Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Bridging Finance Inc (Re),* 2022 ONCMT 35
Date: 2022-11-25
File No. 2021-15

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

(Sections 16.1 and 25.0.1 of the *Statutory Powers Procedure Act,* RSO 1990, c S.22)

Adjudicators:	Timothy Moseley (chair of the panel) William Furlong Dale R. Ponder	
Hearing:	By videoconference, September 8, 2022; final written submissions received September 20, 2022	
Appearances:	Mark Bailey Adam Gotfried	For Staff of the Ontario Securities Commission
	Alistair Crawley Melissa MacKewn Brian Greenspan Alexandra Grishanova Naomi Lutes Dan Thomas	For David Sharpe
	Erin Pleet	For the receiver of Bridging Finance Inc. et al.

TABLE OF CONTENTS

REASONS AND DECISION

1. OVERVIEW

[1] On May 12, 2021, Staff of the Ontario Securities Commission commenced this proceeding, seeking an extension of a temporary cease trade order that had been issued against all respondents except Bridging Finance Inc. and David Sharpe. That order has been extended a number of times, with modifications we describe below.

[2] There are or have been several proceedings in court or before the Capital Markets Tribunal, all arising from a common factual background. For clarity in these reasons, we sometimes refer to this proceeding as **this temporary cease trade proceeding**.

[3] This decision arises from a motion brought by Sharpe for a stay of a decision issued earlier in this proceeding. In that earlier decision, this Tribunal dismissed Sharpe's request that certain portions of the adjudicative record filed by Staff of the Ontario Securities Commission at the outset of this proceeding be kept confidential. Sharpe has applied to the Divisional Court for judicial review of that decision.

[4] We dismiss Sharpe's request for a stay of that decision. As we explain below, we conclude that we do not have jurisdiction to issue a stay under these circumstances. We reach that conclusion particularly because our authority to grant any stay would arise under s. 16.1(1) of the *Statutory Powers Procedure Act*,[1] but that provision permits only interim orders. The requested stay in this case would not be an interim order, because this Tribunal's dismissal of Sharpe's confidentiality request finally disposed of the real matter in dispute between Staff and Sharpe, and there would be no future order in this proceeding on that issue.

[5] Even if we did have jurisdiction to issue the stay, we would not do so. While Sharpe's request raises a serious issue to be tried, Sharpe has not demonstrated

[1] RSO 1990, c S.22

that if we decline his request he will suffer irreparable harm of a nature that would justify a stay. Further, the balance of convenience does not favour the granting of a stay, when the interests that Sharpe identifies are weighed against the public interest in the transparency of Tribunal proceedings.

2. BACKGROUND

[6] On April 30, 2021, before this proceeding was commenced, the Ontario Securities Commission (acting in its executive capacity, not its adjudicative capacity) issued an order[2] providing that:

a. trading cease in securities of nine of the respondent entities (*i.e.*, all of the respondent entities except Bridging Finance Inc.); and

b. Sharpe's registration as Ultimate Designated Person of Bridging Finance Inc. be suspended.

[7] The order was made without notice to the respondents and was to expire fifteen days later.

[8] Also on April 30, 2021, the Commission (acting in its executive capacity) applied for and obtained an order from the Superior Court of Ontario, appointing a receiver over the various Bridging entities.

[9] This proceeding was commenced on May 7, 2021, by way of an application from Staff of the Commission to extend only the cease trade portion of the order. Sharpe's employment with Bridging Finance Inc. had been terminated by the receiver, so Staff did not seek an extension of the term of the April 30 order by which Sharpe's registration with Bridging Finance Inc. had been suspended. As a result, while Sharpe continues to be named as a respondent, Staff has never sought any relief in respect of him in this proceeding.

[10] On May 12, 2021, the Tribunal granted Staff's request and extended the cease trade provision to August 12, 2021.[3] The cease trade provision was later extended five times (the last of those being shortly after we received final

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[2] *Bridging Finance Inc (Re)*, (2021) 44 OSCB 3781

[3] *Bridging Finance Inc (Re)*, (2021) 44 OSCB 4187

written submissions on this hearing of Sharpe's stay motion),[4] each time with an exception allowing the receiver of the nine respondent entities to carry out the receivership. The current cease trade order is set to expire on March 31, 2023.

[11] In support of Staff's first request to extend the order in May 2021, Staff filed an extensive record. That record includes material that Staff obtained during its investigation using powers of compulsion pursuant to an order issued under s. 11 of the *Securities Act*.[5] That material is therefore subject to the confidentiality provisions of s. 16 of the *Securities Act*.

[12] In July 2021, Sharpe took two steps simultaneously. He:

a. commenced a separate proceeding, in which he asked that the Tribunal revoke the s. 11 investigation order (pursuant to which the compelled material had already been obtained); and

b. brought a motion in this temporary cease trade proceeding, in which he asked that certain portions of the adjudicative record and written submissions in this proceeding be kept confidential.

[13] On December 16, 2021, the Tribunal held a hearing relating both to Sharpe's application to revoke the s. 11 order, and to Sharpe's motion in this proceeding seeking a confidentiality order. The purpose of the hearing was to determine two preliminary questions that would bear upon Sharpe's request (contained within Sharpe's revocation application) that the Tribunal revoke the s. 11 order. The Tribunal advised that at that first stage it would consider only the preliminary questions relating to the s. 11 order, and that it would defer consideration of Sharpe's confidentiality request. However, the Tribunal ordered[6] that in the meantime, the adjudicative record was to be kept confidential pending the disposition of that confidentiality request at a later date.

