



Capital
Markets
Tribunal

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financiers

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Citation: *Nvest Canada Inc (Re)*, 2023 ONCMT 14

Date: 2023-04-19

File No. 2023-1

**IN THE MATTER OF
NVEST CANADA INC., GX TECHNOLOGY GROUP INC.,
SHORUPAN PIRAKASPATHY and WARREN CARSON**

REASONS FOR DECISION

**(Rule 3 and Subrules 6(4), 23(6)(b), 27(1), (2) and (3) and 28(5)(a) of the
Capital Markets Tribunal Rules of Procedure and Forms)**

Adjudicator: James Douglas

Hearing: In writing; final written submissions received March 20, 2023

Appearances: Brian Weingarten For Staff of the Ontario Securities
Commission

No one appearing for Nvest Canada Inc., GX Technology Group Inc.,
Shorupan Pirakaspathy or Warren Carson

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REASONS FOR DECISION

1. OVERVIEW

[1] Staff of the Ontario Securities Commission brought a motion in writing for procedural relief including, among other things, proceeding without notice to Warren Carson, waiving service of the Notice of Hearing and Statement of Allegations on Carson, waiving service of all future processes in this proceeding on the Respondents, and dispensing with OSC Staff's disclosure obligations with respect to the Respondents. By order dated March 23, 2023, I granted the relief sought in respect of Carson and some, but not all, of the balance of the relief sought.¹ The following are my reasons for the order.

2. PROCEDURAL HISTORY

[2] OSC Staff filed a Statement of Allegations on January 17, 2023, and a Notice of Hearing was issued on January 20, 2023. The Statement of Allegations makes allegations of unregistered trading and illegal distributions against the Respondents that, if proven at a hearing, would be serious breaches of Ontario securities law.

[3] The first attendance in this proceeding was on February 15, 2023. Counsel attended for OSC Staff. No one attended on behalf of the corporate or individual respondents. Mustafa Ghassan, as explained later in these Reasons, attended on his own behalf and clarified he was not attending on behalf of Nvest. Since the Respondents failed to attend, OSC Staff indicated their intention to bring this motion in writing.

[4] At the first attendance, OSC Staff filed an Affidavit of Service and Attempted Service of Sherry Brown affirmed February 8, 2023, relating to service of the Notice of Hearing and Statement of Allegations. At my request, Staff filed an amended version addressing certain technical deficiencies, affirmed March 6, 2023.² The Brown affidavit details the attempts made by OSC Staff to locate

¹ *Nvest Canada Inc (Re)*, (2023) 46 OSCB 2689

² Exhibit 1, Affidavit of Service and Attempted Service of Sherry Brown affirmed February 8, 2023 including Exhibit A referred to in the Affidavit of Sherry Brown (**Brown affidavit**)

Carson and serve him and the steps taken to serve the corporate respondents and Pirakaspathy.

- [5] In addition to the Brown affidavit, OSC Staff filed an Affidavit of Service of Yolanda Leung sworn March 10, 2023,³ evidencing: (a) service of the Notice of Motion and motion materials on the corporate respondents, Pirakaspathy, and Ghassan, all as I directed at the first attendance; (b) attempted service of the Notice of Motion and motion materials on Carson; and (c) service of the Notice of Motion and motion materials on a lawyer, Victor Wall, who had identified himself to OSC Staff following the first attendance as representing Fariha Jafri whose role will be explained later in these Reasons.

3. ANALYSIS AND DISPOSITION

3.1 Hearing in writing

- [6] OSC Staff asked that this motion be heard in writing. Under Rule 23(6) of the *Capital Markets Tribunal Rules of Procedure and Forms* (the **Rules**) the Tribunal may order that a hearing be conducted in writing if:

(a) the only purpose of the hearing is to deal with procedural matters; or

(b) the Panel is satisfied that there is good reason to conduct the hearing as a written hearing.

- [7] Both branches of the disjunctive test are satisfied in the case of this motion. Firstly, the purpose of the motion is to deal exclusively with procedural matters. Secondly, the motion is unopposed which, in these circumstances, is good reason to conduct the hearing in writing.

