

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

MOTION

OF DAVID AND NATASHA SHARPE

(For an Order to Adjourn Stay Motions and the Hearing on the Merits
under Rule 29 of Capital Markets Tribunal Rules of Procedure)

A. ORDER SOUGHT

The Lawyers for the Moving Parties, David and Natasha Sharpe (the “**Sharpes**”), request with notice that the Tribunal make the following orders:

- (a) Adjourning the hearing of the motions for a stay of the proceedings against the Sharpes, currently scheduled to be heard on May 23, 2023 (the “**Stay Motions**”), revising the timetable for the delivery of submissions and argument regarding the issuance of summonses to witness in respect of the Stay Motions, and adjourning the commencement of the hearing on the merits until the motion brought by the Ontario Securities Commission (“**OSC**” or the “**Commission**”) in the Divisional Court proceeding under File No. 168/23 (the “**Judicial Review Application**”) to quash the Sharpes’ Judicial Review Application (the “**Motion to Quash**”) has been determined;
- (b) Providing that should the Sharpes be successful on the Motion to Quash and their Judicial Review Application be permitted to proceed, the timetable in respect of the Stay Motions

and related summons issues be further varied and the commencement of the hearing on the merits be further adjourned until the Judicial Review Application has been determined;

(c) If necessary, abridging time for service and filing of this Notice of Motion and Motion Record; and

(d) Such further relief as counsel may advise and the Tribunal may permit.

B. GROUNDS

The grounds for the motion are:

Background – The Commission’s Breach of the Act and the Resulting Stay Motions

1. The within proceeding was initiated against the Sharpes by a Statement of Allegations dated March 31, 2022.

2. On March 30, 2022, the Tribunal issued a decision in *Re Sharpe*, 2022 ONSEC 3 (the “**March 30 Decision**”), finding that the Commission breached ss. 16 and 17 of the Ontario *Securities Act* (the “**Act**”) and violated Mr. Sharpe’s privacy rights by improperly publicly disclosing compelled evidence obtained in the course of OSC enforcement staff’s (“**Staff**”) investigation that gave rise to the issuance of the Statement of Allegations. The Commission’s improper disclosure included confidential compelled evidence of both David and Natasha Sharpe.

3. On October 21, 2022 and November 24, 2022 respectively, David and Natasha Sharpe brought the Stay Motions seeking a stay of proceedings as the appropriate remedy to address the Commission’s breach of the Act.

4. On December 6, 2022, the Tribunal issued a decision in *Re Bridging Finance, 2022 ONCMT 37*, finding that the Stay Motions should proceed prior to the commencement of the hearing on the merits because, *inter alia*, the issues on the motions were unrelated to the issues at the merits hearing; the resolution of the Stay Motions could potentially allow the parties and the Tribunal to avoid a lengthy and costly hearing, including significant preparation time; and, hearing the Stay Motions before the merits hearing afforded the parties an opportunity to make submissions about possible alternative measures that should apply in the merits hearing if the Stay Motions were not granted. The Stay Motions were scheduled to be heard on May 23, 2023, and the hearing on the merits was to commence on June 26, 2023.

Disclosure Required for Fair Hearing of Stay Motions

5. Following the filing of the Stay Motions, counsel for David Sharpe wrote to Staff, requesting disclosure of documents relevant to and necessary for a fair determination of the Stay Motions (the “**Staff Records**”). Staff refused to provide the requested disclosure.

6. On November 24, 2022, David Sharpe filed with the Tribunal a motion for disclosure of Staff Records. Natasha Sharpe filed a motion for disclosure of Staff Records on the same basis on December 2, 2022 (collectively, the “**Disclosure Motions**”).

7. On January 30, 2023, the Tribunal heard and dismissed the Sharpes’ Disclosure Motions. Reasons for Decision were issued on February 21, 2023 (reported as *Re Bridging Finance, 2023 ONCMT 8*) (the “**Disclosure Decision**”).

8. Despite the pending Stay Motions, on March 10, 2023, Staff brought a motion for an order requiring the Sharpes to file further witness summaries for the purposes of the merits hearing (the “**Witness Summaries Motion**”).

9. On March 16, 2023, Staff brought a motion to summarily dismiss the Sharpes’ Stay Motions based on the Tribunal’s findings on the Disclosure Motions.

Judicial Review of the Disclosure Decision Relating to the Stay Motions

10. On March 17, 2023, the Sharpes filed the Judicial Review Application with respect to the Disclosure Decision. In the Notice of Application, the Sharpes identify numerous significant legal errors made by the Tribunal in arriving at the Disclosure Decision, including that the Tribunal failed to recognize that its own unanimous finding that the Commission breached the Act satisfied the evidentiary threshold required to obtain disclosure of Staff Records.