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[4] *Bridging Finance Inc (Re)*, (2021) 44 OSCB 6878; *Bridging Finance Inc (Re)*, (2021) 44 OSCB 10379; *Bridging Finance Inc (Re)*, (2022) 45 OSCB 3088; *Bridging Finance Inc (Re)*, (2022) 45 OSCB 6551; *Bridging Finance Inc (Re)*, (2022) 45 OSCB 8314

[5] RSO 1990, c S.5

[6] *Sharpe (Re)*, (2021) 44 OSCB 10378

[14] On March 25, 2022, the Tribunal dismissed,[7] for reasons issued on March 30, 2022,[8] Sharpe's request to revoke the s. 11 order. The Tribunal found that when the Commission, acting in its executive capacity, applied to court for the appointment of a receiver, the Commission ought first to have obtained an order under s. 17 of the *Securities Act* authorizing disclosure of material obtained using the powers of compulsion. That material had been filed in court in support of the receivership application, and had been posted on the receiver's website in accordance with the court's order.

[15] The Tribunal determined, however, that despite the Commission's failure to obtain a s. 17 order, revocation of the s. 11 order was not an available remedy in the circumstances set out in the agreed statement of facts filed by the parties.

[16] In its reasons of March 30, 2022, the Tribunal directed that Sharpe's still-pending confidentiality request (contained in his motion in this temporary cease trade proceeding) be dealt with in writing. Following the receipt of written submissions on that question, the Tribunal decided on July 5, 2022, to dismiss Sharpe's confidentiality request.[9] That July 5 decision (the **Confidentiality Decision**) revoked the December 2021 interim confidentiality order referred to above.

[17] On July 15, 2022, Sharpe moved in this proceeding for a stay of the Confidentiality Decision. His motion, which is disposed of by this decision and these reasons, contemplated that he would commence an application in the Divisional Court seeking judicial review of that decision. Sharpe asked that we stay the Confidentiality Decision until the court decides the judicial review application.

[18] Sharpe filed his judicial review application in Divisional Court on August 4, 2022. At the hearing before us, counsel advised that the judicial review application is scheduled to be heard on February 16, 2023.

[19] Until he filed that application, Sharpe had never sought any relief from the court in relation to the public availability of the compelled material about which he has

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[7] *Sharpe (Re)*, (2022) 45 OSCB 3274

[8] *Sharpe (Re),* 2022 ONSEC 3

[9] *Sharpe (Re),* 2022 ONCMT 18

expressed concern. Sharpe would first have been in a position to do so, if he chose to, as early as May 2021, when the materials in the receivership application were served on him. We return below to discuss the significance of this fact in the context of the current motion.

3. ANALYSIS

3.1 Introduction

[20] Sharpe's request for a stay presents two principal issues:

a. Does this Tribunal have jurisdiction to stay the Confidentiality Decision?

b. If the Tribunal has jurisdiction to stay the Confidentiality Decision, should it do so?

[21] We conclude that the answer to both questions is "no". We do not have jurisdiction, and even if we did, we would not exercise it.

[22] We begin our analysis by examining whether we have jurisdiction to grant the requested stay.

3.2 Jurisdiction to grant the requested stay

3.2.1 Statutory framework

[23] Sharpe submits that the Tribunal has jurisdiction to grant the requested stay under two provisions of the *Statutory Powers Procedure Act*:

a. s. 16.1(1), which provides that a tribunal may make interim decisions and orders; and

b. s. 25.0.1(a), which provides that a tribunal has the power to determine its own procedures and practices, and may for that purpose make orders about the procedures and practices that apply in any particular proceeding.

[24] Staff submits that neither provision gives the Tribunal authority to stay the Confidentiality Decision.

[25] Below, we will explain why we agree with Staff's position. Before examining in detail each of the two provisions of the *Statutory Powers Procedure Act*

mentioned above, we must first set some context by reviewing three other statutory provisions.

[26] The first of those other statutory provisions is s. 10 of the *Securities Act*, which provides that the Commission's Chief Executive Officer or a person or company directly affected by a final decision of the Tribunal may appeal the decision to the Divisional Court. Subsection 10(2) states that the decision appealed from takes effect immediately, but this Tribunal or the Divisional Court may grant a stay. We note that s. 10(2) refers to appeals of Tribunal decisions, but does not refer to applications for judicial review of Tribunal decisions.

[27] Staff submits that since the legislature expressly empowered the Tribunal to grant a stay on an appeal, but did not do so in the case of an application for judicial review (which form of application is not mentioned at all in the *Securities Act*), we should conclude that the legislature intended that the Tribunal have no such power. In Staff's submission, had the legislature intended the Tribunal to have the power to grant a stay in the context of an application for judicial review, the legislature would have expressly said so.

[28] Staff provided no authority that directly supports that proposition. Sharpe submits, and we agree, that in the absence of exclusionary language, the mere grant of power in the case of an appeal does not necessarily preclude the conclusion that the power can be derived elsewhere.

