Court of Appeal File No. C70114
Court File No.: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

- and-

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP, and 2506039 ONTARIO LIMITED

Respondents
(Appellants in Appeal – Moving Party)

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

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I N D E X

Tab	Description	Page No.
1	Sharpe (re), 2022 ONSEC 3	1-29

TAB 1

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

Citation: Sharpe (Re), 2022 ONSEC 3
Date: 2022-03-30
File Nos. 2021-26 and 2021-15

IN THE MATTER OF
DAVID SHARPE

and

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 FOR DECISION
(Section 144 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	December 16, 2021; further written submissions received January 7 and 14, 2022	
Decision:	March 30, 2022	
Panel:	Timothy Moseley	Vice Chair, and Chair of the Panel
	Lawrence P. Haber	Commissioner
	M. Cecilia Williams	Commissioner
Appearances:	Alistair Crawley Melissa MacKewn Alexandra Grishanova	For David Sharpe
	Linda Rothstein Robert Gain Jacob Millar	For Staff of the Commission
	John L. Finnigan Erin Pleet	For the receiver of Bridging Finance Inc. et al.

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REASONS FOR DECISION

I. OVERVIEW

[1] This case arises because in April and May of 2021, the Ontario Securities Commission indirectly publicly disclosed compelled testimony of David Sharpe that Commission Staff had obtained during an investigation conducted pursuant to an order issued under s. 11 of the *Securities Act*[1] (the **Act**). The Commission made that disclosure:

a. on April 30, 2021, by filing the compelled testimony in the public court record in connection with the Commission's application for the appointment of a receiver over Bridging Finance Inc. (**Bridging**) and related entities; and

b. on May 1, 2021, by publishing a news release on the Commission's website, announcing the appointment of the receiver, and including a link to the receiver's website, on which could be found the compelled testimony.

[2] Mr. Sharpe submits that the Commission's public disclosure was improper, and that Staff of the Commission ought first to have obtained an order from this tribunal under s. 17 of the Act, authorizing disclosure. As a remedy, Mr. Sharpe asks that we revoke the s. 11 investigation order. He makes that request in two different proceedings: (i) by way of a motion in the proceeding commenced by Staff for a temporary order; and (ii) in a separate application that he commenced.

[3] The Commission directed that the motion and the application be heard together, and that before a full merits hearing, there would be a hearing at which two preliminary questions were to be addressed. The questions, the form of which was agreed upon by the parties before the hearing, are:

a. Can the Commission publicly disclose compelled evidence obtained under a s. 11 order when it brings an application for the appointment of a receiver under s. 129 of the Act, without first obtaining a s. 17 order?

b. If the answer to Question 1 is no, is the revocation or variation of the s. 11 order an available remedy?

[4] At the joint request of the parties, these two questions were supplemented by a statement of agreed facts, to give context to the questions. The parties agreed that if we were to conclude that the Commission cannot make the kind of public disclosure contemplated in the first question, and that revocation of the s. 11 order is an available remedy, then the question of whether we should revoke the s. 11 order in this case would be determined at a subsequent hearing at which evidence could be called to establish additional facts.

[5] On March 25, 2022, we issued an order dismissing Mr. Sharpe's request for a revocation or variation of the s. 11 order. We set out below the reasons for that decision. The order also calls for further steps to resolve Mr. Sharpe's request that part or all of the adjudicative record (except for written submissions) be kept confidential. We describe those steps at the end of these reasons. With

[1] RSO 1990, c S.5

respect to the primary request, for revocation or variation of the s. 11 order, we conclude for the reasons below that:

a. the Commission cannot publicly disclose compelled evidence (or any similarly protected material) in the context of an application to the Court to appoint a receiver, without first obtaining a s. 17 order;

b. however, the revocation or variation of a s. 11 order is not an available remedy in the circumstances set out in the statement of agreed facts.

[6] Accordingly, no further hearing is required with respect to the merits of Mr. Sharpe's request for revocation or variation of the s. 11 order in this case. We dismiss that request.

