



Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DAVID SHARPE

Plaintiff

- and -

**ONTARIO SECURITIES COMMISSION and ATTORNEY GENERAL OF
ONTARIO**

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.
The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of Superior Court of Justice
court office: 330 University Avenue
9th Floor
Toronto ON, M5G 1R7

TO: **ONTARIO SECURITIES COMMISSION**
20 Queen Street West
20th Floor
Toronto, ON
M5H 3S8

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, ON
M5G 2K1

ATTORNEY GENERAL OF CANADA
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario M5X 1K6

CLAIM

1. The plaintiff claims the following relief against the defendant the Ontario Securities Commission (the “**OSC**” or “**Commission**”):

- (a) A declaration that the actions of the OSC breached the plaintiff’s rights under sections 7, 11(c), and 13 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)¹;
- (b) An order under section 24(1) of the *Charter* or the common law requiring the OSC to apply to seal all court filings containing unredacted information collected under section 13 of the *Securities Act* (the “*OSA*”)² in the following matters:
 - (i) 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 DBT 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, OSC File No. 2021-15; and
 - (ii) 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, OSC File No. 2022-09 (the “**Enforcement Proceeding**”);

¹ Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982*, 1982, c 11.

² *Securities Act*, RSO 1990, c S.5.

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- (c) An order staying the enforcement proceeding before the Capital Markets Tribunal (“CMT”, the “Tribunal” or the “Adjudicative Tribunal of the Commission”) against the plaintiff;
- (d) A declaration under section 52 of the *Constitution Act, 1982*,³ that sections 13, 16 and 17 of the *OSA* violate sections 7, 11(c), and 13 of the *Charter*, that these violations are not justified under section 1 of the *Charter*, and that sections 13, 16, and 17 of the Act are therefore of no force or effect;
- (e) A declaration under section 52 of the *Constitution Act, 1982* that section 33(1) of the *OSA* is of no force or effect to the extent that the provision purports to limit or restrict the assertion of claims based on the breach of rights guaranteed by the *Charter*;
- (f) Damages in the amount of \$10 million for the breach of the plaintiff’s *Charter* rights;
- (g) Damages in the amount of \$10 million against the Ontario Securities Commission for misfeasance in public office, breach of confidence and negligence;
- (h) Aggravated damages in the amount of \$5 million;
- (i) Punitive damages in the amount of \$10 million;

³ Being Schedule B to the *Canada Act 1982*, 1982, c 11.

- (j) Prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act* (“**CJA**”);⁴
- (k) The costs of this proceeding on a substantial or full indemnity basis, plus all applicable taxes; and
- (l) Such further and other Relief as this Honourable Court deems just.

THE PARTIES

2. The plaintiff David Sharpe (“**Sharpe**”) was the Chief Executive Officer and ultimate designated person of Bridging Finance Inc. (“**BFI**”), an alternative financing business that provided financing to middle-market companies through various funds that it manages. Sharpe is Haudenosaunee and a member of the Mohawks of the Bay of Quinte. Sharpe was one of the few Indigenous people leading a financial firm or securities registrant in Canada. He is a recognized leader in economic reconciliation for First Nations and other Indigenous groups in Canada.

3. The defendant OSC is a corporation without share capital. The *OSA* creates and governs the OSC. The OSC performs its duties and exercises its powers under the *OSA* through its enforcement staff (“**Staff**”) and others. The *Charter* applies to the OSC under Section 32. The OSC is vicariously liable for the actions of Staff and CEO, including Jeff Kehoe (Director of the OSC’s Enforcement Branch), Grant Vingoe, Carlo Rossi, Adam Gotfried and others, and any breach of the plaintiff’s *Charter* or common law rights. However, in this case, as outlined below, the actions of Staff were approved at the highest level of the organization.

⁴ R.S.O. 1990, c. C.43f.

4. The defendant Attorney General of Ontario is the proper respondent to an action brought for a declaration in relation to the interpretation or validity of a provincial statute.

OVERVIEW

5. This action concerns the intentional breach of the *OSA* and misuse by the OSC of confidential compelled testimony obtained pursuant to statutory powers of investigation exercised by Staff of the OSC. The OSC intentionally and improperly filed confidential compelled testimony in the public court file to obtain an *ex parte* court order to appoint PricewaterhouseCoopers (“PWC”) as receiver over BFI, including authorization to post the confidential compelled testimony on the website of PWC, courted the media to report on the case and issued a press release to the public providing a link to the PWC website.