11. In the circumstances, judicial review of the Disclosure Decision is not premature. The Tribunal’s dismissal of the Disclosure Motions denied the Sharpes procedural fairness by depriving them of their ability to obtain necessary evidence for the fair adjudication of the Stay Motions (which the Tribunal has already determined should be heard in advance of the merits hearing).

12. The Divisional Court requested that the parties agree to a schedule for exchange of materials on the Judicial Review Application. Staff refused to schedule the Judicial Review Application and instead wrote to the court stating that they were intending to bring the Motion to Quash on the basis of prematurity.

13. On April 13, 2023, the parties attended a case conference before Nishikawa J. of the Divisional Court. Nishikawa J. advised the parties that pre-hearing motions are discouraged, and suggested that Staff should consider making their prematurity arguments in their response to the Judicial Review Application. Counsel for the Sharpes indicated that they were prepared to attend the hearing of the Judicial Review Application on an expedited basis.

14. Nishikawa J. indicated that a panel of the Divisional Court was available for the hearing of the Judicial Review Application on May 11, 2023. Further expedited dates were not canvassed as Staff refused to abandon the Motion to Quash. The Motion to Quash will be heard by a single judge and is reviewable by a panel.

15. The Motion to Quash has been scheduled to be heard on May 15, 2023 and, if the Commission is unsuccessful on that motion, the hearing of the Judicial Review Application may proceed on July 10, 12 or 13, 2023. The Sharpes' written submissions for the Motion to Quash are due on May 10, 2023.

Principles of Procedural Fairness Require Variation of the Current Timetable

16. On April 14, 2023, the Tribunal ordered that the Sharpes:

- (a) Attend Staff's Witness Summaries Motion on May 23 and 26; file a responding motion record by April 21, and written submissions by May 17, 2023;
- (b) By April 21, 2023, file written submissions, and by May 2, 2023, file reply submissions in support of their request that summonses for attendance at the Stay Motions be issued to

Staff members involved in the decision to publicly disclose compelled evidence in breach of the Act (the “**Summonses Motion**”); and

(c) Proceed with the Stay Motions on May 23 and 26 and file written submissions and any responding record for the Stay Motions by May 16, 2023.

17. Further, as noted above, the Motion to Quash is scheduled to be heard on May 15, 2023, with the Sharpes’ written submissions due on May 10, 2023.

18. The circumstances surrounding the Sharpes’ pending Judicial Review Application constitute exceptional circumstances for the purposes of Rule 29 of the Tribunal’s Rules.

19. The evidence at issue in the Disclosure Motions goes to the core of the Sharpes’ Stay Motions. Despite the Tribunal’s finding that the Commission breached the Act, the Sharpes were denied disclosure of the records necessary to provide context for the Commission’s decision-making. This is a reviewable error.

20. The law is clear that the Commission’s “state of mind” and attitude towards compliance (or not) with its enabling legislation is a key consideration in the assessment of the appropriate remedy to be granted in respect of a breach. Further, as a breach has been found, the evidentiary burden shifts to Staff to inform the Tribunal of the relevant context. Staff have failed or refused to do so despite having sole power, possession and control over that information.

21. In the circumstances, proceeding with the Stay Motions in the absence of the evidence that is necessary for the Sharpes to establish that a stay is the appropriate remedy to address the Commission’s breach of the Act, while the Tribunal’s decision to deny disclosure of that evidence

is under review, would be procedurally unfair. It would result in a denial of the Sharpes' right to make full answer and defence which includes seeking a stay of proceedings.

22. Further, the reasons issued by the Tribunal on the Disclosure Motion strongly imply that the Stay Motions, if heard, would be dismissed on the current evidentiary record. Similarly, Staff have indicated that they will be challenging the issuance of summonses for the Stay Motions as a collateral attack on the Disclosure Decisions. Accordingly, the scope of the evidentiary record must be determined by the Court before the Stay Motions (and summons issues) are heard.

23. As set out above, Staff brought the Witness Summary Motion, the Motion to Quash and the (now abandoned) motion to dismiss the Stay Motions knowing that Mr. Greenspan, Mr. Sharpe's counsel of choice for these matters, is unavailable due to long-standing trial commitments. The Tribunal has also now scheduled the delivery of submissions in respect of the requested summonses for the Stay Motions during this same period of counsel unavailability. Forcing these matters to proceed on the present schedule will effectively deny Mr. Sharpe his counsel of choice.

