to do so, and that OSC Staff has cited no precedent where the Ontario Court has granted the relief that Hamlin seeks. Hamlin also rejects OSC Staff's suggestion that his application is a collateral attack on the Ontario Court's order, since he is not asking the Tribunal to interfere in any way with the terms of that order. Hamlin submits that, instead, the relief he seeks facilitates rather than interferes with the purpose of the Ontario Court's order, which is to help the SDNY Court obtain Hamlin's evidence in the SDNY Action.

3.3 The terms of the Ontario Court's order

- [18] We turn now to consider the terms of the Ontario Court's order requiring Hamlin to attend to be examined. We conclude that nothing in that order expressly or impliedly excludes or displaces the statutory jurisdiction of this Tribunal to grant a s. 17 order. Similarly, neither this application nor any s. 17 relief that the Tribunal might grant conflicts with or undermines the Ontario Court's order. More specifically, the fact that Hamlin is seeking the s. 17 relief in order to remove a legal impediment under Ontario law to Hamlin answering certain questions in his examination does not create a conflict with or undermine the Ontario Court's order.
- [19] Paragraph 2 of the Ontario Court's order requires Hamlin to attend and provide testimony under oath "on matters relevant to the [SDNY Action], including as set

forth in the [letter of request]" and to "answer all proper questions relating to those matters and arising out of his answers to those questions". The letter of request sets out at section 7 a list of "Topics of Questions for Oral Examination of the Witness". The letter of request does not itemize any specific questions to be asked of Hamlin during the examination. Hamlin's May 2019 compelled examination is not one of the expressly itemized "Topics of Questions for Oral Examination of the Witness" in the letter of request.

[20] Paragraph 5 of the Ontario Court's order provides that the examination is subject to Rule 30 of the Federal Rules of Civil Procedure (United States), various SDNY Court rules and practices of the judge with carriage of the SDNY Action, and a stipulated protective order issued in the SDNY Action.

[21] Paragraph 6 of the Ontario Court's order provides that Hamlin is entitled to assert at the examination:

any of the protections available to a party examined in a case pending in an Ontario court and may assert any such rights and refuse to answer any question including on the basis of subsection 60(3) of the Evidence Act, RSO 1990, c E23, subsection 50(1) of the Canada Evidence Act, RSC 1985, c C-5, and the Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[22] Paragraph 7 of the Ontario Court's order provides that Hamlin "may, from time to time, seek the advice and directions of this Court with respect to the administration of this Order and the matters contemplated hereunder".

[23] We agree with Hamlin's submission that the essential character of his application is that it is to allow Hamlin to avoid any breach of s. 16 of the *Act* if he answers questions in the examination in relation to his May 2019 compelled examination and related matters. We therefore disagree with OSC Staff's submission that the essential character of the application is to have the Tribunal determine the scope of Hamlin's obligations under the Ontario Court's order. OSC Staff is correct that such a determination is exclusively for the Ontario Court, but Hamlin has not asked the Tribunal to make any determination about his rights or obligations under the Ontario Court's order, or to make any decision that might interfere in any way with the terms of the order.

[24] We note Staff's suggestion that Hamlin may already be in breach of the Ontario Court's order because of his apparent refusal to answer certain questions at the examination which took place after the first attendance in this proceeding. It is beyond our jurisdiction to opine on that question, and in any event it is irrelevant to our decision. In particular, it is not for the Tribunal to determine the propriety of:

- a. any question that Hamlin is required to answer under paragraph 2 of the Ontario Court's order; or
- b. any basis for Hamlin refusing to answer any particular question under paragraph 6 of the Ontario Court's order, or otherwise.

[25] We do not accept OSC Staff's submission that if we decide the Tribunal has jurisdiction to grant the requested s. 17 order, we will impair the Ontario Court's ability to receive foreign assistance, or to effectively adjudicate and enforce letters of request from foreign courts. Our decision has no effect on the Ontario Court's jurisdiction.

4. CONCLUSION

[26] For these reasons, we ordered that the Tribunal has jurisdiction to grant the requested relief under s. 17 of the Act.

Dated at Toronto this 6th day of January, 2023

"Andrea Burke"

Andrea Burke

"Timothy Moseley"

Timothy Moseley