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Citation: *Hamlin (Re)*, 2023 ONCMT 5
Date: 2023-01-30
File No. 2022-16

**IN THE MATTER OF
MARK HAMLIN**

REASONS FOR DECISION

(Subsection 17(1) of the Securities Act, RSO 1990, c S.5)

Adjudicators: Andrea Burke (chair of the panel)
Timothy Moseley
Geoffrey D. Creighton

Hearing: By videoconference, October 31, 2022

Appearances: Erin Hoult For Staff of the Ontario Securities Commission

Steven Sofer
Usman Sheikh
Alex Zavaglia

REASONS FOR DECISION

1. OVERVIEW

- [1] These reasons relate to a question about the interplay between the *Securities Act's*¹ (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] OSC Staff also submitted that in the event that the Tribunal determined that it had jurisdiction, it should decline to exercise such jurisdiction given the Ontario Court's involvement. In the further alternative, OSC Staff also submitted that it is not in the public interest for the Tribunal to grant the requested relief under s. 17 of the *Act*, including because of the Ontario Court's involvement.
- [5] A differently constituted panel of this Tribunal determined, as a preliminary matter, that the Tribunal has jurisdiction to make the order that Hamlin

¹ RSO 1990, c S.5

requests.² That panel did not decide whether the Tribunal should exercise its jurisdiction in the circumstances.

- [6] On October 31, 2022, we granted the s. 17 relief requested by Hamlin, for reasons to follow³, following written and oral submissions of the parties, including the affidavit evidence of Andre J. Moniz, sworn October 25, 2022⁴. These are our reasons for that decision.

2. BACKGROUND

- [7] At the request of staff of the U.S. Commodity Futures Trading Commission Division of Enforcement (**CFTC Staff**), the OSC issued a s. 11 investigation order 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.
- [8] 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.
- [9] 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.
- [10] 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.
- [11] CFTC Staff advised Hamlin that it intended to elicit testimony from him about his May 2019 compelled examination and transcript.

² *Hamlin (Re)*, (2022) 45 OSCB 8962; *Hamlin (Re)*, 2023 ONCMT 1 (**Hamlin**)

³ *Hamlin (Re)*, (2022) 45 OSCB 9330

⁴ We have marked the Affidavit of Andre J. Moniz, sworn October 25, 2022 as Exhibit 4 in this proceeding

- [12] Hamlin then brought this application. In addition to materials already marked as exhibits in this proceeding, Hamlin relies upon a copy of the August 29, 2022, transcript of the hearing in the SDNY Action⁵ and a copy of the order of the SDNY Court granting an extension of the discovery deadline to December 1, 2022⁶.
- [13] Following a first attendance in this proceeding, 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

- [14] The sole remaining issue raised by Hamlin's application is whether it would be in the public interest for us to grant the s. 17 relief that Hamlin requests.
- [15] We agree with OSC Staff and Hamlin that our consideration of this issue does not require us to decide the question of whether CFTC Staff required a s. 17 order authorizing it to disclose Hamlin's compelled examination transcript in the SDNY Action. Accordingly, we have not addressed that question.

3.2 The Statutory Framework and the Test for Authorizing Disclosure

- [16] First, we turn to consider an overview of the statutory framework at the heart of this application and the test for authorizing disclosure under s. 17 of the *Act*.
- [17] Section 16 of the *Act* prohibits disclosure of, among other things, the nature or content of a s. 11 investigation order and testimony given under s. 13. Disclosure may be made only if a prescribed exception applies. One of the prescribed exceptions is an order under s. 17 authorizing disclosure.

⁵ The August 29, 2022, transcript of the hearing in the SDNY Action is marked as Exhibit 5 in this proceeding

⁶ The October 26, 2022, order of the SDNY Court is marked as Exhibit 6 in this proceeding