[29] The second relevant provision is s. 4 of the *Judicial Review Procedure Act*,[10] which provides that on an application for judicial review, "the court may make such interim order as it considers proper pending the final determination of the application." As with the first provision, Staff submits that because the legislature expressly conferred this power on the court and did not expressly confer a similar power on tribunals that are the subject of judicial review applications, we should conclude that the legislature intended that tribunals have no such power.

[10] RSO 1990, c J.1

[30] Once again, we agree with Sharpe's submission that in the absence of exclusionary language, the mere grant of power to the court does not preclude the conclusion that tribunals' power to grant a stay can be derived elsewhere.

[31] The third provision we consider as part of the context is s. 25 of the *Statutory Powers Procedure Act*. Subsection 25(1) provides that an appeal from a decision of a tribunal operates as a stay, unless: (i) another applicable statute or regulation provides to the contrary; or (ii) a competent body has ordered otherwise. The effect is automatic and by operation of the statute, without the need for an order staying the decision appealed from.

[32] Subsection 25(2) clarifies that an application for judicial review is not an appeal within the meaning of s. 25(1). Accordingly, the automatic stay called for by s. 25(1) does not apply in the case of an application for judicial review. This is so even if the automatic stay would not apply due to it being displaced by s. 10 of the *Securities Act* (discussed above) because s. 10 is a statutory provision that provides to the contrary.

[33] Staff submits that this distinction supports the conclusion that a decision that is the subject of a judicial review application cannot be stayed by the tribunal whose decision is being reviewed. We agree with Sharpe's response that even though no automatic stay occurs by operation of the statute, nothing in that section precludes a tribunal from granting a discretionary stay, assuming that the tribunal is properly authorized to do so.

[34] We therefore conclude that none of the three provisions, on its own, excludes the possibility that the Tribunal's authority to stay may be found elsewhere. We note Staff's submission that taking the various provisions together, as opposed to each in isolation, should compel us to find that we have no jurisdiction. We do not accept that submission, since we do not see a statutory scheme that is any more apparent holistically than can be discerned from one of the provisions on its own. The provisions are consistent with each other, in that none of them features exclusionary language, which would have been equally easy for the legislature to include.

[35] With that background, we turn now to consider each of s. 16.1(1) and s. 25.0.1 of the *Statutory Powers Procedure Act*, the two provisions that Sharpe relies on.

3.2.2 Subsection 16.1(1) of the *Statutory Powers Procedure Act*

3.2.2.a Introduction

[36] Subsection 16.1(1) of the *Statutory Powers Procedure Act* provides that a tribunal may make interim decisions and orders. Sharpe's request for a stay under s. 16.1(1) raises two issues:

a. does the provision empower tribunals to issue interim orders staying a decision; and

b. if so, would a stay of the Confidentiality Decision be an interim order?

[37] We will deal with each of these in turn. Through our analysis, we conclude that s. 16.1(1) does empower tribunals to issue interim orders staying a decision. However, we also conclude that for s. 16.1(1) to apply in this case, the order that would be the subject of the stay must itself be interim. In this case, the Confidentiality Decision is not interim. Accordingly, the power under s. 16.1(1) is not available to Sharpe on this motion.

3.2.2.b Does s. 16.1(1) empower tribunals to issue interim orders staying a decision?

[38] We begin by examining whether s. 16.1(1) empowers tribunals to issue interim orders staying a decision.

[39] Staff describes s. 16.1(1) as a general provision that cannot be extended to stays, in the face of the various statutory provisions mentioned above that expressly deal with stays. Staff submits that in substance, what Sharpe seeks is interim relief in his judicial review application, not interim relief in this temporary cease trade proceeding. In Staff's submission, Sharpe's request here would stretch s. 16.1(1) beyond its breaking point.

[40] In response, Sharpe submits that s. 16.1(1) gives tribunals largely unfettered discretion to make interim orders, including interim stay orders.

[41] This Tribunal has not canvassed the issue in any of its previous decisions. Numerous decisions of other bodies have considered whether s. 16.1(1) authorizes substantive orders (*e.g.*, a stay), as opposed to other kinds of orders that are merely procedural in nature. *Toussaint v Ontario (Health and Long Term*

Care),[11] a decision of the Human Rights Tribunal of Ontario, reviews conflicting tribunal decisions on the question and adopts an interpretation of s. 16.1(1) that confers upon tribunals the power to make substantive interim decisions.[12] That tribunal, in reasons that were recently endorsed by the Divisional Court,[13] found that:

a. the broad language of s. 16.1(1) suggests an intention to confer broad powers;

b. there is nothing in s. 16.1(1) that suggests that the provision is limited to purely procedural questions;

c. the widespread presence of procedural provisions elsewhere in the *Statutory Powers Procedure Act* would make s. 16.1(1) redundant if s. 16.1(1) were limited to procedural orders; and

d. a statutory provision that is remedial should be given a fair, large and liberal interpretation as best ensures the attainment of the provision's objects.[14]

[42] We adopt that reasoning and conclude that s. 16.1(1) authorizes tribunals to grant substantive orders, including stays.

3.2.2.c Would a stay of the Confidentiality Decision be an interim order?

3.2.2.c.i Introduction

[43] As we have concluded, s. 16.1(1) authorizes the issuance of substantive orders, including stays. However, that authority authorizes only "interim" orders. The question remains whether the stay sought in this case would be an interim order. Staff says that it would not. We agree.

