CITATION: Echelon Wealth Partners Inc. v. mdf commerce inc., 2024 ONSC 5809
COURT FILE NO.: CV-21-00674211-0000
DATE: 20241021

ONTARIO SUPERIOR COURT OF JUSTICE

RE: ECHELON WEALTH PARTNERS INC., Plaintiff

-and-

MDF COMMERCE INC., Defendant

BEFORE: L. Brownstone J.

COUNSEL: *David Z. Seifer*, for the Plaintiff

Eli Mogil and Brittany Cerqua, for the Defendant

HEARD: June 4, 2024

ENDORSEMENT

Introduction

[1] The plaintiff, Echelon Wealth Partners Inc. ("Echelon"), is a wealth management and capital markets firm that advises clients on strategic and financial matters. The defendant, mdf commerce inc. ("mdf"), is a publicly traded e-commerce and e-procurement company that specializes in developing integrated commerce technology solutions for businesses.

[2] In about March 2020, mdf committed to a new strategic plan focused on growth by acquisition. Its existing credit facilities with National Bank were expiring and were insufficient to support the plan, particularly in respect of its debt to EBITDA ratio requirements.

[3] mdf engaged Echelon as its sole financial advisor to assist it in designing and sourcing a credit facility that would support its plans.

[4] On June 9, 2020, the parties entered into a one-year agreement that set out the terms of the arrangement (the "Agreement"). Under the Agreement, mdf agreed to pay Echelon a success fee or fees on the closing of a financing transaction, as defined.

[5] In October 2020, Echelon sourced a credit facility from various arms of the Bank of Nova Scotia ("BNS") and its affiliate, Roynat Capital Inc. ("Roynat"). The financing included a revolving facility of $35 million provided by BNS and a term facility of $15 million provided by Roynat.

[6] The term sheet described these facilities as:

a. a revolving credit facility from BNS of up to $35 million for "general corporate purposes, including working capital requirements, permitted capital expenditures, permitted distributions and permitted acquisitions". This facility could be increased by up to $25 million; and

b. A non-revolving credit facility from Roynat of $15 million to finance working capital, revenue growth, or acquisitions.

[7] The terms of these facilities restricted mdf's ability to make acquisitions without the lender's prior written consent. Among other restrictions, mdf required prior written consent for any single purchase that exceeded $5 million, or multiple purchases that in aggregate exceeded $15 million in a fiscal year.

[8] mdf paid Echelon a success fee for that transaction in accordance with the Agreement.

[9] In about early 2021, while the Agreement was still in effect, mdf started to consider a share purchase of a large enterprise called Periscope Intermediate Corporation ("Periscope"), a $270 million transaction. Prior to the Agreement's expiry, mdf began sourcing credit facilities with BNS to assist it with the purchase, without involving Echelon in the sourcing or arranging of the credit facilities.

[10] The financing package for the Periscope acquisition was to comprise several parts, two of which are relevant to this dispute. First, there would be a $67.84 million "bought deal" by which Echelon and other underwriters would purchase the securities at a lower price than a market offering and then sell the shares. Second, BNS committed to providing a revolving facility in the amount of $50 million and a non-revolving credit facility in the amount of $20 million, representing a $20 million increase to the amount of the 2020 credit facility.

[11] The vendor of Periscope's shares was concerned about the bought deal portion of the financing. It insisted that mdf obtain financing to "backstop" the $67.84 million that was to be raised in the bought deal, in case the bought deal fell through. BNS agreed to back the bought deal. It committed $67.84 million in temporary bridge financing for this purpose. The Periscope transaction closed on August 31, 2021, after the Agreement expired.

[12] On September 9, 2021, Echelon invoiced mdf for a success fee under the Agreement in the amount of $658,800, which equated to 0.75 percent of these additional credit facilities of $87.84 million ($137.84 million less the 2020 credit facility amount of $50 million), plus taxes.

[13] Echelon moves for summary judgment for payment of these fees. mdf states Echelon is not entitled to any such fee and moves for summary judgment dismissing Echelon's claim against it.

The test for summary judgment

[14] Under r. 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary

judgment and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[15] In accordance with *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 57, in order to be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she can fairly resolve the dispute.

[16] The court must first determine if there is a genuine issue requiring trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring trial if the evidence allows the court to fairly and justly adjudicate the dispute through this proportionate procedure: *Hryniak*, at para. 66.

