



Capital  
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des marchés  
financiers

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Citation: *Sharpe (Re)*, 2022 ONCMT 18  
Date: 2022-07-05  
File Nos. 2021-26 and 2021-15

**IN THE MATTER OF  
DAVID SHARPE**

**and**

**IN THE MATTER OF  
BRIDGING FINANCE INC., DAVID SHARPE, BRIDGING INCOME FUND LP,  
BRIDGING MID-MARKET DEBT FUND LP, BRIDGING INCOME RSP FUND,  
BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT  
INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING  
SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, and BRIDGING INDIGENOUS  
IMPACT FUND**

**REASONS AND DECISION**

**(Subsection 2(2) of the *Tribunal Adjudicative Records Act, 2019*, SO 2019, c 7,  
Sch 60, and Subrules 22(2)(c) and 22(4) of the *Capital Markets Tribunal Rules  
of Procedure and Forms*)**

**Adjudicators:** Timothy Moseley (chair of the panel)  
Lawrence P. Haber  
M. Cecilia Williams

**Hearing:** In writing, final written submissions received April 28, 2022

**Appearances:** Mark Bailey For Staff of the Ontario Securities  
Adam Gotfried Commission  
Alistair Crawley For David Sharpe  
Melissa MacKewn  
Alexandra Grishanova

## REASONS AND DECISION

### 1. OVERVIEW

- [1] On March 30, 2022, this panel issued a decision<sup>1</sup> following a hearing in two proceedings:
- a. an application by Staff of the Ontario Securities Commission (Tribunal file number 2021-15) for an extension of a portion of a temporary order originally issued against various entities related to Bridging Finance Inc. (**Bridging**), and against David Sharpe; and
  - b. an application by Sharpe (Tribunal file number 2021-26) seeking:
    - i. the revocation or variation of an investigation order that the Commission issued under s. 11 of the *Securities Act*<sup>2</sup> (the **Act**); and
    - ii. an order that certain portions of the adjudicative records and written submissions in the two proceedings be kept confidential, without access by the public.
- [2] As we directed, that hearing and the resulting decision were limited to two preliminary questions related to the first of Sharpe's two requests, *i.e.*, for a revocation or variation of the investigation order. We deferred consideration of the request for a confidentiality order and in our reasons for our March 30 decision we invited the parties to make written submissions on that question. Sharpe and Staff did so.
- [3] For the reasons set out below, we dismiss Sharpe's request for the confidentiality order. We disagree with Sharpe's submission that a confidential hearing is required by law. We find that, among other reasons, in view of the considerable time that has elapsed since public disclosure of the subject materials, Sharpe has failed to meet the high bar required for us to depart from the general principle that Tribunal proceedings should be open to the public.

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<sup>1</sup> *Sharpe (Re)*, 2022 ONSC 3 (**Sharpe #1**)

<sup>2</sup> RSO 1990, c S.5

## **2. BACKGROUND**

- [4] On April 30, 2021, and without notice to any of the parties in these proceedings, the Commission issued a temporary order under s. 127 of the *Act*.<sup>3</sup> That order provided that:
- a. trading in securities of the named entities related to Bridging cease; and
  - b. Sharpe's registration under the *Act* be suspended.
- [5] On that same day, the Commission applied to the Ontario Superior Court of Justice for the appointment of a receiver over Bridging and the related entities. The Court issued the requested order. The following day, the Commission published a news release on its website, announcing the appointment of the receiver, and including a link to the receiver's website, on which could be found much of the material filed in support of the receivership application.
- [6] That material included transcripts of testimony given earlier by Sharpe during Staff's investigation. Sharpe's testimony was given pursuant to a summons issued by Staff. Sharpe's objection to the public disclosure of his compelled evidence ultimately gave rise to his application for revocation or variation of the s. 11 investigation order. We dismissed that request.
- [7] The April 30, 2021, temporary order cease trading securities and suspending Sharpe's registration provided on its own terms and pursuant to ss. 127(5) and 127(6) of the *Act* that it was to expire on May 15, 2021. Staff applied to the Tribunal under ss. 127(1) and 127(8) of the *Act* for an extension of the cease-trade portion of the temporary order. In support of that application, Staff filed a seven-volume application record that included the entire receivership application record filed in court, including the compelled evidence.
- [8] The receiver for the Bridging-related entities consented to the extension order. On May 12, 2021, the Tribunal extended the cease-trade portion of the