[7] That would dispose of the application and motion, except that Mr. Sharpe also asked that the adjudicative records in the two proceedings be kept confidential. He later clarified that his request did not extend to the written submissions filed by the parties, which are part of the adjudicative record. At the hearing before us, we ordered that the adjudicative records (excluding the written submissions) would continue to remain confidential and not accessible to the public, pending the issuance of this decision.

[8] We also advised that upon issuing this decision, if we contemplated that the confidentiality order might be terminated, we would afford the parties an opportunity to make submissions on that question. At the conclusion of these reasons we set out a mechanism for the parties to do so.

II. BACKGROUND

A. Context and terminology

[9] The Commission is an integrated regulatory agency. The powers it exercises in furtherance of its mandate fall into three categories that align with the three branches of government, and to which we will return in our analysis below, using these labels:

a. the Commission exercises a **quasi-legislative function** when it makes rules and policies;

b. the Commission exercises a **quasi-judicial function** when its tribunal adjudicates proceedings that come before it; and

c. the Commission carries out an **executive function** when, among other things, it applies and enforces legislation, rules and policies.

[10] The Commission acts in different capacities depending on the context and the nature of the power being exercised. Because this case touches upon those different capacities, it is important for our analysis and for clarity of our reasons to be precise in the use of terminology.

[11] We use the word **Commission** to refer to the agency as a whole, including its appointed Members and staff. The Commission carries out its regulatory mandate through, among other things, the making of policies and rules (*i.e.*, its quasi-legislative function), and the exercise of oversight over those who participate in the capital markets (part of its executive function).

[12] We use the word **Tribunal** to refer to the agency's quasi-judicial (or adjudicative) function. The Tribunal comprises all appointed Members of the

Commission, except the individual who is both the Chair and Chief Executive Officer, who does not adjudicate because they oversee the enforcement function and the staff who appear before the Tribunal.

[13] We use the word **Staff** to refer to the unitary entity that is a party before the Tribunal (see Rule 5(g) of the *Ontario Securities Commission Rules of Procedure and Forms*[2]). This entity is essentially made up of all Commission employees, although where appropriate it includes outside counsel acting for Staff. It excludes the Vice Chair, who is a Commission employee but who is separate from Staff in the context of Tribunal proceedings. It also excludes those employees in the Office of the Secretary who support the Tribunal.

[14] We elaborate on these terms as necessary in the analysis that follows.

[15] We use one other term for convenience. The concern that Mr. Sharpe raises in his motion and application relates to **compelled evidence**, which includes testimony that he gave in response to a summons issued by a person appointed under the s. 11 investigation order. As a result, his testimony is "compelled testimony", a sub-category of compelled evidence that is protected by confidentiality provisions in the Act. Those statutory provisions protect more than just compelled evidence (*e.g.*, they also protect the fact that an investigation order was issued), but because compelled evidence is the focus of this hearing, we use that term in these reasons.

B. Facts

[16] The following brief factual background is drawn from the parties' statement of agreed facts and from the history of these two proceedings.

[17] On September 11, 2020, the Commission performing its executive function issued an order under s. 11 of the Act, authorizing the persons named in that order to conduct an investigation into Bridging. At the time, Bridging was a registered restricted portfolio manager, exempt market dealer and investment fund manager.

[18] As part of that investigation, a summons was issued to Mr. Sharpe under s. 13 of the Act, compelling his attendance to answer investigators' questions. At the time of these examinations, Mr. Sharpe was the chief executive officer and ultimate designated person of Bridging. Mr. Sharpe attended to be examined on October 23 and 27, 2020, and again on April 29, 2021.

[19] At the examinations, Mr. Sharpe took the use and derivative use protections of the *Evidence Act*[3] and the *Canadian Charter of Rights and Freedoms*[4] (the ***Charter***) in respect of all questions asked and answers given.

[20] On April 30, 2021, the day after Mr. Sharpe's last examination, Staff asked the Commission (acting in its executive capacity, *i.e.*, not the Tribunal) to issue a temporary order without notice to any party, cease trading the securities of certain Bridging-controlled investment vehicles. The Commission issued the temporary order, which has been extended and varied by the Tribunal since then. The current order expires on June 30, 2022.