[44] To reach that conclusion, we break this question down into two parts:

a. was the Confidentiality Decision itself an interim order; and

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[11] 2010 HRTO 2102 (***Toussaint***)

[12] *Toussaint* at paras 14-31

[13] *Dua v College of Veterinarians of Ontario*, 2021 ONSC 6917 at paras 22-33

[14] *Legislation Act*, SO 2006, c 21, Sch F, s 64(1)

b. if the Confidentiality Decision was not an interim order, could a stay of the Confidentiality Decision nevertheless be an interim order and therefore authorized by s. 16.1(1)?

[45] There is no explicit requirement that the order sought to be stayed is itself an interim order. However, we consider the analysis of whether the Confidentiality Decision is an interim order to be a helpful step in our analysis of whether the requested stay would be an interim order. Below, we explain in more detail why that is. Briefly, though, once a final order is made in a proceeding about a particular issue (even if that order is not the final, as in chronologically last, order in the proceeding), the tribunal will not return to the issue that was the subject of that final order. The issue that was the subject of that final order has been determined.

[46] Because the Confidentiality Decision finally determined the issue before the Tribunal, a stay of that decision cannot be "pending" (*i.e.*, awaiting) any further resolution by the Tribunal of the issue, which the Tribunal has resolved. Given that such a stay cannot be pending final determination by the Tribunal of the original issue, how could the stay be seen as interim? Conceivably, a stay could be made temporary, pending some other unrelated event in the proceeding, but Sharpe has not asked for such an order. He has asked for a stay pending an event outside the proceeding, *i.e.*, resolution of a question in the judicial review application. As we discuss below, we consider that misalignment of venues to be problematic for Sharpe's requested relief.

[47] For these reasons, we find it useful to examine whether the Confidentiality Decision was an interim or final order, before we consider the nature of a stay order itself.

3.2.2.c.ii Was the Confidentiality Decision itself an interim order?

[48] Staff submits that the Confidentiality Decision was not interim because the issue of confidentiality of the adjudicative record in this temporary cease trade proceeding has been finally disposed of. Even though the proceeding continues, that is only to deal with Staff's continuing request that securities of nine respondent entities be cease traded. There is no unresolved issue about confidentiality of the record. The issue of confidentiality of that record will not

come back before the Tribunal in the context of this proceeding. There is no relationship between the question of whether the adjudicative record should be confidential and the question of whether the nine respondent entities should be prohibited from trading securities.

[49] More importantly, there is no pending claim for relief in respect of Sharpe; indeed, Staff has never sought any relief in respect of Sharpe during the life of this temporary cease trade proceeding, because the initial order suspended his registration with Bridging Finance Inc., but Sharpe was terminated before this proceeding was commenced.

[50] Accordingly, says Staff, the order dismissing Sharpe's request for confidentiality cannot be described as temporary or provisional, and it therefore does not meet the standard set by the Supreme Court of Canada in *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*.[15] In that case, the court held that it is "inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order."[16]

[51] That analysis is consistent with the words of s. 4 of the *Judicial Review Procedure Act*, quoted in paragraph [29] above. That section contemplates "interim orders … pending the final determination of the application". It cannot be said that the Confidentiality Decision, when made, was "pending" anything.

[52] That the order dismissing Sharpe's confidentiality request is not interim is further highlighted by the fact that Staff could at any time withdraw its request for the cease trade order against the nine entities. That request is the sole reason this temporary cease trade proceeding still exists. If Staff did withdraw its request, or if it let the current order expire on March 31, 2023, without seeking an extension, that would conclude this proceeding. The Tribunal would no longer have jurisdiction over the proceeding (except, for example, in the case of an application under s. 144.1 to revoke or vary the Tribunal decision), and the adjudicative record would persist. Sharpe's only recourse to have the adjudicative record treated as confidential would lie with the court, since the

[15] [1989] 1 SCR 1722 (***Bell Canada***)
[16] *Bell Canada* at 1752

Tribunal's authority in this proceeding would have been exhausted (or, to use the Latin, the Tribunal would be *functus officio*).

[53] In rebutting Staff's position, Sharpe cites the Court of Appeal for Ontario's description of an "interlocutory" order (which is arguably analogous to an interim order).[17] The court held that an interlocutory order does not determine "the real matter in dispute between the parties".[18] Sharpe submits that the dismissal of his confidentiality request was merely an interlocutory procedural order, since it did not determine the real matter in dispute between the parties.

[54] In our view, the court's description undermines rather than supports Sharpe's position. Sharpe sought only one thing from the Tribunal in his original motion in this temporary cease trade proceeding. He asked that various material "be marked confidential and not be made available to the public", without time limitation. That was the only matter in dispute between Staff and Sharpe in this proceeding, so we cannot give effect to Sharpe's submission that the Confidentiality Decision did not determine the real matter in dispute.

[55] Sharpe did seek revocation of the s. 11 investigation order, but:

a. that request arose in another proceeding (*i.e.*, the proceeding that Sharpe commenced, in which he sought that revocation), not in this temporary cease trade proceeding; and

b. in any event, the question of whether or not the investigation order should continue to exist was disposed of in that other proceeding.