6. The results of this unlawful conduct were predictable and disastrous for Mr. Sharpe. The *ex parte* court order combined with the wave of prejudicial media coverage made it impossible to reverse the OSC’s seizure of control over BFI. As the OSC based the receivership application on the alleged lack of integrity of BFI management, the OSC intended to damage Mr. Sharpe’s professional reputation. They did so through the combined effect of unlawful disclosure, duplicitous dealings with BFI prior to the *ex parte* application, and disregard for procedural fairness and natural justice despite the lack of any urgency.

7. The Superior Court heard only one side of the case and was not advised that the OSC was relying on confidential compelled testimony in breach of the *OSA*. The Superior Court was not told that BFI had been engaging with the OSC for months to make changes to the board of directors, put in place an independent review committee, and hire a law firm to review its

policies and procedures in an attempt to address OSC concerns, while the Commission was already working on preparing materials for the *ex parte* receivership application,

8. Once PWC was appointed receiver, it refused to pay the legal accounts of BFI's legal counsel. The receivership was a *fait accompli*.

9. Mr. Sharpe sought recourse from the Adjudicative Tribunal of the Commission for the improper disclosure of his compelled testimony.

10. Contrary to decades of jurisprudence, including from the Supreme Court of Canada, the OSC through Staff took the perplexing position that it was not subject to the confidentiality requirements of the *OSA*. To resolve this troubling position, Mr. Sharpe asked the Tribunal to interpret the operative provisions of the *OSA*. After delay and obfuscation by the OSC for many months, two discrete legal issues were heard.⁵

11. At first instance, the Tribunal demonstrated independence and ruled that the OSC had breached sections 16 and 17 of the *OSA*. However, the Tribunal declined to award the only available remedy requested by Mr. Sharpe, which was to quash the investigation order pursuant to which the compelled testimony was obtained.

12. While the Tribunal recognized the need to provide direction to Staff and the capital markets about the confidentiality requirements of the *OSA*, the Tribunal was not prepared to order a remedy that would sanction the unlawful conduct of OSC Staff. The lack of willingness to sanction the OSC or provide meaningful redress to Mr. Sharpe became abundantly clear in a

⁵ These two issues were: (1) 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 *OSA*, without first obtaining a Section 17 Order?; and (2) If the answer to (1) is no, is the revocation or variation of the Section 11 Order an available remedy?

subsequent decision from the Tribunal, in which it ruled that the entire record improperly filed in the receivership application in breach of the *OSA*, should be made public within the context of a companion temporary cease trade order made by the Tribunal. The Tribunal found that Mr. Sharpe suffered no prejudice from the publication of his compelled testimony in the absence of any evidence, following a hearing limited to two discrete questions of law. To add insult to injury, the Tribunal justified its decision by profiting from the OSC's earlier improper disclosure: implying that there now existed no reasonable basis to conclude that Sharpe would suffer any prejudice through the disclosure of that which had already been public for about a year.

13. This later decision was being judicially reviewed by Mr. Sharpe. The publication of the illegally disclosed receivership record as part of the Tribunal's record would clearly undermine Mr. Sharpe's ability to obtain a remedy from the Tribunal in the future context of the enforcement proceeding. As explained below, the judicial review application has now been abandoned as a result of the Tribunal's failure to stay its decision.

14. It is apparent that the Tribunal is in an irreconcilable conflict of interest. Any further steps it might take to sanction OSC Staff would expose the OSC to liability and political pressure.

15. The refusal to sanction the OSC has emboldened the OSC to continue to disregard the Tribunal's decision interpreting sections 16 and 17 of the *OSA*. In fact, the OSC went so far as to submit to the Court of Appeal for Ontario, in an unrelated matter, that the Tribunal decision was wrong and that the OSC is not bound by the confidentiality provisions of the *OSA*. Previously, the OSC had disregarded its own Vice Chair, who questioned the OSC about whether they had obtained a Section 17 Order before disclosing compelled testimony.

16. The OSC has exceeded its mandate and acted as if it is not bound by its constating statute. In acting as if it is above the law, the OSC has violated Mr. Sharpe's rights under sections 7, 11(c), and 13 of the *Charter* and caused him substantial damages that are compensable under the law of torts.

FACTS

Background: The Investigation and Compelled Testimony

17. This action relates to the unlawful public disclosure by the OSC of compelled evidence collected by its Staff during an investigation under the *OSA*.

18. On September 2, 2020, Sharpe wrote to Jeff Kehoe, the Director of the OSC's Enforcement Branch, raising concerns regarding systemic and institutional bias at the Commission. Mr. Kehoe promised a substantive reply but failed to provide one.

