

**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

**RESPONDING MOTION  
OF NATASHA SHARPE**

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

**A. ORDER SOUGHT**

1. The moving party, Natasha Sharpe, requests, with notice, that the Tribunal make the following order(s):

(a) an order staying all proceedings against her under Tribunal File No. 2022-09; and

(b) such further relief as counsel may advise and the Tribunal may permit.

2. Natasha Sharpe respectfully requests that the Motion be scheduled to be heard after the final determination of David Sharpe's 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**

3. 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 David Sharpe in connection with a court application to appoint a receiver without notice to David Sharpe and without obtaining the authorization from the Tribunal that is specifically required by the *Ontario Securities Act*<sup>1</sup> (the “**OSA**” or the “**Act**”), before any valid evidence can be used.

4. The Commission, acting through Staff, at the same time publicly disclosed confidential compelled evidence of Natasha Sharpe in connection with that same court application to appoint a receiver without notice to Natasha Sharpe, and without obtaining the authorization from the Tribunal that is specifically required by the Act,<sup>2</sup> before any valid evidence can be used.

5. The Commission has refused to recognize the consequences, or accept the implications, of the Tribunal’s decision. It has taken no steps to remedy the unauthorized public disclosure and use of Natasha Sharpe’s confidential compelled evidence. 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.

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<sup>1</sup> R.S.O. 1990, c. S.

<sup>2</sup> R.S.O. 1990, c. S.

6. Based on the Commission's breach of the Act, David Sharpe sought a revocation or variance of the investigation order which authorized the collection of his compelled evidence. Despite its unequivocal finding that David 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. In doing so, the Tribunal recognized the wrong but refused to grant any remedy.

7. Natasha Sharpe has incurred the same breach of legal rights, and has incurred the same losses and other harms.

8. A proceeding has now been commenced against Natasha Sharpe and David Sharpe. The Commission's breach can and should now be remedied. Given the nature of the breach and its wide-ranging and substantive consequences to Natasha Sharpe's right to, among other things, a fair hearing, the only appropriate remedy is a stay of proceedings. The Commission caused this breach and is liable for the consequences of its actions. Its conduct should be censured to protect the integrity of the Commission's enforcement and adjudicative processes, as the country's largest securities regulatory authority.

### **The Grounds for this Motion**

9. Natasha David Sharpe was the Chief Investment Officer and a Director and shareholder of Bridging Finance Inc. ("**BFI**"), an alternative financing business that provides financing to middle-market companies through various funds that it manages.

10. 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 Natasha Sharpe and BFI were cooperating .

11. On September 28, 2020, Staff sent Natasha Sharpe a letter and a summons (the “**Summons**”) under Section 13 of the *OSA*, requiring Natasha Sharpe to attend an examination by Staff in connection with the Investigation Order.

12. In the cover letter accompanying the Summons, Staff advised Natasha 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*.

13. In response to the Summons, Natasha Sharpe gave compelled testimony at Staff’s examination which took place over two days: October 21 and 22, 2020 (the “**Compelled Testimony**”). Additional compelled evidence was taken on July 7, 2021. Natasha Sharpe relied upon Staff’s assurances of confidentiality. As required by Section 13 of the *OSA*, Natasha Sharpe answered all questions put to her by Staff, with the exception of privilege claims.

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

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

15. On April 30, 2021, the OSC, through the same Staff lawyers conducting the investigation and who examined Natasha. Sharpe and David 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**”). Natasha Sharpe is not a party to the receivership.

16. 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 Natasha Sharpe’s Compelled Testimony and excerpts of six other individuals’ compelled interviews as exhibits to the Tourangeau Affidavit.

17. Staff had not sought an order from the Commission authorizing disclosure of compelled evidence as required by Section 17 of the *OSA* (the “**Section 17 Order**”) or provided notice to Natasha Sharpe prior to the public disclosure of her Compelled Testimony, as required by Section 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.

18. 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.

19. The Receivership Order proposed by the OSC allowed the Receiver to publish portions of the Receivership Application Record, which included parts of Natasha Sharpe's Compelled Testimony.. The Receiver's website was available to all members of the public.

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

21. 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.