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[2] (2019) 42 OSCB 9714
[3] RSO 1990, c E.23
[4] Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

[21] Later on April 30, 2021, the Commission applied to the Superior Court of Justice under s. 129 of the Act, for the appointment of PricewaterhouseCoopers Inc. as receiver and manager of all the assets, undertakings and properties of Bridging and associated entities. The application was made without notice to Mr. Sharpe or to any other party. The material that the Commission filed with the Court in support of the application included compelled evidence, including the entire rough draft of the transcript of Mr. Sharpe's April 29, 2021, examination.

[22] Staff did not seek a s. 17 order from the Tribunal before filing the compelled evidence with the Court on April 30.

[23] The Court granted the Commission's application on the day of the hearing. The Court's order provided that the receiver would create a website on which Court materials could be found. The receiver did so, and posted some compelled evidence, including the draft transcript of Mr. Sharpe's April 29 examination, on its website.

[24] On May 1, 2021, the day after the Court issued the order appointing the receiver, the Commission published on its website a news release announcing the appointment of the receiver. The news release included a link to the receiver's website, on which some of the compelled evidence was posted.

III. ANALYSIS

A. Submissions invoking the *Charter*

[25] Before we turn to our analysis of the questions before the Panel, a preliminary comment is in order.

[26] In their submissions, both Mr. Sharpe and Staff make arguments about the *Charter* and the effect it might have on the issues before us. We decline to address those arguments. At a preliminary attendance before the hearing that gives rise to this decision, the Tribunal canvassed with the parties whether any issues would arise that might require notice to the Attorneys General of Canada and Ontario of a constitutional question. Mr. Sharpe confirmed that there would be none at this stage of the proceeding.

[27] The parties gave no such notice. Any finding we make with respect to the *Charter*, including its effect in this case, might fall within the scope of matters for which the Attorneys General of Canada and Ontario require notice. Accordingly, we will not address those issues.

[28] We turn now to address the two questions before us.

B. The Commission cannot publicly disclose compelled evidence without first obtaining a s. 17 order

1. Introduction

[29] The first question is whether the Commission can publicly disclose compelled evidence without first obtaining a s. 17 order when the Commission uses that evidence in support of a Court application for a receiver. We conclude that it cannot.

[30] Staff makes a preliminary objection to our considering this question at all. Staff submits that if the Commission engaged in any impermissible conduct, that

conduct was purely in connection with the Court application, a proceeding over which the Tribunal has no jurisdiction, control or influence.

[31] With respect to the Court proceeding, we agree with Staff's characterization of the Tribunal's role, or more precisely the lack of a role. However, we disagree with the suggestion that as a consequence, we cannot answer the first question. Mr. Sharpe's primary request for relief is that we revoke the s. 11 order. Even though we ultimately dismiss that request, in order to reach it we must begin by considering his allegations about the Commission's conduct.

[32] That brings us to our analysis of the first question. We start with the relevant statutory provisions, being ss. 16 and 17 of the Act. We then consider applicable statutory interpretation principles and the interests at stake, and we apply those principles and interests to assess whether the Commission acted improperly in the circumstances of this case as specified in the statement of agreed facts.

2. Relevant statutory provisions

[33] Section 16 of the Act sets out the confidentiality and non-disclosure obligations with respect to compelled evidence. We consider s. 16's provisions in detail below, but by way of introduction, they serve two main purposes:

a. they protect the integrity of an ongoing investigation; and

b. they protect the privacy interests of persons or companies who provide evidence under compulsion.[5]

[34] The first of those two purposes is not at issue here. In general, Staff is the principal steward of the confidentiality of an ongoing investigation. Staff asserted no such interest in this case; indeed, the Commission's actions in publicly disclosing some compelled evidence clearly demonstrate that the Commission was not concerned about protecting confidentiality of that material. We therefore conduct our analysis with regard to the interests protected by the second purpose. In this case, those are the privacy interests of Mr. Sharpe, who was compelled to testify.

