

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, C. S5, AS AMENDED**

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

File No. 2022-09

**MOTION
OF DAVID SHARPE**

For a Stay of Proceedings under Rule 28 of the Tribunal's Rules of Procedure

A. ORDER SOUGHT

The applicant, David Sharpe, requests, with notice, that the Tribunal make the following order(s):

- (a) an order staying the proceedings against him under Tribunal File No. 2022-09;
- and
- (b) such further relief as counsel may advise and the Tribunal may permit.

Mr. Sharpe asks that the Motion be scheduled after the determination of his pending application for judicial review under Divisional Court File No. 433/22 of the Tribunal's decision dated July 5, 2022, which is scheduled to be heard on February 16, 2023.

B. GROUNDS

Introduction

1. This motion flows from the unprecedented unanimous finding of the Adjudicative Tribunal of the Ontario Securities Commission (the "**Commission**" or "**OSC**") that the Commission, acting through its enforcement staff ("**Staff**"), breached its enabling legislation by publicly disclosing confidential compelled evidence of Mr. Sharpe in connection with a court application to appoint a

receiver without notice to Mr. Sharpe and without obtaining the requisite authorization from the Tribunal.

2. The Commission has refused to accept the implications of the Tribunal's decision. It has taken no steps to have Mr. Sharpe's confidential compelled evidence removed from the public domain, instead repeatedly asserting that the cost and burden of doing so rests with Mr. Sharpe; a private party whose rights have been violated. Remarkably, the Commission has also taken the position at the Court of Appeal for Ontario in an unrelated proceeding involving the same improper public disclosure of compelled evidence in the record filed to have a receiver appointed, that the Tribunal's decision was wrong.

3. Based on the Commission's breach of the *Ontario Securities Act*¹ (the "**OSA**" or the "**Act**"), Mr. Sharpe sought a revocation or variance of the investigation order which authorized the collection of his compelled evidence. Despite its unequivocal finding that Mr. Sharpe's privacy rights and expectation of privacy had been violated, the Tribunal did not grant the requested relief on the basis that investigative relief was not connected with and would not redress the Commission's breach. A wrong without a remedy.

4. A proceeding has been commenced against Mr. Sharpe and the Commission's breach can and should now be remedied. Given the nature of the breach and its wide-ranging and substantive consequences to Mr. Sharpe's right to, among other things, a fair hearing, the only appropriate remedy is a stay of proceedings. The Commission must be required to finally accept the consequences of its actions. Its conduct ought to be censured in order that the integrity of the

¹ R.S.O. 1990, c. S.5

Commission's enforcement and adjudicative processes, as the country's largest securities regulatory authority, is not undermined.

The Grounds for this Motion

5. David Sharpe was the Chief Executive Officer and ultimate designated person of Bridging Finance Inc. ("**BFI**"), an alternative financing business that provides financing to middle-market companies through various funds that it manages. Mr. Sharpe is Haudenosaunee, a Status Indian and a member of the Mohawks of the Bay of Quinte. Mr. Sharpe was one of the few Indigenous people leading a financial firm or securities registrant in Canada.

6. On September 11, 2020, the Commission issued an order under section 11 of the *OSA* authorizing Staff to conduct an investigation into BFI (the "**Investigation Order**"). The Investigation Order followed several months of informal investigation by Staff with which Mr. Sharpe and BFI were cooperating, as well as Mr. Sharpe's email to the Director of Enforcement Branch of September 2, 2020, in which Mr. Sharpe raised issues of systemic racism and the unreasonable burden imposed by Staff's investigation on BFI. Mr. Sharpe's request for a meeting to discuss a potential collaborative approach was left unanswered.

7. On September 28, 2020, Staff sent Mr. Sharpe a letter and a summons (the "**Summons**") under section 13 of the *OSA*, requiring Mr. Sharpe to attend an examination by Staff in connection with the Investigation Order.

8. In the cover letter accompanying the Summons, Staff advised Mr. Sharpe that "there is a high degree of confidentiality associated with this matter" and cited the confidentiality provisions in section 16 of the *OSA*. Section 16 provides in part that "no person shall disclose at any time ...

the nature of an order under section 11 or any testimony given under section 13.” Violation of section 16 is a breach of the *OSA*.

