Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen ouest, Toronto ON M5H 3S8

Citation: *Bridging Finance Inc (Re)*, 2023 ONCMT 8
Date: 2023-02-21
File No. 2022-9

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

REASONS FOR DECISION

(Rules 27 and 28 of the *Capital Markets Tribunal Rules of Procedure and Forms*)

Adjudicators:	Russell Juriansz (chair of the panel) Timothy Moseley Sandra Blake	
Hearing:	By videoconference, January 30, 2023	
Appearances:	Naomi Lutes Melissa MacKewn Alexandra Grishanova	For David Sharpe
	Lawrence Thacker	For Natasha Sharpe
	Mark Bailey Johanna Braden Katrina Gustafson Nicole Fung	For Staff of the Ontario Securities Commission
	Erin Pleet	For the receiver of Bridging Finance Inc.
	No one appearing for Andrew Mushore	

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REASONS FOR DECISION

1. OVERVIEW

[1] These are the reasons for the dismissal of motions brought by David Sharpe and Natasha Sharpe for disclosure under rules 27 and 28 of the *Capital Markets Tribunal Rules of Procedure and Forms*.

[2] The motions seek disclosure of various documents that possibly may exist and which the Sharpes hope will provide support for their motions for stay of proceedings currently scheduled to be heard on May 23, 2023 and for the merits hearing. The motions for a stay are premised on an abuse of process arising from the Ontario Securities Commission's filing David's and Natasha's (we use their first names to distinguish between them and we mean no disrespect in doing so) compelled testimony in a public court record to support the Commission's application for the appointment of a receiver over Bridging Finance Inc. without Commission Staff first obtaining from the Tribunal a s. 17 order permitting its disclosure.

[3] We dismissed the motions for disclosure without reviewing the numerous categories of materials requested because the moving parties failed to establish a tenable case for their motions for a stay as required in order to obtain an order for disclosure.

[4] The respondent Mushore did not participate in the motion. The receiver for the respondent Bridging attended but did not take a position.

2. BACKGROUND

[5] During its investigation of Bridging, the Commission issued a summons to David, the Chief Executive Officer and Ultimate Designated Person of Bridging, and to Natasha, the Chief Investment Officer of Bridging, compelling their attendance to answer investigators' questions. Section 16 of the Act prohibits disclosure of their compelled testimony except as permitted by the section, or if the Tribunal makes an order under s. 17 authorizing its disclosure in the public interest. On April 30, 2021 the Commission issued a temporary order without notice that trading cease in the securities of certain Bridging-controlled investment vehicles

(this order has since been extended and varied by the Tribunal and currently expires on March 31, 2023). The Commission applied, without notice, to the Superior Court of Justice for the appointment of a receiver of the assets, undertakings and properties of Bridging and associated entities. The Commission's application materials included the compelled testimony of several persons, including that of David and Natasha. Staff did not seek a s. 17 order from the Tribunal before filing the receivership application.[1]

[6] The Court granted the Commission's application for a receiver and the Court's order provided that the receiver would create a website on which the Court materials could be found. The receiver did so and posted materials containing compelled testimony of David and Natasha. The Commission published on its website a news release announcing the appointment of the receiver. The news release included a link to the receiver's website, which included the compelled testimony.[2]

[7] David took the position the Commission's filing of his compelled testimony in a public court record was improper and sought, as a remedy, an order from the Tribunal revoking the s. 11 investigation order. In its March 30 Reasons, the Tribunal concluded OSC Staff had breached the Act by filing the moving parties' compelled testimony in the receivership application without first obtaining an order permitting that disclosure under s. 17(1).[3] The Tribunal also decided that revocation of the s. 11 investigation order was not an available remedy in the circumstances.[4] In a subsequent decision dated July 5, 2022, the Tribunal dismissed David's request for an order that his compelled testimony be kept confidential in the temporary cease trading order (**TCTO**) proceeding.[5]