3.2 Waiver of service on Carson and proceeding without notice to Carson

- [8] OSC Staff sought orders permitting this motion to proceed without notice to Carson and waiving service of the Notice of Hearing and Statement of Allegations on him.

³ Exhibit 2, Affidavit of Service of Yolanda Leung sworn March 10, 2023

- [9] Subsection 6(1) of the *Statutory Powers Procedure Act*⁴ (**SPPA**) prescribes that a party receive “reasonable notice” of a hearing. Section 25.0.1 of the SPPA further gives the Tribunal the power to determine its own procedures and practices, both by making orders in particular proceedings and through the establishment of procedural rules which must be consistent with the SPPA.⁵ Rule 6(4) gives the Tribunal the discretion to grant orders waiving the service requirements otherwise prescribed in Rule 6.
- [10] The Brown affidavit details the efforts made by OSC Staff to both locate Carson and serve him with the Notice of Hearing and Statement of Allegations. These efforts include forensic steps to identify Carson’s current place of residence, attempts to serve him at his last known residence in India, attempts to locate him in Uganda based on representations he made in a YouTube video, attempts to enlist the assistance of the Uganda Capital Markets Agency to locate and serve him in Uganda and unsuccessful attempts to serve him electronically at an email address he had previously used in communications with OSC Staff.⁶ After detailing the efforts made to locate and serve Carson, Brown deposes that she “believes that Carson is currently residing at an unknown location in Uganda.”⁷ In my view, Brown’s evidence demonstrates that further efforts on the part of OSC Staff to locate and serve Carson would prove futile.
- [11] Rule 6(4) provides no express guidance as to when the Tribunal might exercise its discretion to waive service requirements. However, past authorities suggest that the discretion may be exercised where, as in this case, the evidence demonstrates that OSC Staff have “exhausted all reasonable efforts” to effect service on the party.⁸ Based on Brown’s affidavit evidence, I was satisfied that OSC Staff have made all reasonable efforts to locate and serve Carson and that the requested orders waiving service upon him should be made. In making these

⁴ RSO 1990. c S.22

⁵ SPPA, ss 25.0.1 and 25.1

⁶ Brown affidavit at paras 39–46

⁷ Brown affidavit at para 47

⁸ *Threegold Resources Inc (Re)*, 2021 ONSEC 15 (**Threegold**) at paras 11 and 12; *Lehman Brothers & Associates Corp (Re)*, 2011 ONSEC 36 at para 34

orders, I was also satisfied, on the facts of this case, that the requirement for reasonable notice under s. 6(1) of the SPPA had been met in respect of Carson.

[12] The Brown affidavit sets out that Carson was in email communication with OSC Staff as recently as January 27, 2022, attended a voluntary interview with OSC Staff on February 7, 2022, at which he provided a home address in India (which later proved to be of no avail when OSC Staff attempted to courier him correspondence) and was electronically sent a copy of correspondence on August 25, 2022, to an email address that he had previously used when communicating with OSC Staff.⁹

[13] Thereafter, the Notice of Hearing and the Statement of Allegations were posted on the Tribunal's website and published in the Ontario Securities Commission Bulletin. Notice of this motion was also posted on the Tribunal's website. In view of his alleged role in the matters at issue in this proceeding and considering the facts outlined in paragraph 12 of these reasons, it is my view that such posting and publishing satisfied the requirement for reasonable notice in respect of Carson in the circumstances of this case.

[14] Accordingly:

- a. I ordered that OSC Staff may bring this motion without notice to Carson; and
- b. I waived the requirement to serve Carson with the Notice of Hearing and Statement of Allegations.

3.3 Service on Nvest, GX Technology and Pirakaspathy

[15] OSC Staff requested orders validating service of the Notice of Hearing and Statement of Allegations on Nvest, GX Technology and Pirakaspathy. The Tribunal's jurisdiction to validate service is also found in Rule 6(4). Again, while Rule 6(4) is silent as to when the Tribunal might exercise its discretion to validate service, in my view it is intended to be exercised in instances where service has been effected in a manner other than as prescribed in Rule 6.