19. 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**").

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

21. In the cover letter accompanying the Summons, Staff, including Kehoe, Rossi, Gotfried, and others, advised 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 subject to section 17, "no person... shall disclose at any time" "the nature or content

of an order under section 11”, “the name of any person examined or sought to be examined under section 13 [or] any testimony given under section 13.” Violation of section 16 is a breach of the *OSA*.

22. Section 17 of the *OSA* provides limited circumstances under which the Commission is allowed to order the release of information obtained under section 13, namely if the disclosure is in the public interest (the “**Section 17 Order**”). Absent exceptional circumstances, section 17 requires the Commission to give a person who gave evidence notice and an opportunity to object to the disclosure. The disclosure orders are required to limit the disclosure of compelled evidence to the minimum extent necessary by applying terms and conditions on the use and dissemination of the evidence.

23. Subsection 17(6) of the *OSA* provides for circumstances where a person authorized to conduct an investigation or examination under the *OSA* may “disclose” compelled evidence in connection with a “proceeding” under the *OSA* without obtaining a Section 17 Order. Until April 29, 2022, subsection 17(6) limited the “proceedings” to those brought before the Commission or its Executive Director.⁶ Investigators are prohibited from disclosing compelled testimony to a municipal, provincial, federal, or other police force, member of a police force, or a person responsible for the enforcement of the criminal law of Canada, or of any other country, or jurisdiction without the consent of the person from whom the testimony was obtained.⁷

⁶ [Section 17\(6\) of the Securities Act, RSO 1990, c S.5](#) was amended as of April 29, 2022. Prior to the amendment, it permitted disclosure only in connection with proceedings under the Act “before the Director or the Commission”. The April 29 amendment has removed this limitation. The timing of the amendment accords with the reorganization of the Commission and no record is available of the preceding Legislative debate, if any.

⁷ [Securities Act, RSO 1990, c S.5, s 17\(7\)](#).

24. In response to the Summons, Sharpe provided compelled testimony at Staff's examination which took place over three days: October 23, 2020, October 27, 2020, and April 29, 2021 (the "**Compelled Testimony**"). Sharpe relied upon assurances of confidentiality from Staff, including Kehoe, Rossi, Gotfried, and others. As required by section 13 of the *OSA*, Sharpe answered all questions put to him by Staff, with the exception of areas over which he asserted privilege.

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

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

26. The day after Sharpe's final compelled examination, the OSC, through the same Staff lawyers conducting the investigation and who had examined Sharpe under section 13 of the *OSA*, including Rossi, Gotfried, and others, sought a receivership order in the Superior Court of Justice pursuant to which PWC (the "**Receiver**") would be appointed receiver and manager over all of the assets, undertakings, and properties of BFI and associated entities. This receivership application was authorized by Vingoe on behalf of the OSC.

27. In support of its *ex parte* receivership application (the "**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 Sharpe's Compelled Testimony

and excerpts of six other individuals' compelled interviews as exhibits to the Tourangeau Affidavit.

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

29. Staff had not sought a Section 17 Order from the Commission or provided notice to Sharpe prior to the public disclosure of his Compelled Testimony. Despite their obligation of full and frank disclosure, Staff did not bring to the court's attention that their application materials contained confidential compelled evidence.

30. 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. The OSC's failure to seek such a provision in the Receivership Order further violated Sharpe's reasonable expectation of privacy and the confidentiality provisions of the statute.

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

32. On April 30, 2021, Staff obtained from the Commission a temporary cease trading order regarding some of the funds managed by BFI (the "**Temporary Cease-Trade Order**").

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

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

The Disclosure and Filing of the Compelled Evidence was Illegal

35. The OSC had no lawful basis to disclose confidential compelled evidence to the Receiver or publicly file it:

- (a) Staff did not obtain an Order from the Commission under section 17 of the *OSA* authorizing disclosure of the April 29 Sharpe Transcript or the compelled evidence obtained from Sharpe and other parties.
- (b) In fact, Vice-Chair Moseley inquired with Staff on April 30, 2022 as to whether Staff had obtained a Section 17 Order in connection with the Receivership Application, to which Staff, including Rossi and Gotfried, replied that no order was required.
- (c) Staff did not give Sharpe an opportunity to object to the disclosure of his compelled testimony. Staff did not notify Sharpe that the OSC proposed to disclose his compelled testimony in public court proceedings.
- (d) The Receiver does not fall in the categories of entities in section 153 of the *OSA* to whom the Commission can disclose compelled evidence without notice.
- (e) The OSC's disclosure of the compelled evidence without an order from the Commission was not authorized by section 17(6) of the *OSA*.
- (f) Finally, sections 17(3) and 17(7) of the *OSA* prohibit disclosure of compelled testimony to police or persons responsible for enforcing criminal laws without the written consent of the person from whom the testimony was obtained. The disclosure and filing of Sharpe's Compelled Testimony in the Receivership Application publicized it to the world at large, including law enforcement entities.