[35] With that focus in mind, we begin with s. 16(1), which prohibits any person or company from disclosing compelled evidence. Staff submits that this prohibition does not apply to the Commission itself, a position we consider and reject below.

[36] Whenever s. 16(1) does apply, though, two exceptions appear. Only one of those two is relevant here, and applies if the disclosure is made in accordance with s. 17 of the Act. The other, in s. 16(1.1), permits disclosure to counsel or for insurance purposes.

[37] Subsection 16(2) of the Act is similar in substance to s. 16(1). Unlike s. 16(1), though, which speaks in the active voice and focuses on what a person or company may or may not do, s. 16(2) speaks in the passive voice and focuses on the compelled evidence itself. It provides that compelled evidence "is for the exclusive use of the Commission… and shall not be disclosed or produced to any other person or company or in any other proceeding…". The prohibition does not

[5] *Black (Re),* (2007) 31 OSCB 10397 (***Black***) at para 135; *Potter v Nova Scotia (Securities Commission),* 2006 NSCA 45 at para 48

depend on the identity of the person or company that would otherwise make disclosure.

[38] Staff relies heavily on the words "for the exclusive use of the Commission" in s. 16(2) when justifying the Commission's choice to disclose compelled evidence in this case. We return to consider those words below.

[39] Assuming s. 16(2) does apply to protect the confidentiality of compelled evidence, the same two exceptions are provided in that subsection as in s. 16(1), *i.e.*, s. 16(1.1) and s. 17. Once again, the only relevant exception here is if disclosure is made in accordance with s. 17.

[40] Section 17 provides three mechanisms by which disclosure may be made:

a. pursuant to an order of the Tribunal under s. 17(1);

b. pursuant to an order of a court having jurisdiction over a prosecution under the *Provincial Offences Act*[6] initiated by the Commission (s. 17(5)); and

c. a person appointed under s. 11 as an investigator may disclose in connection with an existing or contemplated proceeding before the Tribunal or before certain designated Commission staff members (s. 17(6)).

[41] The third of those mechanisms (disclosure by an appointed investigator) allows Staff, in the enforcement context, to discuss evidence with a contemplated respondent before a proceeding is commenced, to satisfy its disclosure obligations to respondents, and to prepare its case, including by briefing witnesses.

[42] Neither that mechanism nor the second of the three listed above is directly relevant to the proceedings before us. However, Mr. Sharpe cites them in support of his submission that the overall legislative scheme is one of significant protection of compelled evidence, and that disclosure may be made only as explicitly permitted. He notes that neither mechanism results in disclosure that is public and unlimited; rather, the disclosure is targeted to specified recipients and is limited to the specified purpose.[7]

[43] Mr. Sharpe submits that Staff was required to pursue the first of the above three mechanisms (a s. 17(1) order from the Tribunal) before the Commission filed the compelled evidence with the Court and then further disclosed it by issuing a news release that linked to the receiver's website.

[44] When a party employs the first mechanism and applies for an order under s. 17(1), the Tribunal's authority to issue such an order is subject to two limitations:

a. where applicable and where practicable, reasonable notice must be given to, among others, persons who provided the compelled evidence pursuant to a s. 13 summons (s. 17(2)); and

b. the Tribunal must determine that it is in the public interest to make the order, and this determination must be made in the context of this part of

[6] *Provincial Offences Act*, RSO 1990, c P.33
[7] *A Co v Naster,* [2001] OJ No 4997 (Div Ct) (***Naster***) at para 26

the Act that governs investigations and compelled evidence,[8] taking into account the public interest in maintaining the confidentiality of compelled evidence generally.[9]

[45] We are aware of no case in which the Tribunal has ordered unlimited public disclosure of compelled evidence under s. 17(1). Similarly, we are aware of no decision that refers to broad public disclosure of compelled evidence in the absence of a s. 17 order. Staff counsel advised that in other cases, the Commission has filed compelled evidence in court in support of a receivership application without first obtaining a s. 17 order. The fact that the Commission may have previously done so unchallenged neither supports nor undermines the legitimacy of that approach.