⁹ Brown affidavit at paras 39–42

- [16] Dealing first with Pirakaspathy, the Brown affidavit sets out that Pirakaspathy was served with the Notice of Hearing and Statement of Allegations at two of his email addresses on January 23, 2023. One of the email addresses was previously used when corresponding with OSC Staff and the other email address had been used in previous email correspondence with Carson.¹⁰ Subrule 6(2)(a) sets out that an unrepresented individual, such as Pirakaspathy, may be served electronically (*i.e.*, by email). Accordingly, I find that Pirakaspathy has been validly served with the Notice of Hearing and Statement of Allegations and no order is required validating service upon Pirakaspathy.
- [17] Electronic service on Pirakaspathy similarly constituted service of the Notice of Hearing and Statement of Allegations on GX Technology in accordance with the Rules. Subrule 6(2)(b) prescribes that service may be effected on an unrepresented company by electronically serving a director of the company. The Brown affidavit sets out that the corporate records of GX Technology list Pirakaspathy as the company's only current director.¹¹ While the Brown affidavit details various failed efforts on the part of OSC Staff to locate and serve GX Technology,¹² I find that the electronic service of the documents upon Pirakaspathy as described above establishes that GX Technology has also been served in a manner prescribed by the Rules. Again, no order is required validating service of the Notice of Hearing and Statement of Allegations upon GX Technology.
- [18] The facts with respect to service upon Nvest are somewhat more complicated. According to the Brown affidavit, Nvest is a federally incorporated company that was dissolved under the provisions of the *Canada Business Corporations Act*¹³ (**CBCA**) on November 19, 2022.¹⁴ The CBCA provides at s. 226(3) that service upon a dissolved corporation may be effected by serving the document on a person shown in the last notice filed under ss. 106 or 113. This includes "Form 6 Changes Regarding Directors" which lists the last directors prior to dissolution.

¹⁰ Brown affidavit at paras 24–27

¹¹ Brown affidavit at para 31

¹² Brown affidavit at paras 33–34

¹³ RSC 1985, c C-44

¹⁴ Brown affidavit at para 10

- [19] The corporate records of Nvest included in Exhibit A to the Brown affidavit show that Ghassan and Jafri were added as directors of the company on November 26, 2020, and November 2, 2020, respectively, and continued to be listed as directors at the date of Nvest's dissolution.¹⁵ The Brown affidavit sets out that each of Ghassan and Jafri was personally served with the Notice of Hearing and Statement of Allegations on January 26, 2023.¹⁶ Neither Ghassan nor Jafri dispute that they were personally served with the documents. Accordingly, I find that Nvest was served with the Notice of Hearing and Statement of Allegations in a manner prescribed by the Rules and consistent with the requirements of the CBCA. Therefore, no order validating service is required.
- [20] The only additional information to be considered in the analysis relating to the validity of service upon Nvest is that both Ghassan and Jafri (through her counsel) dispute the validity of their appointments as directors of Nvest, and therefore the validity of the Nvest records regarding its directors as filed in accordance with the CBCA. As stated above, Ghassan appeared before the Tribunal at the first attendance in this matter and advised the Tribunal of his position in this regard and emphasized that he does not represent Nvest and was unaware he was named as a director. Jafri's largely identical position was articulated by her counsel on her behalf.
- [21] While I have sympathy for the positions that Ghassan and Jafri appear to find themselves in, I am nevertheless of the view that Nvest has been validly served with the Notice of Hearing and Statement of Allegations. In my view, s. 226(3) of the CBCA permits a party seeking to serve a dissolved corporation to rely on information shown in the corporate records as filed with and maintained by the Director under the CBCA. In other words, it is not incumbent on the party seeking to effect service on the dissolved corporation to look behind those records or take steps to verify their accuracy.
- [22] In this case, OSC Staff served Nvest in accordance with the requirements of Rule 6(2)(b) and s. 226(3) of the CBCA, relying on Nvest's corporate records. In reaching this conclusion, I am comforted by the assurance given by OSC Staff at

¹⁵ Brown affidavit at paras 8–9 and 12

¹⁶ Brown affidavit at paras 14 and 23

the first attendance that no relief is or will be sought in this proceeding against Ghassan in his personal capacity and I assume that the same assurance applies in respect of Jafri. I further note that neither of these two individuals is named as a respondent in the Statement of Allegations.