[17] If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2). These powers may be used if it would not be against the interests of justice to do so: *Hryniak*, at para. 66.

[18] The moving party bears the evidentiary burden of showing there is no genuine issue requiring a trial. Parties are required to put their best foot forward: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11.

[19] In the motions before me, the facts are not contentious. I am confident that I am able to find the facts on the materials before me, and that I am able to fairly and justly adjudicate this dispute using this proportionate procedure. The parties were in substantial agreement that the matter could be determined by this procedure.

The Agreement's governing provisions

[20] The preamble to the Agreement states:

> Echelon … understands that [mdf] is looking to raise additional capital through the refinancing of [mdf's] existing debt facilities, to fund strategic initiatives and for general working capital requirements (referred to as the "**Transaction**").
>
> The purpose of this agreement (the "**Agreement**") is to confirm the engagement of Echelon by [mdf] as its sole and exclusive financial advisor in respect of the Transaction upon the terms and conditions set forth herein (the "**Engagement**").

[21] Under "Scope of Engagement" and subheading "Phase 3: Negotiation and Closing", the Agreement states in part as follows:

> [mdf] agrees that Echelon shall be [mdf's] sole and exclusive financial advisor in connection with the Transaction. [mdf] shall (i) concurrent with the execution and delivery of the Engagement, identify to Echelon all potential counterparties or financiers who have been in contact with the Company with respect to a similar

transaction prior to Echelon's engagement; and (ii) promptly upon receipt of an inquiry, identify to all potential counterparties or financiers who make inquiries to the Company with respect to a transaction during the term of Echelon's engagement. **Except as otherwise mutually agreed in writing, [mdf] shall not initiate discussions regarding a similar transaction with any potential counterparty or financier, except through Echelon.** (emphasis added)

[22] The fees section provides:

> **Fees**. The fees payable to Echelon by [mdf] in respect of the Engagement shall be as follows:
>
> (a) **Work Fee.** A monthly work fee of $15,000 per month, plus any applicable taxes, will be payable for each of the first three (3) months, with the first $15,000 payable upon signing of the agreement (the "**Work Fee**"). 100% of the Work fee shall be creditable against any Success Fee (as defined below) payable.
>
> (b) **Success Fee**. [mdf] agrees to pay Echelon a fee (the "**Success Fee**") payable by money transfer on the closing of the Financing Transaction (as defined below). The Success Fee shall be computed as the sum of:
>
> - 0.75% of the Aggregate Consideration (as defined below) up to $30 million; plus
> - 2.00% of Aggregate Consideration in excess of $30 million, but less than $45 million; plus
> - 3.00% of the Aggregate Consideration in excess of $45 million; plus
> - 0.75% of [the] gross amount of capital issued or raised in connection with a Financing Transaction with the "Identified Parties" (as defined below);
>
> If a Financing Transaction (as defined below) is completed, the Success Fee shall be subject to a minimum of $225,000.
>
> A **Financing Transaction** shall be defined as any Transaction or series of related Transactions whereby the Company receives capital in the form of accordions (when fully committed), **commited** *(sic)* **bank financing [**emphasis added], debt re-financing, or debt

> securities. For the abundance of clarity, any Success Fee owing on an accordion portion of a Financing Transaction shall be due and payable at the time when such accordion is committed by the lender.
>
> **Aggregate Consideration** shall be defined as the total gross amount of capital issued or raised in connection with the Financing Transaction except for the gross amount of capital issued or raised in connection with a Financing Transaction with any of the Identified Parties.
>
> **Identified Parties** shall include National Bank of Canada, Bank of Nova Scotia and its affiliate RoyNat, Caisse Centrale Desjardins, Banque de développement du Canada, Fonds de Solidarité FTQ and Investissement Québec.

[23] The agreement further provides for certain fees to be protected when the agreement terminates or expires. It states:

> 3. **Protected fees. Upon the termination or expiry of this engagement prior to completion of a Financing Transaction** [emphasis added], Echelon shall prepare a Prospective Financier List and deliver it to the Company. The Prospective Financier List shall only include persons or entities who Echelon actually approached or with whom discussions took place during Echelon's engagement. **Echelon will be entitled to the Success Fee in the event that the Company completes a Financing Transaction with a person or entity on the Prospective Financier List at any time prior to the date that is 12 months after the termination or expiry of this engagement.** [Emphasis added]

[24] Termination and survival are addressed towards the end of the Agreement, with the following provisions:

> 13. **Termination**. This Agreement is effective from the date it is executed below for a period of twelve (12) months unless otherwise extended by written agreement between both parties. Following such period this Agreement may be terminated by either party at any time with or without cause, upon written advice to that effect to the other party; provided, however, that notwithstanding any termination Advisor will continue to be entitled to any fees and permitted expenses applicable under the sections titled Fees, Other Services, Expenses and Taxes hereof.
>
> 14. **Survival**. The provisions contained in the sections titled Fees, Other Services, Expenses, Taxes, Confidentiality, Disclosure of Advice, Right of First Refusal, Financing Activity, Indemnity and

> Legal Proceedings, Survival and Governing Law of this Agreement and in the indemnity in Schedule A shall survive, and shall continue in full force and effect, subsequent to the termination of this Agreement. In the event that any indemnity or provision thereof shall be determined to be invalid or unenforceable in any respect, such determination shall not affect such provision in any other respect or any other provision hereof, all of which shall remain in full force and effect.

[25] There is an entire agreement clause.

[26] Thus, the court must determine whether the 2021 credit facilities are a Financing Transaction within the meaning of the Agreement, whose fee is protected by the Agreement and payable.

Position of the parties

[27] Echelon argues it is clear that the parties intended for Echelon to be paid a success fee where mdf approached or had discussions with a lender during the term of its engagement, and that lender agreed or committed to make credit available to mdf for the purpose of funding mdf's strategic initiatives and working capital. This was so whether the credit was committed in a single transaction or over a series of transactions.

[28] Echelon argues that the 2021 credit facilities transactions are a Transaction or Related Transaction within the meaning of the Agreement, and that Echelon is entitled to its fee as a Related Transaction or as a protected fee under s. 3 of the Agreement. In its factum Echelon argued in the alternative that it is entitled to its fee on the basis of quantum meruit. It did not pursue this position in oral argument.

[29] mdf argues that the 2021 credit facilities are not related transactions, that they are not protected fees under the Agreement, and that the temporary bridge financing does not meet the definition of capital received under the Agreement. Therefore, Echelon is not entitled to any success fee.

Principles of contractual interpretation

[30] The goal of contractual interpretation is to determine the objective intention of the parties. This involves reading the contract as a whole and giving words their ordinary and grammatical meaning. The meaning ascribed to the contractual terms is to be consistent with the surrounding circumstances known to the parties at the time the contract was entered into: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47 [*Creston Moly*].

[31] The surrounding circumstances include the commercial purpose of the contract, including the genesis of the transaction as well as its context: *Creston Moly*, at paras. 57-58. A commercially absurd interpretation is to be avoided.

[32] The role of the court is to interpret, not rewrite, the agreement the parties entered into.

Are the 2021 credit facilities a Related Transaction?

[33] The parties spent a significant amount of time arguing whether the 2021 credit arrangements were or were not a Related Transaction (a term undefined in the Agreement). In my view, the germane question is whether the transaction is a Financing Transaction as defined in the Agreement. However, given the arguments about whether the transactions were related, I will address this issue first.

[34] Echelon argues that the two facilities are clearly related. The only differences between the 2020 and 2021 facilities are that Roynat is not a party to the 2021 facility, the quantum was increased, and the Periscope share acquisition was expressly permitted.

[35] mdf argues that these are the material provisions and that the rest is "boilerplate". mdf takes the position that the 2020 and 2021 credit facilities are not in substance "Related Transactions" for two main reasons. First, the lender was only BNS, not BNS and Roynat. Second, the 2020 credit facilities were for broad purposes and contained significant limitations, particularly with respect to acquisitions, while the 2021 facility was specifically aimed at the Periscope transaction, a transaction that would not have been foreseen or possible under the 2020 facility.

[36] mdf argues that the fact that one of the original lenders reappears in subsequent financing transactions cannot be sufficient to render the new transaction a related one. To find otherwise would result in mdf being obliged to pay Echelon in perpetuity, any time it arranges financing with BNS in the future. Such an interpretation would be absurd and contrary to the principles of contractual interpretation.

[37] Echelon points to various documents, including mdf's own characterization of the new BNS financing in various materials, to support its position that the transaction is a related one.