3. Applicable principles of statutory interpretation

[46] There are two principles of statutory interpretation that guide us and that we highlight before proceeding with our analysis.

[47] The first requires that statutory language be interpreted purposively, in context, and in its grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation and the intention of the legislature.[10] We should be skeptical about a proposed interpretation that does not meet this standard, because when a legislature intends to provide an exception or otherwise depart from the general scheme of the legislation, it can say so expressly.

[48] Secondly, legislation that interferes with citizens' rights is to be strictly construed. Any ambiguity found upon the application of proper principles of statutory interpretation should be resolved in favour of the person whose rights are being truncated.[11]

4. The balancing of competing interests

[49] We turn now to consider the competing interests at play. This contextual analysis will assist us in applying the above two principles and in interpreting the relevant statutory provisions.

[50] The Commission's powers of compulsion are not unique but are extraordinary.[12] Failure to attend an examination or to answer an investigator's questions makes the compelled person liable to be committed for contempt by the Superior Court of Justice.[13]

[51] In *Black,* the Commission held that "these broad powers are balanced with detailed protections for persons compelled to give materials and evidence under oath." The Commission's obligation to maintain all compelled evidence "in the highest degree of confidence" is "the *quid pro quo* in return for" the powers of compulsion.[14]

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[8] *X (Re)*, 2007 ONSEC 1, (2007) 30 OSCB 327 (***Re X***) at para 28
[9] *Coughlan (Re),* [2000] OJ No 5109 (Div Ct) (***Coughlan***) at para 66
[10] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26
[11] *Morguard Properties Ltd v City of Winnipeg,* [1983] 2 SCR 493 at para 26
[12] *Re X* at para 31
[13] Act, s 13(1)
[14] *Black* at para 234

[52] In its written submissions, Staff asserts that the Commission (performing its executive function as applicant in Court) was entitled to determine the appropriate use and disclosure of compelled evidence "in furthering its public interest mandate". While the Tribunal often exercises statutory powers with reference to "the public interest" (as is explicitly called for by the relevant provisions in the Act), "public interest" is not a paramount principle that allows the Commission, when performing its executive function, to override protections that would otherwise operate. The Commission is a creature of statute and has only the authority granted to it, subject to prescribed limitations on that authority. We must examine the Commission's actions in this case against the applicable statutory provisions and legal principles.

[53] As we undertake that examination, it is important to address Staff's submission that the Commission and its Staff are distinct, and Mr. Sharpe's categorical rejection of that submission. In our view, the correct answer lies somewhere in between. Crucially, context matters. It is true that the Act contains many references to the Commission, and separate references to its staff or employees. It is also true that in some contexts, the Commission acts only through its staff. Our analysis below will consider the proper context-specific meaning of these terms.

[54] Examination of the statutory scheme reveals a balancing between the Commission's legitimate interests in obtaining and preserving evidence to further its investigations, and the interests of compelled witnesses. The Tribunal has previously emphasized the "high degree of confidentiality associated with compelled evidence and the strict limitations on its use".[15]

[55] When reviewing an application under s. 17 for authorization to disclose compelled evidence, and when considering how the public interest should influence the outcome of such an application, the Commission also takes into account the reasonable expectations of compelled witnesses. As the Divisional Court has noted, the "effective functioning of the Commission depends upon the reliance which parties affected by its operations can place upon the confidentiality of [an investigation]."[16]

[56] There is a high expectation of privacy with respect to all compelled testimony,[17] and ss. 16 and 17 of the Act are meant, among other things, to give some comfort to compelled witnesses that the information they provide will remain confidential, subject to the terms of the Act.[18]

[57] This reasonable expectation of privacy combines with the reality of potential harm to witnesses as a result of the Tribunal authorizing the use and disclosure of compelled evidence.[19] These factors explain why the Tribunal is required by s. 17(2) to ensure that where practicable, a compelled witness is notified before the Tribunal authorizes disclosure of compelled evidence received from that witness.