9. In response to the Summons, Mr. Sharpe gave compelled testimony at Staff’s examination which took place over three days: October 23, 2020, October 27, 2020, and April 29, 2021 (the “**Compelled Testimony**”). Mr. Sharpe relied upon Staff’s assurances of confidentiality. As required by section 13 of the *OSA*, Mr. Sharpe answered all questions put to him by Staff, with the exception of privilege claims.

10. Mr. Sharpe had a reasonable expectation of privacy concerning his Compelled Testimony based on the Summons, the OSC’s assurances of confidentiality, the statutory scheme, and the nature of the information Staff compelled him to divulge.

OSC Staff Counsel File the Compelled Testimony in the Superior Court Record

11. The day after Mr. Sharpe’s final compelled examination, the OSC, through the same Staff lawyers conducting the investigation and who examined Mr. Sharpe under section 13 of the *OSA*, brought an *ex parte* application at the Superior Court of Justice seeking a receivership order pursuant to which PricewaterhouseCoopers (the “**Receiver**”) would be appointed receiver and manager over all of the assets, undertakings, and properties of BFI and associated entities (the “**Receivership Application**”). Mr. Sharpe is not a party to the receivership.

12. In support of its *ex parte* Receivership Application, the OSC, through Staff, publicly filed an application record (the “**Receivership Application Record**”) which contained the April 29, 2021 Affidavit of Daniel Tourangeau (“**Tourangeau**”), a Senior Forensic Accountant with the OSC’s Enforcement Branch (the “**Tourangeau Affidavit**”). Tourangeau attached excerpts from

Mr. Sharpe's Compelled Testimony and excerpts of six other individuals' compelled interviews as exhibits to the Tourangeau Affidavit.

13. Later the same day, the Commission, through Staff, filed the First Supplemental Affidavit of Daniel Tourangeau (the "**Supplemental Tourangeau Affidavit**"). Tourangeau attached an entire draft transcript of Mr. Sharpe's compelled interview held the day before (the "**April 29 Sharpe Transcript**") and the compelled evidence of other witnesses interviewed by Staff. The April 29 Sharpe Transcript includes questions designed to elicit evidence about whether Mr. Sharpe violated the *OSA* or other laws.

14. Staff had not sought an order from the Commission authorizing disclosure of compelled evidence as required by s. 17 of the *OSA* (the "**Section 17 Order**") or provided notice to Mr. Sharpe prior to the public disclosure of his Compelled Testimony, as required by s. 17. Despite their obligation of full and frank disclosure, Staff did not bring it to the court's attention that their application materials contained confidential compelled evidence.

15. The *ex parte* Receivership Application was heard by the late Justice G. Hainey at 3:30 pm on Friday, April 30, 2021. Hainey J. granted the requested order several hours later (the "**Receivership Order**"). The form of order proposed to the court by the OSC included a provision that certain exhibits to the Tourangeau Affidavit be redacted for personal information (such as addresses or Social Insurance Numbers) before filing. However, the order did not include a sealing provision for compelled evidence.

16. The Receivership Order proposed by the OSC allowed the Receiver to publish the portions of the Receivership Application Record, which included the entire April 29 Sharpe Transcript on the Receiver's website. The Receiver's website was available to all members of the public.

17. On April 30, 2021, Staff obtained from the Commission a temporary cease trade order regarding some of the funds managed by BFI (the "**TCTO**").

18. In connection with the TCTO Application, the Vice Chair of the Tribunal inquired with Staff on April 30, 2021 as to whether Staff had obtained a Section 17 Order in order to file the Compelled Evidence in connection with the Receivership Application, to which Staff replied that no order was required.

19. Staff advised Mr. Sharpe's counsel that the Receivership Order and the TCTO had been obtained. Staff gave a copy of the Receivership Application Record and a copy of the Supplemental Tourangeau Affidavit to Mr. Sharpe's counsel only after extracting an undertaking from Mr. Sharpe that he would keep the unredacted exhibits confidential and not disclose the documents to anyone without a court order. Staff did not inform Mr. Sharpe that the OSC's own Receivership Application Record publicly disclosed his Compelled Testimony in an unsealed court filing. Staff did not give Mr. Sharpe or his counsel a copy of the application record filed in support of the TCTO (the "**Cease-Trade Application Record**").