24. Efficiency, while important, does not trump principles of natural justice and procedural fairness.

25. This is the first adjournment request made by the Sharpes in this proceeding. The hearing on the merits is yet to commence and the Sharpes are not aware of any prejudice or costs consequences to any parties to the proceeding that would be caused by the adjournment.

26. Conversely, as set out herein, the Sharpes will be severely prejudiced if the adjournment is not granted.

27. Given that there is a receivership in place, an adjournment to permit the Sharpes to avail themselves of their legal rights of judicial review would not prejudice investors of Bridging Finance Inc. or the public interest.

28. The numerous steps scheduled to take place between now and the hearing of the Stay Motions are complex. The Sharpes require resources so that they may be represented by competent counsel. At present, such resources are not being made available by the receiver appointed over Bridging Finance Inc. and related entities (the “**Receiver**”), although the Sharpes continue to work with the Receiver (and, if necessary, the Court) to obtain access to funding for their defence of this proceeding.

29. Rules 1, 3, 28 and 29 of the Tribunal’s Rules of Procedure; and

30. Such further and other grounds as counsel may advise and the Tribunal may accept.

C. EVIDENCE

The Lawyers for the Sharpes intend to rely on the following evidence for the motion:

- (a) The Motion Record on the Disclosure Motion;
- (b) The affidavit of Alexandra Grishanova, sworn April 20, 2023;
- (c) Transcript of attendance on April 14, 2023, when completed.

DATED this 20th day of April 2023.

CRAWLEY MACKEWN BRUSH LLP

Barristers & Solicitors
Suite 800, 179 John Street
Toronto, ON M5T 1X4

Alistair Crawley (LSO#: 38726D)

acrawley@cmlaw.ca

Tel: 416.217.0806

Melissa MacKewn (LSO#: 39166E)

mmackewn@cmlaw.ca

Tel: 416.217.0840

Daniel Thomas (LSO#: 78884Q)

DThomas@cmlaw.ca

Tel: 416.217.0773

Alexandra Grishanova (LSO#: 73215N)

agrishanova@cmlaw.ca

Tel: 416.217.0859

Tel: 416.217.0110

**GREENSPAN HUMPHREY WEINSTEIN
LLP**

15 Bedford Road
Toronto ON M5R 2J7

Brian H. Greenspan (LSO# 14268J)

bgreenspan@15bedford.com

Tel: 416.868.1755 x4222

Naomi M. Lutes (LSO# 60192Q)

nlutes@15bedford.com

Tel: 416.868.1755 x 4226

Lawyers for David Sharpe

LENCZNER SLAGHT LLP

Barristers
130 Adelaide Street West
Suite 2600
Toronto ON M5H 3P5

Lawrence E. Thacker (LSO#: 36939M)

lthacker@litigate.com

Tel: 416.865.3097

Tel: 416.865.9500

Lawyers for Natasha Sharpe

TO: **ONTARIO SECURITIES COMMISSION**

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

Mark Bailey (LSO#: 38096I)

mbailey@osc.gov.on.ca

Tel: 416.593.8245

Johanna Braden (LSO#: 40775L)

jbraden@osc.gov.on.ca

Tel: 416.356.7476

Nicole Fung (LSO#: 85061C)

nfung@osc.gov.on.ca

Tel: 416.593.8145

Staff of the Commission

AND TO: **FASKEN MARTINEAU DUMOULIN LLP**

Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

David A. Hausman (LSO#: 32282N)

dhausman@fasken.com

Tel: 416.868.3486

Jonathan Wansbrough (LSO#: 62430G)

jwansbrough@fasken.com

Tel: 416.943.8839

Tel: 416.366.8381

Lawyers for Andrew Mushore

AND TO: **THORNTON GROUT FINNIGAN LLP**
Barristers & Solicitors
Canadian Pacific Tower, TD Centre
100 Wellington Street West, Suite 3200
Toronto ON M5K 1K7

John L. Finnigan (LSO#: 24040L)
jfinnigan@tgf.ca
Tel: 416.304.0558

Tel: 416.304.1616

and

ROSS NASSERI LLP
Barristers & Solicitors
123 John Street
Suite 300
Toronto ON M5V 2E2

Erin Pleet (LSO#: 61043R)
epleet@rossnasseri.com
Tel: 416.572.4903 ext. 109

Tel: 416.572.4910

Counsel to PricewaterhouseCoopers Inc, the Receiver and Manager of all the assets, undertakings and properties of Bridging Finance Inc., 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