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[15] *Black* at para 135
[16] *Coughlan* at para 57 citing with approval *Norcen Energy Resources* (April 29, 1983) OSCB 759
[17] *Black* at para 78
[18] *Mega-C Power Corporation et al,* 2007 ONSEC 11, (2007) 33 OSCB 8273 (***Mega-C***) at para 29
[19] *Black* at para 135

[58] That requirement to give notice to a compelled witness reflects the interest that such a person has in having an opportunity to:

a. oppose the making of the order;

b. argue that the scope of the disclosure ought to be limited, including by "edit[ing] out irrelevant or privileged material";[20] or

c. argue that other possibilities ought to be considered that would minimize the impact of disclosure.[21]

[59] In *Deloitte & Touche LLP v. Ontario (Securities Commission)*,[22] the Supreme Court of Canada articulated an important guiding principle for the making of disclosure orders:

> …in making a disclosure order in the public interest under s. 17, the OSC has a duty to [compelled witnesses] to protect [their] privacy interests and confidences. That is to say that OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act. [emphasis added]

[60] In that decision, the Court calls for an approach that minimally impairs the compelled witness's privacy interests. To assist with the necessary determination, the Act provides a mechanism by which Staff and the compelled witness can present to the Tribunal competing views of the minimum impairment that would be required to allow the Commission to carry out its mandate. The Tribunal cannot fully consider the privacy rights of a compelled witness, and balance those rights against competing interests, without hearing from the compelled witness, where practicable.[23]

[61] Terms and conditions are a tool that can be used to limit the disclosure so that it is only to the extent necessary. Sharpe speculates that had Staff applied under s. 17, disclosure would not have been ordered on the expansive basis that the Commission unilaterally undertook. We will not opine on a hypothetical application, but what is clear is that the route that the Commission chose did not afford Mr. Sharpe an opportunity to make submissions either before the Tribunal or before the Court.

[62] In contrast to the balancing envisioned by the Act and by the Supreme Court of Canada, in this case the Commission in performing its executive (not adjudicative) function chose to make its own determination about how much disclosure was appropriate. At first blush at least, this action failed to take account of what the Superior Court of Ontario has described as the "important public interest" served by the Tribunal's oversight of the Commission's desire to disclose compelled evidence.[24]

[63] On this point, Staff's submissions misapprehend the role of the Tribunal within the agency. This misunderstanding is repeated throughout Staff's written submissions, in which Staff suggests that it would be illogical to conclude that

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[20] *Coughlan* at para 66
[21] *Coughlan* at para 41(vii)
[22] 2003 SCC 61 (***Deloitte***) at para 29
[23] *XX (Re),* 2018 ONSEC 45, (2018) 41 OSCB 7519 (***XX***) at para 45
[24] *A v Ontario (Securities Commission*), 2006 CanLII 14414 (ON SC) at paras 44, 57

the Commission would be required to obtain authorization from itself under s. 17(1) when the Commission wishes to disclose compelled evidence. Staff explicitly disagrees with what it describes as Mr. Sharpe's attempts to bifurcate the Commission.

[64] We reject this submission, which conflates the Tribunal (the adjudicative function) and the Commission performing its executive function as applicant before the Superior Court of Justice. It also ignores the fact that from time to time, Staff applies to the Tribunal for an order under s. 17(1), contrary to Staff's assertion before us that to its knowledge, no such case exists.[25]

[65] Staff's assertion that under s. 17(1), "the Commission is charged with determining whether it is in the public interest for compelled information to be disclosed",[26] appears correct if no distinction is made among the agency's various functions. However, it is the Tribunal that makes that determination, not the Commission performing its executive function.

[66] The same goes for orders of "the Commission" under s. 127 of the Act at the conclusion of an enforcement proceeding. If the Commission were conceptually a unitary entity with no distinction between its executive function and its adjudicative function, there would be no need at all for Staff to appear before the Tribunal in an enforcement proceeding. By its logical extension, Staff's submission about s. 17(1) suggests that the Commission performing its executive function could, by itself, simply issue a sanctions order under s. 127. That is clearly not the case.