20. On May 1, 2021, the Receiver posted the Receivership Application Record and the Supplemental Tourangeau Affidavit on its website. The website post included the entire April 29 Sharpe Transcript. The Receiver also emailed these materials to the large list of entities and lawyers connected to the Receivership.

The Filing and Publication of the Compelled Evidence was Gratuitous

21. The OSC's unjustified inclusion of Mr. Sharpe's Compelled Testimony in the Receivership Application Record was unnecessary for the purpose of obtaining the Receivership Order. In the factum filed in support of the continuation of the Receivership Order, Staff referred only once to the 373-page Supplemental Tourangeau Affidavit and the April 29 Sharpe Transcript appended to it.

22. Neither was it necessary for the Commission to move *ex parte* to appoint the Receiver, which had serious implications for investors. By April 30, 2021, Staff's investigation had been ongoing for over a year, Staff's requests for information were being complied with and a TCTO had been put in place. There was no immediate risk requiring Staff to move quickly and without notice.

23. Although courts routinely grant sealing orders in receivership proceedings, Staff did not ask to seal the filings containing Mr. Sharpe's Compelled Testimony. The OSC knew it could request or direct the Receiver to seek a sealing order to protect Mr. Sharpe's privacy but chose not to do so. Mr. Sharpe had no opportunity to seek a sealing order because the OSC brought the Receivership Application without notice.

24. In order to bring the Receivership Application, Staff were required to obtain approval by the Chair of the Commission, the Executive Director, or the Chief Administrative Officer. As the decision-making process with respect to such approvals, if any such process exists at all, is opaque, it is not clear whether any analysis of the implications of public disclosure of Compelled Evidence was conducted and, if so, by whom.

25. Staff's indiscriminate public disclosure of Compelled Evidence in this case suggests that no such review was conducted and that there were/are, in fact, no internal policies or procedures in place at the Commission, pursuant to which the public interest in filing compelled evidence is weighed by the Commission or the Tribunal against the acknowledged privacy and other rights of those compelled to give evidence.

Widespread Media Reporting and Republication of the Compelled Testimony

26. The OSC's news release announcing the Receivership Order and the TCTO was published at noon on Saturday May 1, 2021 and provided a link to the Receiver's website. Later the same day, the *Globe and Mail* newspaper published an article titled "Private debt manager Bridging Finance placed in receivership as OSC investigates its activities." The article discussed the contents of the Receivership Application Record, including Mr. Sharpe's Compelled Testimony.

27. On Monday, May 3, 2021, the *Globe and Mail* published another article titled "Inside the interrogation of Bridging's CEO before receivership." The article quoted extensively from the April 29 Sharpe Transcript and other compelled testimony included in the Receivership Application Record.

28. Other news outlets including the *National Post* and *Bloomberg* published articles describing Mr. Sharpe's Compelled Testimony and other compelled evidence.

29. On May 7, 2021, Staff filed with the Commission an application to extend the TCTO. In support of the application, Staff filed a seven-volume application record (the "**Cease-Trade Extension Application Record**"), containing the entire Receivership Application Record and the Supplemental Tourangeau Affidavit. This record was not made available to the public due to OSC

practice in proceedings for temporary *ex parte* orders. In contrast, significant portions of the same content remained publicly accessible in the receivership proceedings.

Staff Dismisses Sharpe's Concerns over the Public Disclosure of His Compelled Testimony

30. On May 12, 2021, Mr. Sharpe's counsel wrote to Staff to express concern about the public disclosure of compelled evidence. Counsel asked whether Staff obtained a Section 17 Order authorizing such disclosure. Staff cavalierly responded later that day that there was no Section 17 Order in connection with the Commission's *ex parte* Receivership Application as "none was required."

31. At the first appearance before the Commission with respect to the extension of the TCTO on May 12, 2021, Mr. Sharpe's counsel again expressed concern about the filing of compelled evidence in the public court proceeding. Staff declined to respond to Mr. Sharpe's concern.

32. Since April 2021, the Commission has made no effort to seal or redact the Compelled Evidence filed with the court. Rather, the Commission has incredibly, yet repeatedly, asserted that it is Mr. Sharpe's obligation to seek a remedy from the court for the Commission's breach of its own legislation.

33. A redacted version of the Tourangeau Affidavit and the Supplemental Tourangeau Affidavit, including the complete April 29 Sharpe Transcript, are still publicly available on the Receiver's website.