- [18] The Tribunal may make a s. 17 order authorizing the disclosure of information subject to the s. 16 disclosure prohibition, provided that the Tribunal considers that it would be in the public interest to do so.
- [19] This Tribunal has held that the confidentiality and non-disclosure obligations under s. 16 of the *Act* are central to preserving the integrity of investigations conducted by OSC Staff, which are presumptively confidential, and also protecting the privacy of the individuals compelled to provide testimony and of the market participants being investigated.⁷
- [20] The Tribunal's task on an application for s. 17 relief can be broken down into two stages. First, the Tribunal must give meaning to the phrase "public interest" in s. 17(1) by identifying the factors relevant to the public interest and the framework within which those factors can be weighed. Second, the Tribunal must apply the framework to the specific circumstances of the case.⁸
- [21] When considering whether it is in the public interest to issue an order authorizing disclosure under s. 17(1), the Tribunal must consider the purpose for which the disclosure is sought and the specific circumstances of the case, and must balance that against the presumption of confidentiality.⁹

3.3 Is it in the public interest to authorize Hamlin to make disclosure in the SDNY Action?

- [22] We turn next to consider whether it is in the public interest for us to grant the relief Hamlin seeks. We conclude that it is.
- [23] Hamlin's purpose in seeking a s. 17 order, and his proposed disclosure, are consistent with the public interest. Hamlin seeks authorization to disclose so that he can answer questions on his examination in the SDNY Action without risk of breaching s. 16 of the *Act*. The SDNY Action is, at least in part, a product of the very s. 11 investigation in which Hamlin gave his compelled testimony. Thus, the purpose of Hamlin's proposed disclosure advances the foreign regulatory

⁷ *Katanga Mining Limited (Re)*, 2019 ONSC 4 (***Katanga***) at para 14; *Sharpe (Re)*, 2022 ONSC 3 at para 33

⁸ *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2002 CanLII 44980 (ONCA) at para 26, *aff'd* 2003 SCC 61

⁹ *Katanga* at para 16

proceeding resulting from the s. 11 investigation in which Hamlin gave his compelled testimony. Indeed, the SDNY Court recognized as much, stating explicitly its hope that the OSC would lift the confidentiality restrictions so that Hamlin's deposition can be completed, allowing a full record.

- [24] The usual factors for consideration on a s. 17 application as set out above do not stand in the way of granting the requested order. Hamlin himself seeks the order, so there is no threat to his privacy interests, and OSC Staff has confirmed that in this case the protection of the privacy interests of persons compelled to give evidence is not a consideration. OSC Staff also has no concerns about impairment of the integrity of an ongoing s. 11 investigation. The only reasons that OSC Staff offers for resisting the application are because of the Ontario Court's involvement in issuing the order recognizing and enforcing the SDNY Court's letter of request and because Hamlin allegedly does not require a s. 17 order in the circumstances.
- [25] OSC Staff submits that as a matter of public interest we should decline to exercise our jurisdiction and we should not, in any event, grant the s. 17 relief that Hamlin seeks. OSC Staff's central submission is that we should not grant the s. 17 relief because the Ontario Court is solely responsible for considering and enforcing letters of request from foreign authorities and remains seized for advice and directions concerning Hamlin's examination in the SDNY Action. OSC Staff submits that if we grant a s. 17 order without the Ontario Court's knowledge or invitation, we will risk undermining the Ontario Court's authority to issue binding orders recognizing letters of request, thereby usurping the Ontario Court's function to consider issues and other matters raised by Hamlin's concerns. OSC Staff also submits that there is a risk that our order would be contrary to any decision that the Ontario Court may make on the issue of whether Hamlin should or must answer certain questions on his examination.
- [26] OSC Staff further submits that this case is unique and that the "public interest" we should take into account in considering whether to grant the s. 17 relief is the public interest in the "authority of the [Ontario] Court to grant enforceable orders recognizing foreign letters of request". OSC Staff submits that a decision to grant s. 17 relief to Hamlin will undermine this authority of the Ontario Court,

thus potentially adversely affecting the Ontario Court's ability to receive similar assistance from foreign courts.