[23] Based on the above, I find that Nvest, GX Technology and Pirakaspathy have been properly served with the Notice of Hearing and Statement of Allegations and, therefore, no order validating service upon them is required.

3.4 Prospective service relief

[24] OSC Staff sought relief from its obligations under the Rules to serve future processes in these proceedings on the respondents.

[25] None of the respondents appeared in person or through counsel at the first attendance. Similarly, none responded in person or through counsel to this motion. While the Brown affidavit does not go so far as to establish that any of the respondents have actively been evading service, it does establish that they were aware of OSC Staff's investigation into the matters at issue in this proceeding and that they previously corresponded with OSC Staff.¹⁷ Thereafter, the respondents showed no interest in participating in these proceedings, let alone keeping OSC Staff apprised of their current whereabouts. Moreover, Ghassan and Jafri, through her counsel, have made it clear that they do not represent Nvest and that they have no intention of participating in this matter as it moves forward.

[26] In support of its request to waive notice and service of future processes in this proceeding, OSC Staff references subrules 6(4) and 21(3). Rule 6(4) is discussed above and deals specifically with the discretion of the Tribunal to waive service requirements. Rule 21(3) provides as follows:

21 (3) Failure to participate

If a Notice of Hearing is served on a Party and the Party does not attend a hearing, the proceeding may continue in the Party's absence and the Party is not entitled to any further notice in the proceeding.

¹⁷ Brown affidavit at paras 35 and 40

- [27] Further, s. 7(1) of the SPPA provides that a Tribunal may proceed in the absence of a party who has been given notice.¹⁸
- [28] While strictly speaking subrule 21(3) and s. 7(1) of the SPPA may obviate the need for a prospective order waiving service on the facts of this case, and the Notice of Hearing itself provides clear warning (in bold letters) that failure to attend at the first attendance may lead to the hearing proceeding in the respondents' absence without further notice, the language is permissive and there remains the issue that Carson has not been served with the Notice of Hearing, although service has now been waived.
- [29] In any event, on the facts of this case and for the reasons set out above, I granted the relief sought by OSC Staff to waive service requirements for all future processes in this proceeding. This means that the respondents do not need to be served regarding future steps in the proceeding. However, in so doing, I note that notice of future steps will still be posted in the usual course on the Tribunal's website.

3.5 Disclosure relief

- [30] OSC Staff also sought relief from its ongoing disclosure obligations set out in Rules 27(1), (2) and (3).
- [31] OSC Staff rely upon the Tribunal's general power in Rule 3 to waive any of the requirements under the Rules at any time on such terms as the Tribunal considers appropriate in order to further the objectives of the Rules, namely to ensure that proceedings before the Tribunal are conducted in a "just, expeditious and cost-effective manner".¹⁹ On the facts as set out above, requiring OSC Staff to discharge its prospective disclosure obligations under Rules 27(1), (2) and (3) "would serve no practical purpose and would be a waste of [OSC] Staff resources".²⁰ Moreover, it would be inconsistent with the objectives of the Rules. Accordingly, I granted the relief requested by OSC Staff.

¹⁸ *Threegold* at para 9

¹⁹ Rules, r 1

²⁰ *Threegold* at para 13

4. CONCLUSION

[32] For the reasons set out above, on March 23, 2023, I ordered that:

- a. OSC Staff's motion may be heard in writing;
- b. the motion may be brought without notice to Carson;
- c. the requirements to serve Carson with the Notice of Hearing and Statement of Allegations are waived;
- d. the requirement that OSC Staff serve all future processes in this proceeding on the Respondents is waived; and
- e. OSC Staff's disclosure obligations in this proceeding in respect of the Respondents are waived.

Dated at Toronto this 19th day of April, 2023.

"James Douglas"

James Douglas