The Disclosure and Filing of the Compelled Evidence was Gratuitous

36. The OSC's inclusion of Sharpe's Compelled Testimony in the Receivership Application Record was unnecessary for the purpose of obtaining the Receivership Order. The filing of the April 29 Sharpe Transcript, contrary to the *OSA*, was gratuitous and unjustified. In the

factum filed in support of the continuation of the Receivership Order, Staff referred only once to the 373-page Supplemental Tourangeau Affidavit and the April 29 Sharpe Transcript appended to it.

37. Although this Court routinely grants sealing orders in receivership proceedings, Staff did not ask to seal the materials filed containing Sharpe's Compelled Testimony. The OSC knew it could request or direct the Receiver to seek a sealing order to protect Sharpe's privacy interests but chose not to do so. Sharpe had no opportunity to seek a sealing order because the OSC brought the Receivership Application *ex-parte* and without notice.

Widespread Media Reporting and Republication of the Compelled Testimony

38. The OSC's news release announcing the Receivership Order and the Temporary Cease-Trade Order was published at noon on Saturday May 1, 2021. The release 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 Sharpe's Compelled Testimony.

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

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

41. On May 7, 2021, Staff filed with the Commission an application to extend the Temporary Cease-Trade Order. In support of the application, Staff filed a seven-volume application record (the “**Cease-Trade Extension Application Record**”), containing the entire Receivership Application Record and the Supplemental Tourangeau Affidavit. This record was not made available to the public due to OSC practice in proceedings for temporary *ex parte* orders. Despite this restriction on public disclosure, nevertheless, significant portions of the same content remained publicly accessible in the receivership proceedings.

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

42. On May 12, 2021, Sharpe’s counsel wrote to Staff to express concern about the public disclosure of compelled evidence. Counsel asked whether Staff had obtained an Order under subsection 17(1) of the *OSA* authorizing such disclosure. Staff responded later that day that there was no Section 17 Order in connection with the Commission’s *ex parte* Receivership Application as “none was required.”

43. At the first appearance before the Commission with respect to the extension of the Temporary Cease-Trade Order on May 12, 2021, Sharpe’s counsel again expressed concern about the filing of compelled evidence in the public court proceeding. Staff declined to respond to Sharpe’s concern.

44. Staff have taken no steps to protect Sharpe’s privacy interest in his Compelled Testimony. They have, with casual indifference, ignored each opportunity to protect him. 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). Since April 2021, Staff have made no effort to seal or redact

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the compelled evidence filed in this Court. Staff never applied for an Order to require the media to take down the news articles containing information Staff disclosed in violation of the *OSA*. A redacted version of the Tourangeau Affidavit and the Supplemental Tourangeau Affidavit, including the complete April 29 Sharpe Transcript, are still publicly available on the Receiver's website.

45. Despite repeated requests, Staff refused to explain its justification for publicly filing Sharpe's Compelled Testimony until forced to do so in response to an Application brought by Sharpe. Staff's belated explanation was that Staff were acting as the OSC in the Receivership Application and therefore the restrictions in section 16 of the *OSA* did not apply. There is no authority for Staff's purported justification.

46. The OSC has consistently disregarded Sharpe's privacy and reputational interests in relation to his Compelled Testimony. Staff knew or were recklessly indifferent or willfully blind to the fact that publicly filing Sharpe's confidential Compelled Testimony was unlawful and would likely result in damages to Sharpe's interests.

The Adjudicative Tribunal of the Commission Finds that the OSC Breached the *OSA* but dismisses Sharpe's Application to Revoke or Vary the Section 11 Order

47. On September 22, 2021, Sharpe brought an application before the CMT seeking to vary or revoke the Investigation Order. Sharpe argued that the Commission should revoke or vary the Investigation Order because the publication of his Compelled Testimony violated the *OSA*. Sharpe also sought an order to preserve the confidentiality of the compelled evidence in the Commission's adjudicative record.