[8] On November 11, 2022, OSC Staff refused David's request made on October 28, 2022, for disclosure of various documents including: (i) any communications between OSC Staff and the receiver relating to the compelled testimony of David and other witnesses in connection with the receivership application, (ii) OSC

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[1] *Sharpe (Re),* 2022 ONSEC 3 (**March 30 Reasons**) at paras 20-22

[2] March 30 Reasons at paras 23-24

[3] March 30 Reasons at para 5a

[4] March 30 Reasons at para 5b

[5] *Sharpe (Re),* 2022 ONCMT 18

Staff investigation notes and memoranda not yet disclosed relating to the receivership application and TCTO proceeding, (iii) the list of any records or documents over which OSC Staff claim privilege in the enforcement proceeding, (iv) any internal communications between OSC Staff and OSC executives, OSC senior management, Tribunal members, and other regulators related to the appointment of the receiver, (v) any communications between OSC Staff and witnesses, and (vi) any communications concerning the Commission's position on the Tribunal's March 30 Reasons.

[9] On November 24, 2022, David brought his motion for disclosure, adding to his request, disclosure of all communications between OSC Staff and law enforcement in relation to any ongoing or potential criminal investigations. Natasha filed a similar motion for disclosure on December 2, 2022.

[10] OSC Staff made some further disclosure on December 22, 2022. That further disclosure is of no consequence to this motion.

3. ISSUES

[11] The disclosure motions raise two issues:

a. Have the Sharpes met the threshold test and demonstrated a "tenable case" of abuse of process to support their disclosure request?

b. If so, which categories of materials should be disclosed, if any?

4. LEGAL FRAMEWORK AND ANALYSIS

4.1 Have the Sharpes met the threshold test and demonstrated a "tenable case" of abuse to support their disclosure request?

4.1.1 Threshold to be met for disclosure

[12] Respondents have the right to disclosure of all information that might be relevant to defending the proceedings against them. Information ought not to be withheld if there is a reasonable possibility that withholding of information will impair the right of the party to make full answer and defence, unless the non-

disclosure is justified by the law of privilege.[6] Rule 27 is a codification of this principle.

[13] At the hearing, the moving parties withdrew their request for additional disclosure with respect to the Statement of Allegations after we rendered our oral decision dismissing that portion of these motions that relates only to their motions for a permanent stay of this proceeding for the alleged abuse of process arising from the improper and unlawful disclosure of their compelled testimony. The moving parties are entitled to all materials in the possession of OSC Staff that might be reasonably relevant in advancing their motions for a stay.

[14] That said, a party seeking further disclosure is required to first lay a foundation to establish the materials sought might be relevant. As observed by a Law Society Panel in *Natale*,[7] a "request for disclosure cannot be allowed to encourage "fishing expeditions" or unduly prolix proceedings."[8] This means:

> … more than a bare assertion or mere speculation, something that can be maintained or defended against attack. There must be some concrete evidence or proof that can be held onto, that supports the allegation that the [prosecutor] engaged in an abuse of process.[9]

[15] As the panel in *Natale* noted, the hearing panel in *Igbinosun*[10] explained the reasons for the threshold test:

> There are serious implications in a motion for disclosure brought in the context of an allegation of abuse of process. If any accused or respondent could make an allegation of abuse of process and thereby require the prosecuting or professional authorities to turn over its counsel's brief and its confidential files, which would not otherwise be producible, then serious harm would be done to the prosecution of criminal or professional charges.[11]

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[6] *R v Stinchcombe*, [1991] 3 SCR 326

[7] *Law Society of Upper Canada v Deanna Lynn Natale*, 2011 ONLSHP 192 (***Natale***)

[8] *Natale* at 7

[9] *Natale* at para 8

[10] *Law Society of Upper Canada v Matthew Joseal Igbinosun*, 2010 ONLSHP 134 (***Igbinosun***)