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<sup>3</sup> *Bridging Finance Inc (Re)*, (2021) 44 OSCB 3781

temporary order to August 12, 2021. That portion of the order has subsequently been extended on consent of the receiver:

- a. on August 10, 2021, to December 31, 2021, with an exception made allowing the receiver to conduct certain transactions with prior court approval;
- b. on December 22, 2021, to March 31, 2022, with the same exception; and
- c. on March 21, 2022, to June 30, 2022, with the same exception.

[9] Sharpe's confidentiality request relates to the compelled evidence contained in the application record filed by Staff in support of the renewals of the temporary order. That application record has not yet been made public by the Tribunal, although as noted above much of the application record's contents have been disclosed on the receiver's website since May 1, 2021.

[10] As originally framed, Sharpe's request extended to any references to the compelled evidence that were contained in written submissions that had been filed. However, at the oral hearing on December 16, 2021, Sharpe amended his request by excluding those. Then, in his subsequent written submissions on the confidentiality request, Sharpe appeared to reinstate his original request. Because we conclude that no confidentiality protection is warranted at all, we need not resolve the apparent inconsistency in Sharpe's various submissions.

### **3. ANALYSIS**

#### **3.1 Introduction**

[11] Sharpe relies on subrules 22(2)(c) and 22(4) of the Tribunal's *Rules of Procedure and Forms (Rules)*, which provide that if a confidential hearing is required by law, a panel may order that:

- a. all or part of a hearing be held in the absence of the public; and
- b. all or part of an adjudicative record be confidential and not available to the public.

[12] Sharpe points to no statutory or similar provision that requires that the hearings in Staff's initial application and subsequent motions to extend the temporary order be confidential. We are aware of no such provision or rule. Instead,

Sharpe's position is that the general obligation of confidentiality embodied in s. 16 of the *Act* warrants a confidentiality order in the temporary order proceeding. We disagree, for the following reasons.

### **3.2 General principles**

- [13] As we noted in our March 30 decision, the statutory scheme underlying Part VI of the *Act* seeks to protect the integrity of Commission investigations and to minimize the impairment of privacy interests of those compelled to testify during an investigation.<sup>4</sup>
- [14] However, there are statutory provisions that explicitly provide for exceptions. As Sharpe acknowledges, s. 17(6) permits disclosure of compelled evidence in connection with a proceeding before the Tribunal. However, he submits that the Tribunal must minimize disclosure to that which is necessary.
- [15] The need to protect privacy interests must be balanced against the strong presumption in favour of the open court principle,<sup>5</sup> a principle that applies equally to proceedings before the Tribunal.<sup>6</sup> Indeed, as the Tribunal has held, investors, those being regulated, and the general public all have a strong interest in knowing what the Tribunal is doing and why.<sup>7</sup> Proceedings before the Tribunal should be public to the broadest extent possible.<sup>8</sup>
- [16] As the Supreme Court of Canada has held, a confidentiality order should not be issued unless as a threshold matter a party persuades the decision maker that "openness presents a serious risk to a competing interest of public importance", and the order sought "is necessary to prevent the risk".<sup>9</sup>

### **3.3 Considerations particular to Sharpe**

- [17] Sharpe submits that making the adjudicative record public at this time may further prejudice Sharpe's rights to a fair hearing in the separate enforcement proceeding that has been brought against him. Sharpe makes this bald assertion

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<sup>4</sup> *Sharpe #1* at para 33

<sup>5</sup> *Sherman Estate v Donovan*, 2021 SCC 25 (***Sherman***) at paras 1-2

<sup>6</sup> *Toronto Star Newspapers Ltd v Ontario (Attorney General)*, 2018 ONSC 2586 at para 55

<sup>7</sup> *Gaudet v Ontario (Securities Commission)*, (1990) 13 OSCB 1405 at 1408

<sup>8</sup> *Sharpe #1* at para 93; *Mega-C Power Corporation (Re)*, 2007 ONSC 11 at para 36

<sup>9</sup> *Sherman* at para 3

of potential prejudice, but does not specify the nature of that prejudice, which is not obvious, especially given that the material is already public.