[38] BNS's August 11, 2021, commitment letter states as follows:

> Reference is made to that certain credit agreement dated as of October 14, 2020 among mdf commerce inc., as borrower, and The Bank of Nova Scotia and Roynat Capital Inc, as lenders, as amended on March 1, 2021 (as so amended and as further amended, restated, supplemented and otherwise modified from time to time, the "**Existing Credit Agreement**"). The intent of the Borrower and The Bank of Nova Scotia is that the Facilities (as defined below) be documented through Credit Documents that are based substantially on the terms of the Existing Credit Agreement and the documentation accessory thereto with such modifications and amendments necessary to give effect to the provisions hereof….

[39] Second, in its letter of intent for the proposed Periscope acquisition, mdf states that it has the support of its lead lender. Echelon argues that its introduction of the lead lender in 2020 is consistent with mdf's desire in seeking the 2020 credit facilities to find a lender that had the capacity to support its growth strategy in the near and long-term.

[40] Third, on June 29, 2021, BNS issued a "highly confident" letter to mdf advising that it was highly confident of its ability to arrange the financing and bridge facility to support the completion of the acquisition. That letter refers to the fact that mdf was seeking to "increase the size of mdf's existing C$50 million revolving and term credit facilities by up to C$70 million", including a one-year bridge facility of $50 million.

[41] mdf made similar statements, referring variously to "revised", "amended", or "upsized" facilities in various places including letters of intent, an investor presentation, a publicly filed news release, publicly filed marketing materials, and in an earnings call for the first quarter of 2022.

[42] mdf counters by pointing to other references where the facilities are referred to as "new credit facilities". It argues that these statements are irrelevant to the true characterization of whether the facilities are related.

[43] I find that the transaction is a related one under the Agreement. It is financing that is, in BNS's words, based substantially on the terms of the 2020 facility, negotiated by Echelon for mdf. mdf needed assistance securing the financing in 2020 in order to, among other things, facilitate its acquisition objectives. The Periscope acquisition was of a different scale than could be accommodated by the 2020 facilities. But the increased credit to facilitate the transaction was based on, and related to, the 2020 agreements. The references to the credit facilities as "amended" is apt.

[44] I find this interpretation consistent with the surrounding circumstances in which the Agreement was negotiated in 2020. mdf wished to embark on a period of expansion and acquisition. It did not have the available credit to do so. It engaged Echelon to assist in obtaining the credit facilities it required to be able, among other things, to expand through acquisition. The parties agreed that Echelon had the exclusive right to represent mdf in its search for adequate credit facilities and that mdf would not initiate discussions regarding a similar transaction with any potential financier except through Echelon during the course of the Agreement.

[45] This interpretation is also consistent with the Agreement as a whole. mdf needed Echelon to source capital for it for both general use and to support a period of growth and acquisition.

Is the fee a protected fee under section 3 of the Agreement?

[46] Irrespective of whether the transaction is a related one, section 3 of the Agreement protects Echelon's fees for a Financing Transaction with prospective financiers completed within 12 months of the Agreement's termination or expiry.

[47] I do not accept mdf's argument that the protected fee clause applies only if no financing transaction is completed during the one-year term of the Agreement. This would limit the scope of the Agreement to a single transaction. Had the Agreement been so limited, it would have provided that it terminated upon the earlier of one year or a completed transaction. It did not. A Financing Transaction was defined as "**any** Transaction or series of related Transactions" (emphasis added).

[48] Thus, the Agreement contemplated that payment could be based on a series of transactions, not only a single transaction. mdf contracted to protect Echelon for a period of time after the

Agreement terminated or expired for Financing Transactions that were underway but not completed during the course of the Agreement. Had the Agreement been limited to a single Financing Transaction or had it expired or terminated upon the payment of a success fee, it would have said so.

[49] Nor do I accept mdf's argument that Echelon cannot rely on the protected fee clause because it failed to provide mdf with a Prospective Financier list. When mdf was being examined for discovery, it was asked about the assertion in its statement of defence that "Echelon never prepared a prospective financier list at expiry". The following exchange occurred:

> A. Okay, so and you are asking me if I know, knew, that Echelon had talked to Scotiabank?
>
> Q. Yes.
>
> A. Of course I knew that.
>
> Q. Correct.
>
> A. They gave us the list of every bank they spoke to.
>
> Q. Okay. I would like you to produce the communications you received from Echelon with the list of banks that they spoke to.
>
> MR. MOGIL: Well, why? Counsel, here is something that we are all in violent agreement of.
>
> …
>
> MR. MOGIL: Yeah, obviously, they provided the agreement, and he is acknowledging that he is aware that Echelon was working and gave the names of other ones. No one is disputing that.