48. On March 25, 2022, the Tribunal issued an order dismissing Sharpe's application to revoke or vary the Investigation Order with reasons to follow. On March 30, 2022, the Tribunal released its decision interpreting sections 16 and 17 of the *OSA* and unequivocally concluded that the OSC had breached the *OSA* and violated Mr. Sharpe's privacy interests by publicly disclosing his compelled testimony (the "**March 30 Decision**"). This was a serious rebuke of the OSC.

49. The Tribunal requested that its decision be kept confidential by the parties until its public release. In the intervening period, while Mr. Sharpe respected that request, prior to the public release of the March 30 Decision, Staff strategically rushed to publish a statement of allegations commencing an enforcement proceeding against Mr. Sharpe. Staff knew or ought to have known that the initiation of this proceeding would be widely reported. Accordingly, as a result of Staff's tactical timing of the issuance of enforcement proceedings, the March 30 Decision was secondary and did not serve the intended denunciatory purpose nor properly expose the OSC's wrongdoing to public scrutiny.

50. The Tribunal concluded that revocation or variation of the investigation was not an available remedy for Mr. Sharpe on the basis that the Tribunal lacked jurisdiction to make such an order. Under the *OSA*, the broad remedial powers of the Tribunal under section 127 are not engaged until an enforcement proceeding has been commenced. The Tribunal's decision on remedy was based on the determination that it does not have powers to cause Staff to comply with the *OSA* when exercising investigation powers.

51. By way of a follow-up decision released on July 5, 2022, the Tribunal undermined its March 30 Decision, through an erroneous interpretation of subsection 17(6) of the *OSA*, which has the effect of completely absolving the Commission of its breach of the *OSA* through its failure

to protect Sharpe's privacy and confidentiality interests. It improperly places the onus on Sharpe (the victim of the Commission's breach) to take steps to remedy the breach, faults him for having failed to do so, and implies that there would exist no reasonable basis to conclude that Sharpe would suffer any prejudice through the disclosure of the compelled evidence because this evidence has already been public (through its own breach) for about a year. It is notable that following the March 30 Decision, the Commission has taken no steps to remove from the public domain the Compelled Evidence that was found by the Tribunal to have been disclosed in breach of the *OSA*. Making the Compelled Evidence publicly available demonstrates that the Tribunal condones, rather than condemns, the Commission's negligent, if not malevolent, treatment of compelled testimony.

52. On July 15, 2022, Sharpe filed a motion with the Tribunal asking it to stay its July 5th decision given his intention to seek judicial review at the Divisional Court. On August 4, 2022, Sharpe filed his application for judicial review. A date of February 16, 2023 was ultimately fixed for the hearing of the judicial review application.

53. The Tribunal heard Sharpe's interim stay motion on September 8, 2022. By reasons dated November 25, 2022, it dismissed Sharpe's request to stay the operation of its confidentiality decision. That same day, Sharpe asked the Tribunal for an administrative stay pending a further stay motion at the Divisional Court which had been filed. The request was granted. On December 2, 2022, counsel for Sharpe asked the Tribunal for a continuation of that administrative stay, advising that a date for the stay motion was not yet set. The Tribunal responded that same day that the administrative stay had expired and that there would be no further hold on its confidentiality decision.

54. As a result of the Tribunal's failure to stay its confidentiality motion, and given the prejudice which could not now be remedied, Sharpe ultimately decided to abandon his judicial review application.

55. On October 21, 2022, Sharpe filed a motion for a stay of proceedings with the Tribunal alleging an abuse of process. This motion is scheduled to be heard on May 23, 2023.

The Impact on Sharpe

56. The OSC's conduct in unlawfully disclosing Sharpe's Compelled Testimony and other compelled evidence has violated his privacy and, predictably, has caused and continues to cause him distress, stigma, humiliation, anguish, loss of reputation and impairment to his mental and emotional health, including anxiety, depression, and post-traumatic stress disorder. Sharpe has faced threats to his person and life and has been isolated from his family and son. Because of the OSC's actions, Sharpe no longer has the ability to lead his life and work in his chosen field. The OSC's conduct has irretrievably altered Sharpe's life. The OSC, and the Receiver thereafter, have consistently ignored the impact of its actions on Mr. Sharpe's reputation, including by failing to ensure that steps are being taken to collect on valid loans advanced within the Indigenous community by BFI. The OSC knowingly, or with reckless indifference or wilful blindness, violated the confidentiality provisions of the *OSA*, subjected Sharpe to public scrutiny regarding his Compelled Testimony, and made his evidence available to law enforcement in violation of the *OSA*.