[11] *Igbinosun* at para 52

[16] At the hearing, counsel for the moving parties accepted that they must articulate a "tenable" case for their abuse of process motions before disclosure is ordered. Both sides referred to the discussion, in *R v Ahmad*,[12] of the threshold that must be established. The party bringing the abuse of process motion:

> … must also be able to demonstrate that there is both a legal and a factual basis for the argument sought to be advanced. This demonstration must be rooted in the record, or be established by an offer of proof such as affidavit evidence, that can be dealt with expeditiously by the court.[13]

[17] The moving parties submit they have met this threshold. There is no bald allegation of wrongdoing here, they say, as the Tribunal has found that the Commission has breached its own enabling statute by filing the compelled testimony in the receivership proceeding in the Superior Court. The Commission compounded that wrongdoing, they say, by publishing a news release announcing the Receivership Order, which provided a link to the receiver's website. They say that following the Commission's disclosure of David's and Natasha's compelled testimony, there was extensive publicity that caused them to experience distress, humiliation, anguish and damage to their reputations.

[18] The moving parties submit that OSC Staff is advocating an incorrectly high standard for a "tenable case" to turn this motion into an assessment of the merits of their stay motions in order to avoid a consideration of the material they have requested.

[19] We accept OSC Staff's contention that, notwithstanding the Commission's breach of its own enabling statute, we must still consider whether the moving parties' stay motions have a reasonable prospect of success, before any disclosure is ordered. Whether the moving parties have established a tenable case of abuse of process must be considered in light of what abuse of process is, and when a proceeding will be permanently stayed for an abuse of process.

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[12] 2008 CanLII 27470 (ON SC) (***Ahmad***)

[13] *Ahmad* at para 42

4.1.2 Abuse of Process

[20] A stay of proceedings for an abuse of process is an extraordinary remedy that is available only in "the clearest of cases".[14] A party who seeks the drastic remedy of a permanent stay of a proceeding faces a high bar and must establish that the conduct violates the fundamental principles of justice underlying the community's sense of fair play and decency.[15] They must also establish that there is no alternative remedy available.[16] Generally, it is required that the wrong upon which the applicant relies would be manifested, perpetuated or aggravated in the continuation in the proceedings.[17]

[21] In this case there are several reasons each of which independently shows that the moving parties have not demonstrated a "tenable case" of abuse of process.

4.1.2.a This proceeding and the receivership proceeding are different proceedings

[22] The principal wrong the moving parties rely upon took place in the receivership proceeding before the Superior Court. They have not identified any act done in this proceeding that can be reasonably argued to constitute an abuse of process. At the time of the disclosure of the compelled testimony in the receivership proceeding, the version of the Act then in force permitted OSC Staff to disclose the compelled testimony in this enforcement proceeding and in the TCTO proceeding. Specifically, at that time s. 17(6) of the Act stated "A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1) [that is information regarding an investigation order and compelled examination, among other things], but may do so only in connection with, (a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act." Considering this wording of the Act, generally, disclosure of compelled testimony in an enforcement proceeding cannot be said to be abusive.

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[14] *R v Babos*, 2014 SCC 16 (***Babos***) at para 44

[15] *First Global Data Ltd (Re),* 2022 ONCMT 24 (***First Global***) at 43

[16] *Babos* at para 32

[17] *First Global* at para 34

[23] We do not regard the Superior Court application and this proceeding to be "all part and parcel of the same proceeding", as the moving parties suggest. That was OSC Staff's position which the Tribunal rejected in its March 30 Reasons. The Tribunal concluded the Commission's disclosure of the compelled testimony in the receivership application was not "in connection with" a proceeding "before the Commission or the Director under this Act" within the meaning of s. 17(6) of the Act, as it then read (see our comments below about a later amendment to that provision and how that amendment relates to a different point).