Did the bridge financing constitute "capital received" by mdf so as to fall within the definition of a Transaction or Related Transaction?

[50] The definition of Financing Transaction is a transaction in which mdf "receives capital in the form of accordions (when fully committed), **committed bank financing**, debt refinancing, or debt securities" [Emphasis added].

[51] mdf argues that, even if a fee is payable on the $20 million credit facility (and its primary position is that it is not), the $67.84 million bridge financing is not captured by the Agreement. That is, even if the credit facilities are a Transaction or Related Transaction, only the $20 million increased credit meets the definition of "Related Transaction" in the Agreement. This is because no capital was received by mdf under the temporary bridge financing.

[52] mdf points to the genesis of this bridge financing and submits that clearly, this financing was never intended to be drawn upon. mdf's position is that either the bought deal would proceed and the transaction would close, or the bought deal would fail and the transaction would not close. In neither scenario would the bridge financing be drawn upon. mdf states that it was simply not financially viable for it to complete the purchase relying on credit and not the bought deal, and mdf would not have closed the deal had it come to that. Mr. Filiatreault, mdf's president and CEO, testified that, had the bought deal not proceeded, mdf would not have drawn on the backstop credit facility – it would have "dropped" the deal. The only purpose of that credit facility, from mdf's perspective, was to reassure the vendor.

[53] mdf argues that it would be unfair for Echelon to benefit from the illusory bridge financing, since the success of the bought deal was largely in its hands, as co-lead underwriter of that deal.

[54] In support of its argument, mdf relies on several documents that indicate that the bridge financing amount actually provided would be reduced by the amount raised by the bought deal. Such statements are included in the short form prospectus, the August 2021 commitment letter, and the term sheet appended to the August 2021 commitment letter.

[55] The difficulty with mdf's arguments is that the Agreement contemplates the payment of a fee upon mdf receiving "capital in the form of accordions (when fully committed), **committed bank financing**, debt refinancing, or debt securities" (emphasis added). mdf concedes that Periscope required the committed bridge financing to be in place in order to proceed with the transaction. mdf was not required to draw on the committed bank financing for the definition of Financing Transaction in the Agreement to be met.

[56] I do not find the statements mdf refers to in paragraph 54 above support its argument. According to these statements, if the amount raised in the bought deal were zero, there would be no reduction in the amount forwarded by BNS.

[57] It is true that the commitment letter for the credit facilities was issued on the same day as the bought deal letter was executed. mdf argues it only signed the purchase agreement once it knew the bought deal was in place, which is when the formal term sheet was signed on August 11, 2021. mdf relies on the evidence on cross-examination of Mr. Cusson on behalf of Echelon, who agreed that the custom for the underwriting of a bought deal was for a formal term sheet to be signed as a first step, followed by a separate underwriting agreement. However, Mr. Filiatreault for mdf testified as follows:

> Q. That financing plan, or at least the bought deal portion of it, it wouldn't have been finalized until that underwriting agreement was entered into on August 17, 2021, when Echelon along with other members of the syndicate agreed to buy shares from mdf. Correct?
>
> A. Yes, correct.

[58] August 17 is six days after mdf signed the purchase agreement. I find that while mdf was confident the bought deal would proceed on August 11, 2021, the bought deal was not concluded on that date. The commitment letter did not negate the need for the committed bank financing in

form of the bridge loan on August 11, 2021, the date mdf signed the Periscope agreement. The capital in the form of the committed bank financing existed and garnered a success fee for Echelon. Those were the contractual terms the parties agreed to.

[59] mdf's argument is essentially that the bridge financing was illusory. However, I do not agree that the $67.84 million facility was not committed bank financing. I therefore see no basis upon which it should be excluded from the definition of a Financial Transaction in the Agreement, for which a success fee is payable.

[60] I find that the 2021 credit facilities meet the definition of Financing Transaction in the Agreement. The facilities were negotiated during the currency of the Agreement, when Echelon was mdf's sole financial advisor. According to the terms of the Agreement agreed to by the parties, Echelon is entitled to its success fee.

Disposition

[61] Echelon's motion for summary judgment is granted. mdf's motion for summary judgment dismissing the claim is dismissed. mdf shall pay to Echelon a success fee in the amount of $658,800 plus taxes of $98,655.30. The parties have agreed on costs in the all-inclusive amount of $73,843.95. mdf shall pay costs in this amount to Echelon.

L. Brownstone J.

Date: October 21, 2024