[56] Where a confidentiality order is made in a proceeding, it is often the case that the order is purely procedural and would not resolve any true dispute between the parties. For example, a party may ask the panel to consider evidence related to the party's health, and may ask the panel to keep that information confidential pursuant to s. 2(2) of the *Tribunal Adjudicative Records Act, 2019*,[19] or Rule 22(4) of the Tribunal's *Rules of Procedure and Forms*. That type of request for confidentiality is important to the party but is entirely tangential to

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[17] *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2020 ONCA 375 (***Drywall***) at paras 16-17

[18] *Drywall* at para 16

[19] SO 2019, c 7, Sch 60

the issues being adjudicated and the relief sought by the applicant in that proceeding.

[57] Because it is common for confidentiality orders to be issued in similar circumstances, Sharpe's original request for a confidentiality order may "feel" procedural. But it is not. The question of whether or not the adjudicative record should be confidential was the core of the Confidentiality Decision (the decision that Sharpe seeks to stay). The Confidentiality Decision was therefore a final determination of the sole issue between Staff and Sharpe in this proceeding. As we discussed above, once the Confidentiality Decision was issued, the question of confidentiality was fully resolved. Accordingly, the Confidentiality Decision cannot be seen as interim.

[58] That conclusion aligns with the Supreme Court of Canada's description of an interim order, cited in paragraph [50] above, because the effect of the Confidentiality Decision would not be addressed in any way by the "final" (*i.e.*, chronologically last) order in this proceeding.

[59] As further illustration, this case is unlike *Dua*, the case referred to in paragraph [41] above. In that case, the Divisional Court affirmed that s. 16.1 authorized the tribunal to impose an interim suspension pending the final disposition of discipline proceedings against the respondent, Dr. Dua. In other words, the issue that was the subject of the interim order (the right of Dr. Dua to continue to practise) was the same issue that was to be determined at the end of the proceeding. That case fits squarely within the Supreme Court of Canada's description of an interim order.

3.2.2.c.iii Even though the Confidentiality Decision was not an interim order, could a stay of the Confidentiality Decision nevertheless be an interim order and therefore authorized by s. 16.1(1)?

[60] We must still address, though, whether the requested stay could be interim (and therefore authorized by s. 16.1(1)) even though the proposed subject of that stay (the Confidentiality Decision) was not. We conclude that in the circumstances of this case, the requested stay cannot be characterized as interim.

[61] Our reason for that conclusion overlaps with the discussion above relating to the nature of the Confidentiality Decision. Because there is no pending request for relief by Staff against Sharpe in this temporary cease trade proceeding, how could a stay of the Confidentiality Decision be interim? Interim pending what? Sharpe himself answers that question in his notice of motion and in his written submissions on this motion, in which he specifies that his request is for "an interim stay … pending the disposition of the judicial review application. [emphasis added]"[20]

[62] The misalignment of venues in that submission is problematic. It reinforces our view that in the same way the Confidentiality Decision did not conform to the Supreme Court of Canada's description of an interim order, a stay of that decision would not conform either. Specifically, there will be no future "final order" with respect to the stay against which the supposedly interim stay order could be measured.

[63] Once again, because Sharpe's requested stay would be temporary, pending another event, it may "feel" interim. However, where, as here, the event on which the temporary stay would depend is outside this temporary cease trade proceeding, the stay could not be seen as interim in the context of this proceeding. As we discussed above, this illogicality is highlighted by the possibility that the stay order would last longer than the very proceeding in which it arises. This temporary cease trade proceeding could end long before the court disposes of the judicial review application, and this proceeding could well end without any involvement by Sharpe, since there is no request for relief against him.

3.2.2.c.iv Conclusion about whether a stay of the Confidentiality Decision would be an interim order

[64] For all these reasons, we conclude that because the Confidentiality Decision was not an interim decision, and because the suggested contingent event is the disposition of a court proceeding involving only Sharpe and not the other respondents in this temporary cease trade proceeding, the requested stay cannot

[20] Written submissions of David Sharpe at para 48

be interim in nature. Accordingly, s. 16.1(1) of the *Statutory Powers Procedure Act* does not apply and cannot support a stay of the Confidentiality Decision.

3.2.3 Section 25.0.1 of the *Statutory Powers Procedure Act*

[65] We turn now to the second provision on which Sharpe relies. Sharpe submits that s. 25.0.1 of the *Statutory Powers Procedure Act* also authorizes the Tribunal to grant the requested stay in this case. We disagree.

[66] Sharpe correctly submits that we ought to interpret the section broadly, but we must do so in a way that respects the boundaries set by the section's clear wording, enabling a tribunal "to determine its own procedures and practices", and therefore for that purpose to make orders "with respect to the procedures and practices that apply in any particular proceeding".

[67] In our view, the plain and ordinary meaning of these words indicates that they relate to how a hearing (or a proceeding consisting of multiple hearings) is run. The Confidentiality Decision was not a procedural ruling. It disposed of the substantive relief that Sharpe was seeking in the proceeding. We must point out again that the outcome in the Confidentiality Decision survives the proceeding; that is, the adjudicative record remains open to the public even after the proceeding concludes. The converse would be true as well – if we had disposed of Sharpe's request by ordering (without time limitation) that the adjudicative record would remain confidential, that order would have continued to be effective beyond the end of the proceeding.