[24] The moving parties acknowledge they know of no case in which a proceeding has been stayed for an abuse of process committed in a different proceeding. They offer no policy reason why parties should be allowed to seek a stay in one proceeding for an abuse committed in another proceeding. Yet, they seek a stay of this proceeding for the alleged abuse in the receivership proceeding.

[25] To obtain disclosure for the stay motions, the moving parties must show some legal and factual basis rooted in the record that their motions for a stay have a reasonable possibility of success. They must establish there is a reasonable possibility that a continuation of the proceedings before this Tribunal would be oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency, and there is no alternative remedy available. They must show a reasonable possibility that the OSC's disclosure of the compelled testimony in the receivership proceeding would be manifested, perpetuated or aggravated in the continuation of the proceeding before this Tribunal to the extent of violating the fundamental principles of justice underlying the community's sense of fair play and decency.

[26] The Sharpes' ability to show that reasonable possibility is undermined not only by the fact that the OSC's disclosure was in a separate proceeding. It is also undermined by the April 29, 2022, amendment to s. 17(6) of the Act to provide that disclosure is now permitted in "a proceeding commenced or proposed to be commenced under this Act". The provision no longer limits itself to proceedings before the Tribunal or a Director. By that amendment, the Legislature has chosen to bring within s. 17(6), among other proceedings, a court application by the OSC to appoint a receiver. In other words, the very act that gives rise to the Sharpes' concern is now expressly permitted. While the amendment does not

have retroactive effect, the Legislature's expression of what is permissible undermines the Sharpes' submission today that what the Commission did would violate the community's sense of fair play.

4.1.2.b Adjudicative fairness of this proceeding is not affected

[27] We do not accept that it is reasonably arguable that the wrongful act of the Commission filing the compelled testimony in the Superior Court, without first obtaining a s. 17 order, would be manifested, perpetuated or aggravated in the enforcement proceeding before this Tribunal. The moving parties suggest that witnesses who might appear in the Tribunal's enforcement proceeding might have been tainted because they may have had knowledge of the compelled testimony of the moving parties. They point out that, during the investigation, not all witnesses were interviewed before the compelled testimony of the Sharpes was made public, and the witnesses, when they testify at the merits hearing, might have had access to the compelled testimony beforehand. Consequently, they submit there may have been "witness tainting" in this proceeding.

[28] While that may be, that witnesses come to know the content of the compelled testimony does not affect the adjudicative fairness of this proceeding. The moving parties' compelled testimony was quite properly made public in the TCTO proceeding. Moreover, s. 17(6)(b) permitted OSC Staff during the investigation to disclose the compelled testimony to other witnesses being interviewed under s. 13. The fact that witnesses know what the moving parties said in their compelled testimony may well raise issues of witnesses' credibility in the Tribunal enforcement proceeding but cannot be reasonably argued to constitute an abuse of process.

[29] The moving parties submit that the abuse in the receivership proceeding would be manifested, perpetuated or aggravated in this proceeding in two other ways. First, they point out that the moving parties would be cross-examined in these proceedings by the same entity that wrongfully disclosed their compelled testimony in the receivership proceeding. Second, they submit that if the Commission filed their compelled testimony in the receivership application in bad faith with the deliberate intention of breaching the Act, then the case against

them would be led by counsel employed by the very agency that acted in bad faith against them.

[30] We deal with the second submission first.

4.1.2.c There is no evidence of bad faith on the part of OSC Staff

[31] The moving parties request disclosure of a broad array of internal and external communications because that communication might show intentional wrongdoing such as a deliberate breach of the Act, or improper communication with police agencies or the media. On the return on their motions for a stay, the moving parties could reasonably argue that intentional wrongdoing or a deliberate breach of the Act by OSC Staff amounting to bad faith would fall within the residual category of abuse of process. Such abuse need not relate to the fairness of the proceedings. In the residual category, a stay may be ordered where the continuation of the proceedings would "connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."[18]

[32] The moving parties concede that on the record before us there is no evidence of bad faith on the part of OSC Staff. Counsel for David said that "We're obviously seeking disclosure that might shed light on that."[19] Counsel for Natasha explained more fulsomely "…while there is no evidence now, the question of whether or not there's evidence now isn't really the right question, the question is whether or not there is any evidence of either of those things period. And that's why we're bringing a disclosure motion. … There is no evidence that we have today."[20] He went on to ask rhetorically that if the requested material shows there is no bad faith on the part of OSC Staff, why has the OSC Staff not provided the material to prove that is the case.

