

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, C. s5, AS AMENDED

AND IN THE MATTER OF AN ORDER ISSUED UNDER SUBSECTION 11(1)(A) OF
THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, DATED SEPTEMBER 11, 2020

AND IN THE MATTER OF A SUMMONS ISSUED PURSUANT TO SECTION 13 OF
THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, DATED SEPTEMBER 28, 2020

NOTICE OF APPLICATION OF DAVID SHARPE

(For Revocation or Variation of a Decision Under Section 144 of the *Securities Act*, RSO 1990, c S.5)

A. ORDER SOUGHT

The Applicant, David Sharpe (“**Sharpe**”), requests that the Ontario Securities Commission make the following orders:

- (a) an Order revoking or varying the Commission’s Order authorizing an investigation by Enforcement staff of the OSC (“**Staff**”) pursuant to s. 11 of *Securities Act* (the “**Act**”)¹ in the matter of Bridging Finance Inc., dated September 11, 2020 (the “**Investigation Order**”);
- (b) an Order that any part of the adjudicative record filed on this application that contains or refers to compelled evidence obtained by Staff pursuant to the Investigation Order be marked confidential and not be made available to the public; and
- (c) such further relief as counsel may advise and the Commission may permit.

B. GROUNDS

The grounds for the application are:

1. Sharpe is a former CEO, UDP and director of Bridging Finance Inc.

¹ R.S.O. 1990, c. S.5

2. Pursuant to a summons issued under s. 13 of the Act, Sharpe was compelled to attend an investigative interview by Staff in connection with Staff's investigation authorized by the Investigation Order. Staff advised Sharpe in the cover letter accompanying the summons that "*there is a high degree of confidentiality associated with this matter*" and specifically directed Sharpe to the full text of section 16 – the confidentiality provision – of the Act.

3. Section 16(1) of the Act states:

Except in accordance with subsection (1.1) or section 17, no person or company shall disclose at any time,

(a) the nature or content of an order under section 11 or 12; or

(b) **the name of any person examined or sought to be examined** under section 13, **any testimony given under section 13**, any information obtained under section 13, **the nature or content of any questions asked under section 13**, **the nature or content of any demands for the production of any document or other thing under section 13**, or the fact that any document or other thing was produced under section 13. [emphasis added]

(1.1) A disclosure by a person or company is permitted if,

(a) the disclosure is to the person's or company's counsel; or

(b) the disclosure is to the person's or company's insurer or insurance broker ...

4. Sharpe's compelled interview was conducted over the course of three days: October 23, 2020, October 27, 2020 and April 29, 2021.

5. Pursuant to section 13 of the Act, Sharpe was required to, and did, answer all questions put to him by Staff (with privileged matters being the only exception). However, he had corresponding expectations of privacy, confidentiality and use protections with respect to his compelled testimony.

6. Sharpe took the use and derivative use protections against self-incrimination available to him under Canadian and Ontario law, including section 9 of the Ontario *Evidence Act*, with respect to all questions asked and answers given.

7. Sharpe's interview with Staff concluded on April 29, 2021, at 4:13 pm.

8. On April 30, 2021, Staff filed at the Superior Court of Justice, Commercial List, a notice of application and application record (the "**Application Record**") in support of an *ex parte* application, Court File No. CV-21-00661458-00CL (the "**Receivership Application**"), for an Order under s. 129 of the Act appointing PricewaterhouseCoopers Inc. ("**PwC**" or the "**Receiver**") as receiver over all of the assets, undertakings and properties of Bridging Finance Inc. and related entities (collectively, "**Bridging Finance**").

9. The Application Record contained the Affidavit of Daniel Tourangeau, Senior Forensic Accountant at the Enforcement Branch of the OSC, sworn on April 29, 2021 (the "**Tourangeau Affidavit**"). Attached as exhibits to the affidavit were excerpts from the transcript of Sharpe's compelled interview held on October 23, 2020, as well as additional compelled testimony, documents and information that Staff obtained from Sharpe and others pursuant to s. 13 of the Act during its investigation (the "**Compelled Evidence**"). Later in the day on April 30, 2021, Staff filed with the Court the First Supplemental Affidavit of Daniel Tourangeau sworn on April 30, 2021 (the "**Supplemental Tourangeau Affidavit**"). Attached as an exhibit to the affidavit was the **entire rough draft** of the transcript of Sharpe's compelled interview held the day before (the "**April 29 Transcript**"), as well as other Compelled Evidence.

10. Staff did not obtain an Order from the Commission under s. 17 of the Act authorizing it to disclose any of the Compelled Evidence.

11. Staff did not put Sharpe on notice that his Compelled Evidence would be disclosed in court proceedings and posted on the Receiver's website or give him any opportunity to oppose the proposed disclosure.

12. The *ex parte* Receivership Application was heard by The Honourable Hailey J. at 3:30 pm on Friday, April 30, 2021, via Zoom. Hailey J. granted the requested Order appointing the Receiver that evening.