[68] As we did with s. 16.1(1), we must consider not just the Confidentiality Decision, but more importantly the requested stay, when interpreting s. 25.0.1. If we were to accede to Sharpe's submission that s. 25.0.1 permits a stay in this case, we would have to read s. 25.0.1 as authorizing a tribunal to stay any of its own decisions, even when the tribunal had finally disposed of the issues addressed by its decision. That would be a broad power, and nothing in s. 25.0.1 would limit its applicability to situations where the party was seeking judicial review of the decision. We see no support for that interpretation in the statutory scheme.

[69] Further, in our view the plain and ordinary meaning of the words "practices and procedures that apply in any particular proceeding" cannot include a stay:

a. which may be granted only on satisfaction of an onerous three-pronged test (discussed below) that is inconsistent with the mundanity of those words; and

b. which the Federal Court of Appeal has described as "serious relief".[21]

[70] We were provided no authority to suggest that s. 25.0.1 could be relied on in these circumstances. We reject the submission that we should do so.

3.2.4 Conclusion on jurisdiction

[71] Before we conclude on the jurisdiction question, we wish to address one Tribunal decision that Sharpe cites. He submits that the Tribunal previously granted a respondent an order similar to the one he now requests. He refers to the Tribunal's 2010 order in *Re Boock*.[22] It appears from the order, which was issued without reasons, without any express reference to statutory authority, and on consent of Staff, that:

a. the Tribunal had made an earlier decision on a motion in the same proceeding;

b. the motion decision related to disclosure "regarding" one of the respondents;

c. the respondent commenced an application for judicial review of the motion decision; and

d. the Tribunal stayed the motion decision pending the court's decision in the judicial review application.

[72] We do not find the order to be of assistance in this proceeding, because:

a. it was on consent, and there is no indication that the Tribunal canvassed the issue before us;

b. it appears to relate to the obligations that parties to an enforcement proceeding have to each other to make certain disclosures (although in the absence of reasons we are not certain);

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[21] *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 (***Janssen***) at para 24

[22] (2010) 33 OSCB 2375

c. if we have correctly described the subject matter of the order in *Re Boock*, then that falls within the category of "procedures and practices" within a proceeding, as contemplated by s. 25.0.1 of the *Statutory Powers Procedure Act*, in that it does not determine any of the relief sought in that proceeding, but instead governs a procedural step along the path to the ultimate disposition of the proceeding.

[73] We therefore conclude, for the reasons set out above, that neither s. 16.1(1) nor s. 25.0.1 of the *Statutory Powers Procedure Act* empowers us to grant the requested stay.

[74] We note also that as we have discussed above, our conclusion on this question does not leave Sharpe without recourse in his pursuit of a stay of the Confidentiality Order. The Divisional Court's jurisdiction to grant a stay is less constrained than this Tribunal's. Sharpe could have, and still can, seek a stay from that court.

[75] Having concluded, therefore, that we have no jurisdiction to grant the requested stay, we could end our decision here. However, we have decided against Sharpe on two bases, one as much as the other. Accordingly, and in the event we are wrong about whether we have jurisdiction, we will analyze whether we should stay the Confidentiality Decision, if we had the jurisdiction to do so. That question was vigorously argued by the parties and we have given it our careful consideration.

3.3 If the Tribunal has the jurisdiction to stay the Confidentiality Decision, should it do so?

3.3.1 Introduction

[76] With respect to the question of whether we should grant a stay, assuming we can, the parties agreed that we should apply the three-part test used where injunctive relief is sought.[23] That same test is also commonly used to determine whether a stay is appropriate. The test calls for three questions to be considered:

[23] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311

a. Is there a serious issue to be tried?

b. If the stay is not granted, will the requesting party suffer irreparable harm of a nature that would justify a stay?

c. Does the balance of convenience favour the granting of the stay?

[77] If the answer to one or more of the three questions is "no", then we should not grant the stay.

[78] In this case, we answer "yes" to the first question (*i.e.*, there is a serious issue to be tried), but "no" to the second and third questions. We will now address each of the three questions in turn.

3.3.2 Is there a serious issue to be tried?

[79] We begin by asking whether Sharpe's request for a stay, and by extension his application for judicial review, raise a serious issue. If the stay request is frivolous or vexatious, then the answer to this first question is "no", and we should deny the request.

[80] We agree with Sharpe's submission that in this case the answer to this first question is "yes".

[81] On the surface, Sharpe's judicial review application raises serious issues. He questions the proper interpretation of s. 17(6) of the *Securities Act*, and the interplay between the Tribunal's process and Sharpe's privacy rights.

[82] However, in submitting that there is no serious issue to be tried, Staff focuses not on the inherent merit (or lack of merit) of any particular argument that Sharpe intends to make on the judicial review application. Instead, Staff submits that none of Sharpe's intended arguments was previously made before the Tribunal. Accordingly, says Staff, the Divisional Court will refuse to hear any arguments from Sharpe, leaving no serious issue to be tried.

[83] We cannot reach that conclusion.

[84] In its written submissions, Staff reviewed in detail the arguments made before the Tribunal, and the grounds set out in the judicial review application. There clearly are differences, *e.g.*, the intended advancement of a constitutional argument before the court that was not made before the Tribunal.