- [27] OSC Staff also submits that we should decline to make a s. 17 order and dismiss Hamlin's application, without prejudice to any further future application that Hamlin might choose to bring back before the Tribunal following the receipt of advice and direction from the Ontario Court.
- [28] These submissions by OSC Staff revisit and largely repeat OSC Staff's submissions on the preliminary issue of whether the Tribunal has the jurisdiction to grant a s. 17 order in the circumstances. As a differently constituted panel found and we agree, i) neither this application nor any s. 17 relief that we might grant conflicts with or undermines the Ontario Court's order, ii) this application does not ask us to make any determinations about Hamlin's rights or obligations under the Ontario Court's order, nor to make any decision that might interfere in any way with or undermine the terms of the order, and iii) any s. 17 relief that we might grant will not impair the Ontario Court's ability to receive foreign assistance or to effectively adjudicate and enforce letters of request from foreign courts.¹⁰
- [29] Additionally, we note that the Ontario Court's order does not require Hamlin to seek advice and directions from the Court regarding the order. The language of paragraph 7 of the Ontario Court's order relating to seeking the advice and directions of the Court is permissive, not mandatory. As well, and as previously determined in this proceeding, nothing in the Ontario Court's order excludes or displaces the statutory jurisdiction of this Tribunal to grant a s. 17 order.¹¹ In the circumstances, we do not accept OSC Staff's submission that we should dismiss Hamlin's application and effectively require him to first raise his concerns regarding s. 16 of the *Act* with the Ontario Court.
- [30] OSC Staff also submits that we should not grant a s. 17 order, because Hamlin does not require one. OSC Staff argues that because the parties to the SDNY Action already have the transcript of Hamlin's compelled examination, answering questions about his compelled examination will not result in a breach of s. 16.

¹⁰ *Hamlin* at paras 18, 23, 25

¹¹ *Hamlin* at para 18

OSC Staff's statutory interpretation argument is predicated on a *Black's Law Dictionary* definition of "disclose"—"[t]o make (something) known or public; to show (something) after a period of inaccessibility or of being unknown; to reveal"¹².

- [31] OSC Staff submits that Hamlin can answer questions about his compelled examination at an examination attended by the parties to the SDNY Action without disclosing any confidential information, contrary to s. 16 of the *Act*, because there is no "disclosure" contrary to s. 16 unless information previously unknown or unavailable to the recipients of the information is revealed to them. Hamlin submits that this is not a correct interpretation of s. 16 as it ignores the categorical prohibition in s. 16 ("no person or company shall disclose at any time") and would offend the underlying purposes of s. 16 of the *Act* which contains only limited and narrow exceptions to the prohibition against disclosure without a s. 17 order.
- [32] Even if we were to accept the OSC Staff's submission that Hamlin would not be "disclosing" in breach of s. 16 if he answers questions in the presence of the SDNY parties limited to the content of the transcript of his compelled examination, we do not accept that Hamlin does not require a s. 17 order. The s. 17 relief that he is seeking extends beyond just the transcript that was provided to Rivoire by CFTC Staff. OSC Staff's argument also does not address the purposes for which Hamlin's examination transcript in the SDNY Action will be used or the persons with whom the transcript may be shared beyond the parties to the SDNY Action. We note that on this latter point, no evidence was filed nor submissions made.

4. CONCLUSION

- [33] We conclude that it is in the public interest to grant Hamlin a s. 17 order. We do not agree with OSC Staff's submission that the Ontario Court's order and involvement in this matter is a reason to deny Hamlin s. 17 relief, nor do we agree with OSC Staff that Hamlin does not require the relief sought.

¹² Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, Minn: Thomson Reuters, 2019) definition of "disclose" and "disclosure"

- [34] For these reasons, on October 31, 2022, we issued an order under s. 17 of the *Act* authorizing Hamlin to provide deposition testimony in the SDNY Action, and to make any disclosures related to such deposition to the SDNY Court or the parties in the SDNY Action concerning the following topics:
- a. Hamlin's compelled testimony given at an examination conducted on May 23, 2019, under section 13 of the *Act*;
 - b. the OSC's investigation order issued on April 2, 2019, under section 11 of the *Act*, pursuant to which the May 2019 examination was conducted;
 - c. the transcript of the May 2019 examination; and
 - d. any other document, correspondence, information or evidence relating to the May 2019 examination and any related interactions with OSC Staff or CFTC Staff that is subject to the confidentiality restrictions set out in section 16 of the *Act* or the OSC's investigation order.

Dated at Toronto this 30th day of January, 2023

"Andrea Burke"

Andrea Burke

"Timothy Moseley"

Timothy Moseley

"Geoffrey D. Creighton"

Geoffrey D. Creighton