[67] Returning to the facts of this case, the Commission did what applicants in court typically do, when it applied for the appointment of a receiver. The Commission filed affidavits containing evidence on which the Commission intended to rely. Initially at least (*i.e.*, at the time of filing), such affidavits are not subjected to scrutiny by anyone at the court to determine admissibility of the evidence. Where no notice is given to any respondent to the application (as was the case here), only the applicant is in a position to review the evidence, before it appears in the public court file, to determine whether all of it is properly admissible in court. Further, only the applicant is in a position to raise admissibility issues before the court.

[68] There was no suggestion before us that before filing its material, the Commission undertook a review to determine admissibility or whether public disclosure of any of the material might impermissibly violate Mr. Sharpe's interests. Even if the Commission undertook such a review, it did so without input from Mr. Sharpe, because Mr. Sharpe was afforded no opportunity to give that input. The Commission's bypassing of the mechanisms in s. 17 deprived the Tribunal of the opportunity to exercise control over the extent of disclosure and to ensure that such disclosure was minimized, as required by the Supreme Court of Canada in *Deloitte*.

[25] See, *e.g.*, *XX*, and *Mega-C* at para 24

[26] Memorandum of Fact and Law of Staff of the Ontario Securities Commission, December 3, 2021 (**Staff's Written Submissions**) at para 55

5. Principles of statutory interpretation applied

[69] With that background and the principles of statutory interpretation in mind, we turn to the arguments advanced by Staff to justify the Commission's choice to disclose publicly the compelled evidence without first obtaining a s. 17 order.

(a) The Commission, as a corporation, is bound by the prohibition in s. 16(1)

[70] Staff submits that s. 16(1) prohibits disclosure by a "person or company", but not by the Commission. Staff acknowledges that the Commission is a corporation and therefore a "company" as defined in s. 1(1) of the Act. However, Staff argues that because the Commission became a corporation in 1997, after the 1994 enactment of s. 16(1) in its current form, the restriction could not have been intended to apply to the Commission.[27]

[71] We reject this position. As Mr. Sharpe correctly points out, before the Commission was a corporation it was a person, as that term is defined in s. 1(1) of the Act. A plain reading of s. 16(1) makes it applicable to the Commission, and there is no principle of statutory interpretation that would displace that conclusion.

[72] In particular, we disagree with Staff that because other occurrences of "person or company" in the Act may not lend themselves to applying to the Commission (*e.g.* the right of an investigator to compel the attendance of a person or company), we should exclude the Commission from "company" in s. 16(1). Ideally, a statutory term has a consistent meaning throughout the statute, but that general rule does not apply where the context "clearly indicates otherwise".[28] The word "company" in s. 16(1) includes the Commission by definition.

[73] We should adopt that definition and apply it, since the context does not clearly indicate otherwise, and there is no explicit carve-out for the Commission in s. 16(1). If the legislature intended to depart from the general statutory scheme of protecting confidentiality and create an exception for the Commission, it could easily have explicitly said so. It did not. Because of the absence of explicit exclusionary language, the Commission is bound by s. 16(1).

(b) The words "for the exclusive use of the Commission" in s. 16(2) do not allow the Commission to bypass s. 17

[74] Staff acknowledges the confidentiality regime imposed by ss. 16 and 17 of the Act, but maintains that even if s. 16(1) applies to the Commission as a "company", the Commission need not resort to any of the three s. 17 mechanisms when it chooses to apply to court for the appointment of a receiver. Staff submits that the words "for the exclusive use of the Commission" grant blanket authority to the Commission to make such use of compelled evidence as it sees fit, without the limitations and protections set out in those sections. Staff argues that this is so even if the Commission's use of the compelled evidence will

[27] Act, s 3(1)
[28] *R v Ali*, 2019 ONCA 1006 at para 68

result in public disclosure of that material, without notice to a compelled witness whose evidence is included.

[75] We disagree. The plain meaning of the words "for the exclusive use of the Commission" limits rather than expands the overall use that can be made of compelled evidence. The obligation to construe strictly any ambiguity supports this interpretation.