34. Despite repeated requests, Staff refused to explain the justification for publicly filing Mr. Sharpe's Compelled Testimony until forced to do so in response to an Application brought by Mr. Sharpe. Staff's belated explanation was that Staff were acting as the OSC in the Receivership

Application and therefore the restrictions in section 16 of the *OSA* do not apply. There was no authority for Staff's purported justification.

35. Mr. Sharpe prevailed in the Application he was forced by the Commission to bring, although he can recover no costs.

36. The Commission has consistently disregarded Mr. Sharpe's privacy and reputational interests in relation to his Compelled Testimony and generally. It has ignored each opportunity to protect him.

37. Staff knew or were recklessly indifferent or willfully blind to the fact that publicly filing Mr. Sharpe's confidential Compelled Testimony was unlawful and would result in damages to Mr. Sharpe's interests. Staff were also indifferent to the fact that unproven allegations against Mr. Sharpe were widely circulated and reported on prior to Mr. Sharpe being charged with any misconduct and while he had no opportunity to defend himself. The actions of the Commission, through Staff, caused Mr. Sharpe to experience distress, humiliation, anguish, and harm to his reputation, while he was denied basic procedural fairness and natural justice rights.

38. Furthermore, the disclosure and filing of Mr. Sharpe's Compelled Testimony in the Receivership Application publicized it to the world at large, including law enforcement entities, in breach of sections 17(3) and 17(7) of the *OSA*, which prohibit the Commission from disclosing compelled testimony to law enforcement. Doing so violated Mr. Sharpe's right to remain silent, contrary to s. 7 of the *Charter of Rights and Freedoms* (the "*Charter*").

39. Following the public disclosure of, and widespread reporting on Mr. Sharpe and other compelled witnesses' Compelled Evidence and Staff's investigation generally, Staff continued their investigation and conducted 17 more interviews of 11 witnesses. Notably, six of the witnesses interviewed after April 30, 2021, who, presuming they have access to the internet and/or news media, had access to some or all of the Compelled Evidence, are to testify on behalf of the Commission in its proceeding against Mr. Sharpe.

The Adjudicative Tribunal of the Commission Finds that the OSC Breached the OSA but dismisses Mr. Sharpe's Application to Revoke or Vary the Investigation Order

40. On September 22, 2021, Mr. Sharpe brought an application (a prior version of the application had been brought in July) before the Adjudicative Tribunal of the Commission seeking to vary or revoke the Investigation Order. Mr. Sharpe argued that the Commission should revoke or vary the Investigation Order because the publication of his Compelled Testimony violated the OSA. Mr. Sharpe also sought an order to preserve the confidentiality of the compelled evidence in the Commission's adjudicative record.

41. Mr. Sharpe's application was heard by the Adjudicative Tribunal of the Commission on December 16, 2021. On agreement of the parties, the hearing was limited to two discrete questions of law:

- a) Can the Commission publicly disclose compelled evidence obtained under a s. 11 order when it brings an application for the appointment of a receiver under s. 129 of the Act, without first obtaining a s. 17 order?
- b) If the answer to Question 1 is no, is the revocation or variation of the s. 11 order an available remedy?

42. The two questions of law were supplemented by a limited statement of agreed facts, to give context to the questions of law.

43. On March 30, 2022, the Tribunal released its decision interpreting sections 16 and 17 of the *OSA* and concluded that the OSC breached the Act and violated Mr. Sharpe's privacy interests by publicly disclosing his compelled testimony (the "**March 30 Decision**"). The Tribunal made it crystal clear that the Commission is subject to confidentiality requirements in s. 16(1) of the *OSA* (like any other member of the public) and cannot publicly disclose compelled evidence except in accordance with s. 17 of the *OSA*. Staff's failure to request a Section 17 Order prevented the Adjudicative Tribunal of the Commission from deciding whether the disclosure was in the public interest and from setting terms and conditions on any disclosure under section 17(4) of the *OSA*.

44. The Tribunal further found that Mr. Sharpe had a reasonable expectation that the Commission, through its Staff, would act as it was required to, limiting the extent of disclosure only to that necessary to carry out the Commission's mandate and as they had in the past. Staff's actions breached those expectations.