57. Sharpe's Compelled Testimony was required to be kept confidential under s. 16 of the *OSA*. Sharpe imparted his Compelled Testimony in circumstances importing an obligation of confidence on Staff, following Staff's admonition about strict confidentiality restrictions that

applied to such Compelled Testimony. Further, the OSC's public statements and materials state that one of the purposes of the confidentiality provisions is to protect subjects from reputational harm. Sharpe reasonably expected that his answers to exhaustive and potentially incriminating questions would only be disclosed in the limited circumstances authorized by the *OSA*.

58. Staff's unauthorized and unlawful disclosure of Sharpe's Compelled Testimony resulted in public access to his confidential testimony and widespread media attention. Media outlets reported on and disseminated his Compelled Testimony. This caused Sharpe embarrassment and harm to his reputation and professional standing, as well as exposed him to legal jeopardy. Sharpe was forced to resign from multiple business, academic and charitable appointments, including the Queen's University Board of Trustees and give up his license with the Law Society of Ontario. The OSC knew that its actions would cause harm to Sharpe or was recklessly indifferent or willfully blind to the likelihood of such harm occurring.

59. As a result, the regime under the *OSA* failed to protect the rights of Mr. Sharpe and other subjects of OSC investigations under sections 7, 11(c), and 13 of the *Charter*. As elaborated below, this case has revealed that the deficiencies are extremely serious and that prospectively, the protections against public disclosure of compelled testimony in section 16 and 17 of the *OSA* have been rendered ineffective by the interpretation given to legislative amendments of section 17.

60. Sharpe seeks the assistance of this Court to remedy the OSC's unlawful and unconstitutional disclosure of compelled evidence.

CAUSES OF ACTION

(i) Misfeasance in a public office and breach of confidence

61. The OSC, through or at the direction of Staff including Jeff Kehoe, Carlo Rossi, Adam Gotfried, and others, as well as through Grant Vingoe, acted in bad faith and committed the tort of misfeasance in public office. The OSC knowingly, or with reckless indifference or wilful blindness, violated the provisions of its home statute and the confidentiality assurances Staff gave to Sharpe. The OSC, through Staff, failed to obtain an order on notice to Sharpe authorizing disclosure under section 17 of the *OSA*. The OSC knew or was recklessly indifferent or wilfully blind to the fact that its conduct was unlawful and that its conduct would likely cause harm to Sharpe.

(ii) Negligence

62. The OSC and its Staff are liable for their negligence toward Sharpe. They owed a duty of care to Sharpe and other individuals who are the subject of investigations under s. 11 of the *OSA*. The *OSA* grounds the duty of care owed by the OSC and its Staff to Sharpe. The duty of care includes the duty to exercise care, skill, diligence, and competence to protect the confidentiality of any testimony that is compelled under s. 13 of the *OSA*. Sharpe relied upon Staff's assurances of confidentiality when he answered all questions put to him by Staff (as required by s. 13 of the *OSA*), except for several privilege claims.

63. The OSC and its Staff breached the duty of care they owed to Sharpe through their acts, omissions, and indifference, including by disclosing, publicly filing, and refusing to take the necessary steps to remove or seal from the public domain Sharpe's Compelled Testimony. These actions amounted to gross carelessness and serious negligence, as well as a fundamental

breakdown of the orderly exercise of authority. The injuries and suffering of Sharpe were a foreseeable consequence and arose as a direct result of these actions.

(iii) Charter breaches

64. The power of compulsion conferred by section 13 of the *OSA* engages the subjects' right under sections 7, 11(c), and 13 of the *Charter*, including their right to silence. Indiscriminate public disclosure of such compelled testimony, without notice or an opportunity to object, and without any balancing of the affected person's rights against the public interest to be served by such disclosure places compelled witnesses at risk of legal jeopardy and breaches their right to silence by making their compelled evidence available in other court proceedings and to the public at large, including the police.

65. OSC Staff's unlawful disclosure of Sharpe's Compelled Testimony violated his right to life, liberty, and security of the person under section 7 of the *Charter*. The OSC's unlawful actions infringed Sharpe's liberty interest in three ways. First, statutory compulsion to testify engages liberty interests under s. 7 of the *Charter*. Sharpe's liberty interest was therefore engaged once the OSC compelled him to testify. Second, Sharpe is now forced to contend with a regulatory enforcement proceeding before the OSC. Sharpe could face potential future quasi-criminal proceeding which could result in imprisonment. Further, there have been media reports of a criminal investigation and there is a real potential of a criminal prosecution. Several adverse witnesses in the proceeding have had access to Sharpe's Compelled Testimony. Third, the OSC's actions destroyed Sharpe's privacy interest, specifically his control over the dissemination of critical personal and confidential information, thereby undermining his dignity and self-worth. Since May 1, 2021, there have been hundreds of articles written in the national and international

press disclosing Sharpe's personal and confidential information. As a result, Sharpe has been indicted, prosecuted and convicted in the court of public opinion by the media.