[33] The moving parties seek to place the onus on OSC Staff to establish it did not act in bad faith. However, the onus is on them to first lay a foundation, rooted in the evidence, showing that the requested material might be relevant. Their frank concessions show they currently are unable to lay the necessary foundation and

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[18] *R v O'Connor*, [1995] 4 SCR 411 at para 73

[19] Hearing Transcript, January 30, 2023 at p 37 lines 22-23

[20] Hearing Transcript, January 30, 2023 at p 46 lines 9-15

leave no doubt that their motions for further disclosure to support their stay motions must fail.

[34] The moving parties recognize that the fact OSC Staff applied for a receivership order without first obtaining a s. 17(6) order is not evidence of a deliberate breach of the Act. We note that the record indicates OSC Staff believed s. 17(6) of the Act permitted the Commission to file the compelled testimony in the receivership proceeding. In an email dated April 30, 2021, in connection with the without notice TCTO application, Staff advised that they did not require a section 17 order in relation to the receivership application.[21]

[35] As well, OSC Staff took the position before the Court of Appeal for Ontario that a s. 17(1) order was not required in a receivership application before the Superior Court.[22] Counsel for David submits OSC Staff thumbed its nose at the Tribunal's March 30 Reasons, by taking this position after the Tribunal's decision. Whether OSC Staff should have disclosed the Tribunal's decision to the Court aside, the legal position it took supports the conclusion that OSC Staff did not seek a s. 17(1) order because it considered such an order was not necessary.

[36] We also reject the allegation that OSC Staff engaged in misconduct by serving and publishing the Statement of Allegations on March 31, 2022, the day after the Tribunal's March 30 decision. Sharpe alleges that the timing was "an obvious attempt to quell the expected media interest" in the Tribunal's finding that OSC Staff had breached the Act. Not only is Sharpe's allegation mere conjecture, but he identifies no prejudice he suffered as a result.

[37] We conclude that in the absence of any evidence that supports the allegation of bad faith of the Commission or its Staff, the moving parties' allegations are bare assertion and mere speculation that cannot reasonably be argued to warrant ordering disclosure of the materials sought.

4.1.2.d Cross-examination of moving parties by OSC Staff not abusive

[38] In the absence of any evidence of bad faith on the part of the Commission or its Staff, there is no prospect that Staff's cross-examination of the moving parties at

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[21] Exhibit 4, Affidavit of Wendy Kingston, sworn October 21, 2022, Tab 2K

[22] *Ontario Securities Commission v Go-To Developments Holdings Inc*, 2022 ONCA 328 at paras 13-16

the merits hearing in this proceeding could possibly be seen as oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency.

4.2 Which requested categories of materials should be disclosed, if any?

[39] Having found that the Sharpes have not demonstrated a "tenable case" with respect to the alleged abusive conduct of Staff, it is unnecessary for us to address the specific categories of disclosure requested.

5. CONCLUSION

[40] For these reasons we issued an order[23] dismissing the Sharpes' disclosure motions. The Sharpes have not met the threshold of a "tenable case" on the stay motions to support their disclosure request.

Dated at Toronto this 21st day of February, 2023

"Russell Juriansz"

Russell Juriansz

"Timothy Moseley"

Timothy Moseley

"Sandra Blake"

Sandra Blake

[23] *Bridging Finance Inc*, (2023) 46 OSCB 886