13. On May 1, 2021, the Receiver posted on its website Staff's Application Record (including the Tourangeau Affidavit without the exhibits), as well as the Supplemental Tourangeau Affidavit, which appended the *entire* April 29 Transcript and other Compelled Evidence, as set out above. These materials were also emailed to the extensive service list connected to the receivership.

14. Also on May 1, 2021, the OSC issued a news release announcing the appointment of the Receiver. The news release contained a hyperlink to the Receiver's website and therefore, the Compelled Evidence.

15. On May 3, 2021, the Globe and Mail published an article titled "Inside the interrogation of Bridging's CEO before receivership", which commented on and quoted extensively from Sharpe's April 29 Transcript and other Compelled Evidence (the "**Globe and Mail Article**"). The article is highly prejudicial to Sharpe.

16. The prolific subsequent media reporting with respect to this matter has consistently included direct references to the contents of the confidential April 29 Transcript and other Compelled Evidence.

17. On May 7, 2021, Staff filed with the Commission an application to extend a temporary cease-trade order, issued on April 30, 2021, with respect to Bridging Finance. In support of their application, Staff filed the CTO Application Record in seven volumes, containing the entire Application Record and the Supplemental Tourangeau Affidavit. Staff did not seek a confidentiality Order from the Commission with respect to the Compelled Evidence contained in the CTO Application Record prior to filing it in the public record.

18. Staff's Application Record, including the Tourangeau Affidavit without the exhibits, and the Supplemental Tourangeau Affidavit with the exhibits, remain posted on the Receiver's website.

19. Through the above actions, OSC Staff:

- (a) breached the confidentiality provisions set out in part VI of the Act, including the confidentiality and use protections contained in ss. 17(1)(3) and 17(7) of the Act;
- (b) bypassed the supervisory jurisdiction of the Commission with respect to the disclosure of the Compelled Evidence, including the ability of the Commission to order disclosure in the appropriate circumstances but subject to terms and conditions; and
- (c) ignored the right of a compelled witness to notice of and the ability to object to any proposed disclosure of their testimony.

20. The improper disclosure and publication of the Compelled Evidence has:

- (a) caused irreparable prejudice to Sharpe, his reputation, his privacy interests, his expectation of confidentiality and his ability to defend any future proceedings, whether before the OSC or in any other forum;
- (b) fatally undermined the integrity of Staff's investigation;

(c) potentially prejudiced the interests of investors by exacerbating negative media attention to Bridging Finance and its borrowers; and

(d) undermined public confidence in the integrity of the OSC's investigative process and the due administration of the Ontario securities laws.

21. The harm is ongoing as the Compelled Evidence continues to be publicly available.

22. Staff's breach of the Act constitutes new and compelling circumstances that, if known to the Commission at the time of making the Investigation Order, would have changed the outcome.

23. Any part of the adjudicative record filed in this proceeding that contains or refers to compelled evidence is required by law to be confidential and not be available to the public.

24. The relief requested in this application is not intended to limit permitted disclosure pursuant to section 16(1.1) of the *Securities Act*.

25. Rules 1, 3, 12, 17, and 22(4) of the OSC Rules.

26. Sections 2.1, 11, 13, 16, 17 and 144 of the *Securities Act*, R.S.O. 1990, Ch. S.5.

27. Section 2(2) of the *Tribunal Adjudicative Records Act, 2019*, S.O. 2019, c. 7, Sch. 60.

28. Section 25.0.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

29. Such further and other grounds as the lawyers may advise and the Commission may permit.

C. EVIDENCE

The Applicant intends to rely on the following evidence at the hearing:

(a) the affidavit of Mary DeCaire, to be sworn, and/or a joint statement of agreed facts; and

(b) such further and other evidence as the lawyers may advise.

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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)

mmackewan@cmlaw.ca

Tel: 416.217.0840

Alexandra Grishanova (LSO # 73215N)

agrishanova@cmlaw.ca

Tel: 416.217.0859

Tel: 416.217.0110

Lawyers for the applicant

TO: ONTARIO SECURITIES COMMISSION

20 Queen St. W., 22nd Floor

Toronto, ON M5H 3S8

Robert Gain (LSO# 52836E)

rgain@osc.gov.on.ca

Tel: 416.593.3653

Jacob Millar (LSO# 78076C)

jmillar@osc.gov.on.ca

Tel: 416.596.4268

Tel: 416.593.8314

Staff of the Commission

**AND TO: PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

155 Wellington St. W., 35th Floor

Toronto, ON M5V 3H1

Linda Rothstein

Linda.rothstein@paliareroland.com

Tel: 416.646.4327

Tel: 416.646.4300

Lawyers for the Commission

AND TO: ONTARIO SECURITIES COMMISSION
20 Queen St. W., 22nd Floor
Toronto, ON M5H 3S8

Grace Knakowski
gknakowski@osc.gov.on.ca
Tel: 416.593.8111

Tel: 416.593.8314

Secretary to the Commission