66. The unlawful disclosure of Sharpe's Compelled Testimony also infringed Sharpe's security of the person. As discussed above, the OSC's unlawful disclosure has had a serious and profound effect on Sharpe's psychological integrity. Sharpe has seen his confidential Compelled Testimony papered over the news, resulting in severe stigma, humiliation, harm to his mental health, and harm to his reputation. He has faced threats to his person and life. He has been isolated from his family and son. Because of the OSC's actions, Sharpe no longer has the ability to lead his life and work in his chosen field. The lengthy delay before Sharpe even has an opportunity to clear his name exacerbates the harm.

67. The deprivation of Sharpe's security and liberty interest under the *Charter* was not in accordance with the principles of fundamental justice:

- (a) The OSC's disclosure of Sharpe's Compelled Testimony constitutes an abuse of process. Throughout its actions, OSC has demonstrated a pattern of bad faith conduct which contravenes fundamental notions of justice and undermines the integrity of the judicial process. The OSC's conduct has also affected the fairness of Sharpe's enforcement proceeding.
- (b) The disclosure has violated Sharpe's right to silence, by making Sharpe's Compelled Testimony available in other court proceedings and to the public at large, including the police. Staff violated the confidentiality provisions of the *OSA*, which are necessary to maintain the constitutionality of testimonial compulsion in section 13 of the *OSA*. The OSC failed to comply with the statutory regime that balances the OSC's interest in conducting

investigations against the constitutional and privacy rights of the individuals subject to those investigations. Even worse, the Compelled Testimony was used in an *ex parte* application, and thus one where Sharpe was unable to make submissions about its use.

- (c) Finally, the disclosure was arbitrary, overbroad, and grossly disproportionate to any legitimate interest in pursuing the Receivership Application. Even if disclosure of some compelled evidence was necessary, Staff failed to take any steps to protect Sharpe's privacy or limit the infringement of his constitutional rights. Further, Staff's failure to provide Sharpe with notice or an opportunity to be heard denied him procedural fairness.

68. Similarly, the disclosure of Sharpe's Compelled Testimony has breached, or will breach, his right to silence under section 11(c) and 13.

In the Alternative, Part VI of the OSA is Unconstitutional

69. Unless a remedy of sufficient gravity and scope is available to Mr. Sharpe, the *OSA* contains insufficient protections against the public disclosure of Sharpe's Compelled Testimony. The failure by Staff to follow the confidentiality requirements was met with no consequences because the Adjudicative Tribunal of the Commission does not provide oversight over OSC investigations. The protective regime under section 17 of the *OSA* is not engaged unless OSC Staff bring an application to the Tribunal to permit disclosure. Accordingly, the statute violates sections 7 and 11 (c) of the *Charter*, is not saved under section 1 of the *Charter*, and is of no force or effect under section 52(1) of the *Constitution Act, 1982*.

70. This conclusion is reinforced by two additional factors. First, the OSC does not accept the validity of the decision of the Adjudicative Tribunal of the Commission and has gone

so far as to submit to the Ontario Court of Appeal in another, unrelated proceeding, that the Tribunal was wrong in its interpretation of sections 16 and 17 of the *OSA*.

71. Second, the OSC now relies on an amendment to subsection 17(6) of the *OSA*, which allows use to be made of compelled testimony in a proceeding commenced under the *OSA*. The previous language was limited to a proceeding before the Commission or a Director. If the OSC is correct in its interpretation of the amendment (which they are not), then the confidentiality requirements of section 16 would be eviscerated, and the remainder of section 17 rendered ineffectual.

72. If subsection 17(6) of the *OSA* permits unrestricted public disclosure of Compelled Testimony, then subsection 17(6) is unconstitutional. First, it violates the subject's right to remain silent, contrary to ss. 7, 11(c), and 13 of the *Charter*. Second, both the Tribunal and the courts have recognized that the privacy and confidentiality expectations of compelled witnesses must be respected and protected, and the integrity of the Commission's investigations must be maintained by keeping compelled evidence confidential. *Charter* jurisprudence also recognizes the right to privacy held by all citizens as worthy of constitutional protection. A legislative provision that does not take these values into account is unconstitutional.