[85] However, while there are differences, there is some overlap, a point not strenuously contested by Staff in its oral submissions. Indeed, one example will suffice to show the overlap. Both Sharpe's original motion (leading to the Confidentiality Decision) and his judicial review application explicitly cite, among other provisions, s. 2(2) of the *Tribunal Adjudicative Records Act, 2019*, which permits a Tribunal to order that a portion of an adjudicative record be treated as confidential under certain specified circumstances.

[86] There are other examples of overlap, which we need not review. Even if those examples were not clear, though, and while courts generally discourage the introduction of new arguments on appeal or on judicial review, the court always has the discretion to allow arguments not made before the Tribunal below.[24] Staff is correct in saying that the discretion is not often exercised, but in our view Staff goes too far in suggesting that not only will Sharpe not be entitled to advance new arguments, he will not be permitted to "supplement" arguments that he did make before the Tribunal.

[87] Given the interconnected nature of the issues in this case, and the fact that there are grounds referred to in the judicial review application that were cited before the Tribunal, we would consider it presumptuous to find that Sharpe will be precluded from making in court any of the arguments set out in his judicial review application. Further, any decision we might make about what the court might hear risks being inconsistent with the court's own decision on the point. We should avoid that risk. The court should be left to decide what arguments it is willing to consider.

[88] We therefore cannot accept Staff's contention that the judicial review application is frivolous or vexatious. The application presents a serious issue to be tried.

3.3.3 If a stay is not granted, will Sharpe suffer irreparable harm of a nature that would justify a stay?

[89] We turn to the second prong of the three-part test. If a stay is not granted, will Sharpe suffer irreparable harm of a nature that would justify a stay? We conclude that he will not, primarily because the potential harm that Sharpe

[24] *Quan v Cusson*, 2009 SCC 62 at para 36

anticipates is harm that he has taken no steps to avoid, despite it long having been open to him to do so.

[90] The factual background is central to this question.

[91] Staff's application for a temporary cease trade order, first from the Commission exercising its executive function, and then as a request for the Tribunal to extend the order, includes two affidavits sworn by Daniel Tourangeau, a member of Staff. The first affidavit was sworn April 29, 2021, and it attached transcripts for two of the three days on which Sharpe was examined as part of Staff's investigation. The body of that affidavit describes some of the testimony that Sharpe gave. The second affidavit was sworn April 30, 2021, and it attaches as an exhibit the entire rough draft transcript of Sharpe's examination the previous day.

[92] Those same affidavits formed part of the record that the Commission filed with the court on its application for the appointment of a receiver.

[93] In its decision, the court not only appointed the receiver, it also required that both affidavits, with exhibits, be posted on the receiver's website. As a result, whatever concerns Sharpe may have had about the propriety of the Commission choosing not to obtain a s. 17 order before applying for a receiver, those concerns were, as a practical matter, superseded by the court's order. If Sharpe believed that the without-notice order was improperly obtained or should be varied, it was open to Sharpe, and continues to be open to him, to bring his concerns to the court. He has not.

[94] The exhibits to the first affidavit are no longer included in the version that is posted on the receiver's website. The complete version of the affidavit, including exhibits, was available for some period of time, but the record does not tell us for how long that was the case. At the hearing before us, counsel were unable to assist with any reasonable degree of certainty.

[95] The body of the first affidavit, as posted on the receiver's website, continues to contain the description of the substance of Sharpe's testimony.

[96] Whatever the full chronology may have been with respect to the public availability of the contents of the court file, there is no dispute before us that the

material has been widely dispersed. In his written submissions before us, Sharpe acknowledged that his own compelled evidence and that of other compelled witnesses contained in the receivership application record was filed in the open court record on April 30, 2021, and posted on the receiver's website. In his application for judicial review, Sharpe notes that "the Compelled Evidence was posted on the case website established by [the receiver]… and was subject to widespread reporting by the media."

[97] We could not put it better than Sharpe's counsel did when he was asked at the December 2021 hearing why Sharpe had not asked the court for a sealing order: "[T]he horse was out of the barn and it completed a few laps at the field".

[98] A stay is a significant remedy. We respectfully adopt the conclusion of the Federal Court of Appeal that a party seeking a stay "must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm [emphasis added]", since "it would be strange if a litigant complaining of … harm it could have avoided … or harm it still can avoid … could get such serious relief."[25]

[99] It was open to Sharpe, from the moment he became aware in May 2021 that the compelled evidence was in the court file and posted on the receiver's website, to take steps in court to have that portion of the record sealed and information removed from the website. It is still open to him to take those steps. He could have done so before or after this Tribunal's decision in March 2022, and he could have done so before or after the Confidentiality Decision in July 2022.

[100] We pressed Sharpe's counsel on this point, asking why we should grant a stay when Sharpe has consistently chosen not to seek relief from the court, when it is the court that controls the contents of the court file and the information the receiver posts on its website. Sharpe's counsel offered no satisfactory answer. We were told only that there may be different tests associated with information that has already been made public, an assertion that was not developed and that we do not find persuasive.

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[25] *Janssen* at para 24

[101] We also asked why Sharpe did not, on this motion, put forward any evidence about the harm that Sharpe might suffer. In response, Sharpe's counsel pointed us to the decision of the Nova Scotia Court of Appeal in *Nova Scotia v O'Connor*, in which the chambers judge observed that the concept of irreparable harm concerns itself with the nature of the harm rather than its magnitude.[26] We accept that proposition, but note that the judge was dealing with disclosure that is wrongful and unlawful.