45. In addition, the Tribunal noted that by failing to disclose to the court that the Receivership Application record contained confidential compelled evidence, Staff may have breached their obligations of full and frank disclosure that arise in *ex parte* proceedings stating that: "[w]e question whether the Commission's decision not to mention s. 16 to the court, and not to raise the question of whether a temporary sealing order would be appropriate, meets an *ex parte* applicant's obligation."

46. Although the Tribunal did not grant the requested relief, being the revocation of the Investigation Order, on the basis that relief associated with the investigative stage would not address the breach, the March 30 Decision does not foreclose the granting of appropriate relief following the commencement of a proceeding.

47. The parties were directed by the Tribunal to keep the March 30 Decision confidential until it was publicly released by the Commission. Mr. Sharpe respected that direction in good faith. However, in an obvious attempt to quell the expected media interest in the unprecedented finding in the March 30 Decision that the Commission had breached the Act, on March 31, 2021, the same day that the March 30 Decision was made public, Staff served a Statement of Allegations commencing an enforcement proceeding. The Statement of Allegations was published on the Tribunal's website and was, as the Commission undoubtedly expected, widely reported on. The March 30 Decision was overshadowed and its intended denunciation implications undermined.

48. By way of a follow-on decision released on July 5, 2022, the Tribunal refused Mr. Sharpe's request for a confidentiality order made pursuant to subrules (2) and (4) of rule 22 of the Commission's Rules of Procedure despite its March 30 Decision (the "**July 5 Decision**"). It did so on the basis of written submissions limited, by order of the Tribunal, to five pages in length.

49. In contradiction to the March 30 Decision and the underlying principles upon which it was based, the Tribunal found that the TCTO record could be made available to the public.

50. The July 5 Decision is currently subject to a pending judicial review application in which Mr. Sharpe challenges the procedural fairness of the decision and the Tribunal's interpretation of section 17(6) of the Act in a manner that is inconsistent with and undermines its own March 30 Decision. The Tribunal's interpretation of s. 17 is also subject to an alternative *Charter* challenge.

51. Simply put, there has been a wrong for which no remedy has been granted. The time is ripe for the issue to be addressed by the Tribunal. An enforcement proceeding has been commenced and the connection between the Commission's breach of the Act and the relief sought has undoubtedly crystallized.

A Stay of Proceedings is the Only Appropriate Remedy

52. The unlawful public disclosure of Mr. Sharpe's confidential Compelled Evidence and Staff's intentional seeking of publicity in connection with the Receivership Application, combined with the wave of prejudicial media coverage, eviscerated Mr. Sharpe's privacy interests and subjected him to extra-judicial sanction by publicity before he was alleged to have engaged in any misconduct. Mr. Sharpe was subjected to public opprobrium, loss of employment, loss of reputation, civil liabilities, as well as potential criminal liability while having no opportunity to defend himself from Staff's public allegations.

53. The Commission's conduct has also rendered it impossible for Mr. Sharpe to have a fair hearing. Witnesses have been afforded access to the Compelled Evidence prior to giving their own evidence in investigative interviews and at the hearing itself. The full extent of the "fruits" of the breach cannot be fully and fairly identified given the scope and duration of the Commission's breach of the Act.

54. In the circumstances, the totality of Staff's conduct amounts to an abuse of process. The prejudice to Mr. Sharpe's hearing rights will be manifested, perpetuated and aggravated by the conduct of the hearing on the merits or its outcome.

55. Staff and the Commission's cavalier attitude towards the confidentiality and privacy interests of compelled witnesses resulted not only in a breach of their duties of confidence and procedural fairness, but in a specific contravention of the Commission's enabling legislation. Proceeding with the hearing in the face of this misconduct would bring the Commission's enforcement regime and the administration of justice into disrepute.

56. A stay of proceedings is the only appropriate remedy. There is no alternative remedy capable of redressing the prejudice caused by the Commission to Mr. Sharpe's fair hearing rights or the integrity of the Commission's enforcement regime.

57. The interests served by the granting of a stay of proceedings outweigh the public interest in permitting the proceeding to carry on.

C. EVIDENCE

The moving party intends to rely on the following evidence for the motion:

1. Affidavit of Wendy Kingston, sworn October 21, 2022; and
2. such further and other evidence as counsel may advise.

DATED this 21st day of October 2022.

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