Section 33 of the Securities Commission Act does not immunize the OSC from common law and *Charter* damages when Staff violated the *OSA*

73. The OSC cannot rely on section 33 of the *Securities Commission Act*, 2021, c 8, Sch 9 (the "*SCA*"), to escape liability for its tortious and unlawful conduct. Subsection 33(1) provides legislative immunity *only* for acts done in good faith and in the performance of the persons duties or functions:

No proceeding, including a court, administrative or arbitral proceeding, shall be commenced against the Commission, any current or former director or employee of the Commission or any current or former Chief Executive Officer or adjudicator for any act done in good faith in the exercise or performance, or intended exercise or performance, of the person's powers, duties or functions under this Act, the *Securities Act*, the *Commodity Futures Act* or any other Act or for any alleged neglect or default in the exercise or performance of those powers, duties or functions.

74. The OSC, through Staff, acted in bad faith and in violation of the *OSA*. The unlawful disclosure of Sharpe's Compelled Testimony in the Receivership Application served no legitimate purpose. Further, statutory immunities for acts done in good faith are negated on the basis that such duties have been exercised for an improper purpose.

75. In the alternative, to the extent that subsection 33(1) of the *SCA* bars Sharpe's action for *Charter* relief, including damages, the provision is unconstitutional and of no force or effect under subsection 52(1) of the *Constitution Act, 1982*. A legislative provision barring persons whose *Charter* rights have been infringed from applying to a competent court for a just and appropriate remedy is unconstitutional.

RELIEF SOUGHT

76. Sharpe seeks the declarations, damages, and orders set out in paragraph 1 against the defendant the OSC.

77. Declarations are necessary to denounce and deter the OSC's breaches of the *Charter* and its own home statute and its flagrant disregard for Sharpe's interests. A declaration will also vindicate Sharpe's *Charter* rights, including his right to silence.

78. An order under subsection 24(1) of the *Charter* requiring the OSC to withdraw or apply to seal all court filings containing unredacted information collected under section 13 of the

OSA is necessary to limit the ongoing harm caused by the illegal disclosure and publication of the Compelled Testimony.

79. A stay of the enforcement proceeding before the Adjudicative Tribunal of the Commission against the plaintiff is necessary. Through its conduct, the OSC has obliterated Sharpe's privacy interests, subjected him to extra-judicial sanction by publicity before he was alleged to have engaged in any misconduct, and compromised his right to a fair hearing before the Adjudicative Tribunal of the Commission.

80. Sharpe is also entitled to monetary damages under the common law and subsection 24(1) of the *Charter*.

81. Damages, the full particulars of which are not yet fixed and will be provided before trial, are necessary to compensate Sharpe for the ongoing and future impacts of the OSC's tortious and unconstitutional conduct. They include Sharpe's:

- (a) Emotional and psychological harm, including anxiety, depression, and post-traumatic stress disorder and related expenses;
- (b) feelings of distress, humiliation, anguish, and degradation;
- (c) fear and threats to his person and life;
- (d) harm to his reputation;
- (e) isolation and alienation from his industry and from his Indigenous community and family members;
- (f) loss of general enjoyment of life;
- (g) loss of income, career prospects, and opportunity.

82. Due to the conduct of the defendant, Sharpe's life has been irretrievably altered.

83. Damages are also necessary to vindicate Sharpe's rights, denounce the violations of the *OSA* and the *Charter* and to deter them in the future.

84. Because of the above facts, and particularly the reprehensible, outrageous, deliberate, deceitful, highhanded, shocking, and contemptuous conduct of the OSC, Sharpe also claims aggravated and punitive damages. Over a long period of time, the OSC abused its position of trust, flagrantly disregarded Sharpe's rights and their own duties, and refused to take remedial steps to safeguard Sharpe's confidential information in a way that could only result in increased and aggravated mental stress and anxiety.

85. In the alternative, Sharpe requests relief against the defendant His Majesty the King in Right of Ontario. If the Court finds that sections 13, 16, and 17 of the *OSA* authorized the OSC's public disclosure of compelled evidence, Sharpe seeks a declaration under section 52 of the *Constitution Act, 1982* that those provisions are of no force or effect because they offend section 7 of the *Charter* and cannot be saved by section 1 of the *Charter*.

86. To the extent that section 141 of the *OSA* bars Sharpe from seeking *Charter* relief, including damages, Sharpe seeks a declaration under section 52 of the *Constitution Act, 1982* that the provision is of no force or effect because it offends section 7 of the *Charter* and cannot be saved by section 1 of the *Charter*.

87. The plaintiff requests that this Action be tried in Toronto.

December 16, 2022

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Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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