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Citation: *Bridging Finance Inc (Re)*, 2023 ONCMT 21
Date: 2023-05-29
File No. 2023-13

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

REASONS FOR DECISION

(Section 144.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators: Russell Juriansz (chair of the panel)
Timothy Moseley
Sandra Blake

Hearing: By videoconference, May 23, 2023

Appearances: Brian Greenspan For David Sharpe
Melissa MacKewn
Naomi Lutes
Alexandra Grishanova
Lawrence Thacker For Natasha Sharpe
Jonathan Chen
Mari Galloway
Johanna Braden For Staff of the Ontario Securities
Mark Bailey Commission
Erin Pleet For the receiver of Bridging Finance Inc.
No one appearing for Andrew Mushore

REASONS FOR DECISION

1. OVERVIEW

- [1] These are our reasons for dismissing David Sharpe’s and Natasha Sharpe’s request that we vary an earlier decision¹ (the **Disclosure Decision**) on the basis of new law.
- [2] The Disclosure Decision related to the Sharpes’ pending motions to stay this proceeding because of alleged abuse of process; specifically, because the Commission filed the Sharpes’ compelled testimony in court, in an application for appointment of a receiver, without first obtaining from the Tribunal an order under s. 17 of the *Securities Act*² (the **Act**) authorizing disclosure of that testimony. In support of their stay motions, the Sharpes sought any documents that might exist relating to that choice by the Commission. In the Disclosure Decision, we dismissed that request.
- [3] In this application for a variation of the Disclosure Decision, the Sharpes rely on the Supreme Court of Canada’s recent judgment in *R v Haevischer*,³ which came after we had issued the Disclosure Decision. *Haevischer* defined a new, more rigorous standard that a Crown must meet in satisfying its onus when it moves for summary dismissal of a stay application in a criminal case.
- [4] On May 23, 2023, we dismissed the Sharpe’s request that we vary the Disclosure Decision.⁴ We were not persuaded that *Haevischer* changes the standard the Sharpes had to meet in satisfying the onus on them in claiming further disclosure from the Commission in relation to their pending motions for a stay.

2. TIMING OF THIS APPLICATION

- [5] The Sharpes filed this application on May 19, less than one business day before the scheduled hearing of their stay motions. They say that they were following a

¹ *Bridging Finance Inc (Re)*, (2023) 46 OSCB 886 (order, for reasons to follow); *Bridging Finance Inc (Re)*, 2023 ONCMT 8 (reasons)

² RSO 1990, c S.5

³ 2023 SCC 11

⁴ *Bridging Finance Inc (Re)*, Order dated May 23, 2023 (File No. 2023-13)

process contemplated in the Divisional Court's May 16 quashing⁵ of their application for judicial review of the Disclosure Decision. At the hearing of Staff's motion to quash the judicial review application, Staff did not oppose that contemplated process, but did advise that it would oppose any variation application on its merits.

[6] At the beginning of this Tribunal's May 23 hearing that had been set for the Sharpes' stay motions, the parties advised that they were prepared to argue this application for a variation. We decided to hear it despite the short timeframe, because if we were to grant the requested variation, it was likely that the stay motions would not proceed.

3. ANALYSIS

3.1 Introduction

[7] The main issue before us is whether we should redo our analysis of the disclosure request, this time applying the standard in *Haevischer* (*i.e.*, are the subject stay motions "manifestly frivolous"?) instead of the standard that we applied and that the parties agreed at the time that we should apply (*i.e.*, did those moving for a stay show a "tenable case"?).

[8] Section 144.1 of the Act permits us to vary our earlier decision if we conclude that doing so would not be prejudicial to the public interest. That power ought to be exercised only in the rarest of circumstances,⁶ but if the Sharpes are correct that *Haevischer* changes the applicable law, then this variation request meets the Tribunal's criteria for considering a variation.⁷ This is especially true because the Sharpes' stay motions are still pending.⁸

[9] We decided that *Haevischer* does not change the standard that is relevant to the Sharpes' disclosure motion, for three reasons. We explore each of them in turn.

⁵ *Sharpe and Sharpe v The Capital Markets Tribunal*, 2023 ONSC 2819 (Div Ct) at para 25

⁶ *Pro-Financial Asset Management Inc (Re)*, 2017 ONSEC 39 at para 16

⁷ *X Inc (Re)*, 2010 ONSEC 26 at para 32

⁸ After we gave our oral decision dismissing this variation application, but before we issued these reasons, we heard and later dismissed the Sharpes' stay motions. See *Bridging Finance Inc (Re)*, Order dated May 23, 2023 (File No. 2022-09).