22. Staff advised Natasha 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 Natasha Sharpe's counsel only after extracting an undertaking from Natasha Sharpe that she would keep the unredacted exhibits confidential and not disclose the documents to anyone without a court order. Staff did not inform Natasha Sharpe that the OSC's own Receivership Application Record publicly disclosed parts of her Compelled Testimony in an unsealed court filing. Staff did not give Natasha Sharpe or her counsel a copy of the application record filed in support of the TCTO (the "**Cease-Trade Application Record**").

23. On May 1, 2021, the Receiver posted the Receivership Application Record on its website. 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**

24. The OSC's unauthorized disclosure and use of Natasha Sharpe's Compelled Testimony in the Receivership Application Record was unnecessary for the purpose of obtaining the Receivership Order.

25. 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.

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

27. 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.

28. 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**

29. 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 parts of Natasha Sharpe's Compelled Testimony.

30. 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. 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 Concerns over the Public Disclosure of His Compelled Testimony**

31. On May 12, 2021, David 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 confirmed that no Section 17 Order had been made or even requested in connection with the Commission's *ex parte* Receivership Application.

32. Since April 2021, the Commission has made no effort to seal or redact the Compelled Evidence filed with the court.



33. A redacted version of the Tourangeau Affidavit including parts of the Compelled Testimony, are still publicly available on the Receiver's website.

34. The Commission has consistently disregarded Natasha Sharpe's privacy and reputational interests in relation to her Compelled Testimony.

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

36. Furthermore, the disclosure and filing of parts of Natasha 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 Natasha Sharpe's right to remain silent, contrary to Section 7 of the *Charter of Rights and Freedoms* (the "*Charter*").

37. Following the public disclosure of, and widespread reporting on, Natasha 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 David Sharpe and Natasha Sharpe.

## **The Adjudicative Tribunal of the Commission Finds that the OSC Breached the OSA but Dismisses David Sharpe’s Application to Revoke or Vary the Investigation Order**

38. On September 22, 2021, David 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. David Sharpe argued that the Commission should revoke or vary the Investigation Order because the publication of his Compelled Testimony violated the *OSA*. David Sharpe also sought an order to preserve the confidentiality of the compelled evidence in the Commission’s adjudicative record.

39. David 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 Section 11 order when it brings an application for the appointment of a receiver under Section 129 of the Act, without first obtaining a Section 17 order?
- (b) If the answer to Question 1 is no, is the revocation or variation of the Section 11 order an available remedy?

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

41. 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 David Sharpe’s privacy interests by publicly disclosing his compelled testimony (the “**March 30 Decision**”). The Tribunal confirmed clearly and unconditionally that the Commission is subject to confidentiality

requirements in Section 16(1) of the *OSA* (like any other member of the public) and cannot publicly disclose compelled evidence except in accordance with Section 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*.

42. The Tribunal further found that David 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.

43. 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."

44. 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.

45. The parties were directed by the Tribunal to keep the March 30 Decision confidential until it was publicly released by the Commission. David Sharpe respected that direction in good faith. However, in an obvious and transparent 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 against David Sharpe and Natasha Sharpe. The Statement of Allegations was published on the Tribunal's website and, as the Commission certainly expected, was widely reported on. The March 30 Decision was overshadowed and its intended denunciation implications undermined.

46. By way of a follow-on decision released on July 5, 2022, the Tribunal refused David 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.

47. 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.

48. The July 5 Decision is currently subject to a pending judicial review application in which David 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 Section 17 is also subject to an alternative *Charter* challenge.

49. 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**

50. The unlawful public disclosure of Natasha 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 Natasha Sharpe's privacy interests and has subjected her to extra-judicial sanction by publicity before she was alleged to have engaged in any misconduct. Natasha has been subjected to public opprobrium, loss of employment, loss of reputation, civil liabilities, as well as potential criminal liability while having no opportunity to defend herself from Staff's public allegations.

51. The Commission's conduct has also rendered it impossible for Natasha Sharpe to receive 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.

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

53. 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.

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

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

### **C. EVIDENCE**

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

- (a) Affidavit of Wendy Kingston, sworn October 21, 2022;
- (b) aa additional affidavit evidence to be sworn; and
- (c) such further and other evidence as counsel may advise.

November 24, 2022

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