- [18] Sharpe also submits that the receivership process is extremely transparent. He argues that the need for adjudicative transparency will be adequately addressed even if the application record in the Tribunal's temporary order proceeding remains confidential.
- [19] That submission is illogical. If there is little overlap between the confidential Tribunal record and the public receivership record, then one is an inadequate substitute for the other; in other words, the substantial portion of the Tribunal record that does not appear in the receivership record remains hidden from public view, so transparency is not achieved. On the other hand, if there is substantial overlap between the Tribunal record and the receivership record, then there is no reasonable basis to conclude that there would be any prejudice caused by disclosing that which is already public and has been public for about a year.
- [20] Either way, we reject the underlying premise. An interested member of the public who wants to know about the Tribunal proceeding should not have to visit different venues and try to put the pieces of the story together.
- [21] As noted above, the material about which Sharpe says he is concerned has been public since May 1, 2021. Sharpe became aware of its publication almost instantly. It has been open to him since that day to go to court and seek to have some or all of the information protected by a confidentiality order. To our knowledge, he has not.
- [22] It is of course his right to choose not to seek such an order. However, more and more with each passing day, the absence of a confidentiality order from the court undermines his ability to argue that he suffers undue prejudice from the publication of the information in the receivership record, and that he would do so again by public disclosure of the Tribunal record.

### **3.4 Considerations about others**

- [23] Sharpe also submits that before we decide whether to grant his request for continued confidentiality, we should consider whether notice should be given to

other persons or entities whose compelled evidence would be disclosed if the adjudicative record in the temporary order proceeding is made public. He notes that subrule 22(4) of the *Rules* simply provides that a confidentiality order may be requested by a party, or by someone who would be affected by disclosure of information in an adjudicative record. He points out that there is no associated obligation to give notice to others who might be affected, akin to the requirement in s. 17(2) of the *Act* with respect to authorizations to disclose material protected by s. 16.

- [24] We conclude that no such notice is necessary. These proceedings have been ongoing for a long time and we take notice that they have attracted considerable public and media attention. The material has been on the receiver's website since May 1, 2021. If anyone had a concern, they could have applied to court or to the Tribunal for relief. No one has done so.

### **3.5 Conclusions**

- [25] In our March 30 decision, we canvassed many principles and precedents, but ultimately the decision was about a narrow and specific process point, *i.e.*, whether the Commission was required to obtain a s. 17 order before publicly disclosing protected material in connection with a receivership application. To answer the question, we were not called upon to weigh competing factors and to make a decision about whether the material in this case should be disclosed or not.
- [26] We are now called upon for the first time in these proceedings to make that kind of decision, and we reject Sharpe's assertion that a confidential hearing is required by law. Subsection 17(6) of the *Act* permits disclosure of the material here. Given the considerable time that has elapsed since publication of the portions that Sharpe is concerned about, the public attention this case has attracted, and the fact that Sharpe has not obtained a confidentiality order from the court, we see no reason to depart from the important principle of transparency.
- [27] For these reasons, we dismiss Sharpe's request to make any part of the adjudicative records or written submissions confidential. We will issue an order

revoking our order of December 20, 2021, which provides that the adjudicative record (except for written submissions filed) was to be confidential.

Dated at Toronto this 5th day of July, 2022

*"Timothy Moseley"*

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Timothy Moseley

*"Lawrence P. Haber"*

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Lawrence P. Haber

*"M. Cecilia Williams"*

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M. Cecilia Williams