3.2 *Haevischer* is a criminal case, and does not extend the standard to the administrative context

- [10] First, *Haevischer* is a criminal case. The Court’s reasons speak only to that setting, not to proceedings before administrative tribunals.
- [11] *Haevischer* deals with requests by the Crown for summary dismissal of applications to stay criminal proceedings. The Supreme Court of Canada saw its task as determining the appropriate threshold for such summary dismissals, and concluded that a stay application can be summarily dismissed only where the application is manifestly frivolous.⁹ That conclusion balanced trial fairness with trial efficiency, an underlying value that is essential to mitigating the systemic problem of undue delay in criminal cases.¹⁰ Unfortunately, requests for summary dismissal have become so commonplace that they often consume scarce resources unnecessarily and therefore undermine rather than promote efficiency, the very goal they were designed to achieve.¹¹
- [12] It is against this backdrop that the Court determined to make it more difficult for the Crown to obtain a summary dismissal of a stay application.¹² In deciding on the new standard, the Court held that rules and thresholds from the civil context cannot simply be adopted in the criminal domain, because of the unique features of criminal cases, where trial fairness is a constitutional imperative and an accused’s liberty is often at stake.¹³ The Court acknowledged that the standard of “no reasonable prospect of success” (which we consider to be synonymous with the “no tenable case” standard we applied in the Disclosure Decision) is a useful standard in areas of law other than the criminal area. However, the Court said, that standard was ill suited to summary dismissal in the criminal context.¹⁴
- [13] In adopting the new “manifestly frivolous” standard (*i.e.*, summary dismissal of a stay application is available only where the Crown establishes that the stay

⁹ *Haevischer* at paras 40-41

¹⁰ *Haevischer* at paras 46 and 49

¹¹ *Haevischer* at para 52

¹² *Haevischer* at para 60

¹³ *Haevischer* at paras 56-57

¹⁴ *Haevischer* at para 77

application is manifestly frivolous), the Court made clear repeatedly that the new standard applies in criminal cases.¹⁵

[14] Proceedings before this Tribunal are administrative and regulatory, not criminal or quasi-criminal.¹⁶ There is nothing in the Court's judgment that suggests that the standard should also apply in the civil or administrative context.

3.3 *Haevischer* did not involve a disclosure request

[15] The second reason *Haevischer* does not apply here is that we are considering a disclosure request, not a motion for summary dismissal of an application for a stay of proceedings for abuse of process. The two are fundamentally different.

[16] The stakes are not the same for the two types of motions. The Sharpes' disclosure request is ancillary to their stay motions, and their stay motions continue to a hearing on the merits, no matter what the result of the disclosure motion is. In contrast, a motion for summary dismissal of a stay application in the criminal context potentially brings an end to that stay application.

[17] In addition, the considerations for each are distinct, because the constitutional and factual imperatives that animated the imposition of a more rigorous standard in *Haevischer* do not appear here. There is no similar imperative to lower the bar in Tribunal proceedings for respondents to seek disclosure of information, the existence of which in this case is mere speculation. The Sharpes failed to provide a principled basis for our applying a standard that was customized for one setting in this different setting.

3.4 The onus lies upon a different party

[18] The third reason *Haevischer* does not apply here relates to where the onus lies.

[19] In *Haevischer*, the Crown sought to quash a stay motion and it therefore bore the onus. Here, the onus is on the respondent who seeks disclosure in aid of a stay motion. This difference underscores the need for the applicable standard to be context-specific.

¹⁵ *Haevischer* at paras 1, 60 and 71, for example

¹⁶ *Evgueni Todorov and Sophia Nikolov v Ontario Securities Commission*, 2018 ONSC 4503 (Div Ct) at para 49

4. CONCLUSION

[20] The Supreme Court of Canada's judgment in *Haevischer* explicitly adopts a new standard for motions for summary dismissal of stay applications in criminal cases. The Court makes no suggestion that the new standard ought to apply on a disclosure motion in aid of a stay application in the administrative context. Further, the onus in one instance lies with what is conceptually the opposite party in the other instance.

[21] Because of these differences, we cannot accept the Sharpes' contention that *Haevischer* has changed the law that applies to the Disclosure Decision. For these reasons, we dismissed the Sharpes' application.

Dated at Toronto this 29th day of May, 2023

"Russell Juriansz"

Russell Juriansz

"Timothy Moseley"

Timothy Moseley

"Sandra Blake"

Sandra Blake