[102] We do not and cannot conclude that the disclosure of the adjudicative record in this proceeding is wrongful or unlawful. This Tribunal has already made its decision that it was appropriate and lawful to make the record public in this temporary cease trade proceeding (as opposed to in the receivership application), for reasons set out in the Confidentiality Decision. It would be contrary to the important principle of legal finality and certainty for this panel now to find that continuing to make the adjudicative record available to the public is or would be wrongful. In contrast, a court to which a stay request was brought would be under no such constraint.

[103] It is also critical to assess whether further continued availability of the information would cause incremental harm. What if anything would be the incremental harm if:

a. the information is and has been publicly available all along (*e.g.*, the rough draft of the transcript of Sharpe's third day of examination, posted on the receiver's website); or

b. the substance of the information is described in an affidavit that is and has been publicly available all along (*e.g.*, Tourangeau's description of Sharpe's testimony from the first two days of examination, posted on the receiver's website)?

[104] We cannot conclude on a balance of probabilities that there would be any incremental harm, because Sharpe has not given us any assistance in identifying what that would be.

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[26] *Nova Scotia v O'Connor,* 2001 NSCA 47 at para 16

[105] We note further that there is no absolute confidentiality protection regarding material protected by s. 16 of the *Securities Act*. Subsection 17(6) of that statute permits disclosure in connection with a proceeding commenced under the *Securities Act*, and subsection 17(1) permits the Tribunal to authorize disclosure of otherwise protected material. While the protections of s. 16 are important, this Tribunal has already decided that there is no continuing need or public interest in preserving the confidentiality of the material.

[106] In any event, Sharpe has offered only vague and unsubstantiated speculation about what harm he might suffer, without even identifying a potentially harmful aspect of the adjudicative record that has not already been widely publicized. Further, he has offered no satisfactory answer to the significant concern that for almost the past year and a half he could have sought to avoid the harm he fears, by seeking relief from the court.

[107] We conclude that Sharpe fails to meet the second prong of the three-part test.

3.3.4 Does the balance of convenience favour granting a stay?

[108] We turn now to the third prong of the test. We ask whether the balance of convenience favours granting a stay, assuming we have jurisdiction to do so. We conclude that it does not, for two reasons.

[109] First, a stay is also available from the Divisional Court. If we were to grant a stay, we might reach conclusions that are inconsistent with what the court's findings will be on the merits of the judicial review application. That would be an undesirable outcome that could be avoided by Sharpe seeking his stay from the court rather than from this Tribunal.

[110] In canvassing this issue with the parties, we heard speculation that it might take longer to get before a judge to seek a stay than it would be to get a stay from this Tribunal. We did not find that argument persuasive given that no attempt was made and the parties had no specific information from the court.

[111] Secondly, we attach considerable importance to the need for transparency with respect to Tribunal proceedings, although we are mindful of the Divisional Court's conclusion in *Gaudet v Ontario (Securities Commission)* that the

openness principle is unlikely to be seriously compromised by a relatively brief period during which the materials would be unavailable to the public.[27]

[112] In a number of the authorities cited to us, the concern was that a failure to grant a stay would render the earlier decision nugatory. In other words, and to paraphrase the point made earlier, it was submitted in those cases that if the stay were refused, the horse would be let out of the barn, and even a successful appeal of the original decision could not put the horse back in the barn.

[113] This case is not like those authorities. This Tribunal has already found, many months ago, that the information complained of has been widely available and reported on publicly for a considerable time. It is true that when considering irreparable harm we must recognize that continued public availability of information previously disclosed can be inherently harmful. However, it is common ground that the three prongs of the test are not silos or "watertight compartments",[28] and we observe that when assessing the balance of convenience (a highly discretionary exercise), the surrounding circumstances are important. In balancing competing principles, we can and should take account of the nature and magnitude of that harm, and whether the party seeking the stay has taken any steps to avoid that harm.

[114] Taking all of the above factors into account, we conclude that the balance of convenience favours Staff's position. Sharpe fails to meet the third prong of the test for a stay.

3.3.5 Conclusion as to whether the Tribunal should exercise its jurisdiction, if indeed it has jurisdiction to stay the Confidentiality Decision

[115] For the above reasons, we conclude that:

a. Sharpe's judicial review application raises a serious issue to be tried;

b. Sharpe has not demonstrated unavoidable and irreparable harm that would befall him if the stay were denied; and

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[27] *Gaudet v Ontario (Securities Commission)*, (1990) 13 OSCB 1809 at para 8

[28] *Circuit World Corp v Lesperance*, 1997 CanLII 1385 (ON CA)

c. the balance of convenience favours the transparency of the Tribunal's proceedings over the interests put forward by Sharpe.

[116] Therefore, even if this Tribunal has jurisdiction to grant the requested stay, we conclude that we should not do so.

4. CONCLUSION

[117] We conclude that we do not have jurisdiction to grant the stay that Sharpe requests. Even if we did have that jurisdiction, we would not exercise it, because of Sharpe's failure to satisfy the three-prong test outlined above.

[118] Sharpe's request for a stay of the Confidentiality Decision is dismissed.

Dated at Toronto this 25th day of November, 2022

"*Timothy Moseley*"
Timothy Moseley

"*William Furlong*"
William Furlong

"*Dale R. Ponder*"
Dale R. Ponder