[76] Against the backdrop of a statutory scheme that prescribes a high degree of confidentiality of compelled evidence, with a limited number of specifically enumerated exceptions that balance competing interests, clear legislative intent would be required to support the interpretation advanced by Staff. We see no such legislative intent, and we find Staff's general "public interest" and "Commission mandate" arguments unpersuasive.

[77] The words "exclusive use of the Commission", read in the context of the legislative scheme, strongly suggest emphasis on the word "exclusive". The rest of s. 16 consistently establishes the confidentiality of compelled evidence, except for the counsel/insurer exception in s. 16(1.1) and references to s. 17. It would be inconsistent for the words "exclusive use of the Commission" to expand the use that can be made, as opposed to excluding use by others.

[78] Had the legislature intended that the Commission have unfettered discretion to publicly disclose compelled evidence, it could easily have said so, *e.g.*, by using words such as "exclusive and unrestricted use", or "exclusive use of the Commission in its discretion".

[79] Staff also refers to the following words in s. 16(2) in support of its submissions: "…and [compelled evidence] shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with subsection (1.1) or section 17 [emphasis added]."

[80] We have difficulty with these words of the statute, especially "other proceeding". Until that occurrence of the word "proceeding", s. 16 does not refer to any proceeding, so it is unclear what "other" refers to.

[81] Section 16's focus is a formal investigation and the information derived from one, but an investigation is not a proceeding. Where Staff wishes to obtain a s. 11 order and the powers that result from that order to assist in an investigation, Staff does not commence a proceeding. Instead, that request is made to the Commission performing its executive function.

[82] In contrast, a proceeding is commenced by the issuance of a Notice of Hearing by the Secretary, following the filing with the Tribunal of an Application or a Statement of Allegations. Staff takes no such steps when seeking a s. 11 order.

[83] As a result, because an investigation is not a proceeding we are unable to make sense of the word "other" before "proceeding" in s. 16(2).

[84] We do not agree with Staff that the words should be read as referring to a proceeding other than one that arises out of the investigation order through which the compelled evidence was obtained. That proposed interpretation does not conform to the plain meaning of the words, and in any event, it may be impossible in some cases to determine whether a proceeding "arises" out of a particular investigation order.

[85] As it turns out, we do not need to resolve this quandary. The words of s. 16(2) prohibit disclosure "to any other person or company or in any other proceeding". The "or" following "person or company" means that disclosure to any other person or company is prohibited. That prohibition does not depend on the meaning of "any other proceeding"; nor does it relate to any particular investigation or proceeding.

[86] By filing the compelled evidence in Court without seeking a sealing order, and by issuing a news release linking to that material, the Commission disclosed it to the public (and therefore to persons and companies).

[87] For these reasons, we cannot accept the proposition that the words of s. 16(2) permit the Commission to bypass the mechanisms set out in s. 17. For the same reasons, we cannot accept Staff's repeated but unsubstantiated submission that the interpretation proposed by Mr. Sharpe would "stymie" the Commission's ability to carry out its public interest mandate and undermine the Commission's ability to "uncover the truth".[29]

(c) The words "in connection with a proceeding…" in s. 17(6) do not assist the Commission in this case

[88] We now return to s. 17(6), one of the three mechanisms in s. 17 that permits disclosure of compelled evidence. Under certain specified circumstances, s. 17(6) allows that disclosure without an order from the Tribunal.

[89] In relevant part, s. 17(6) provides that a person appointed under a s. 11 investigation order may disclose compelled evidence "only in connection with a proceeding commenced or proposed to be commenced before the Commission or the Director" [emphasis added].

[90] Staff submits that the Commission's receivership application falls within this language, and that the Commission's public disclosure was therefore permitted by s. 17(6). Staff says that the Court application was "in connection with" a proceeding commenced before the Tribunal, *i.e.*, Staff's application under s. 127 for an extension of a cease trade order (one of the two proceedings in which this hearing was held, and the only one of the two proceedings that existed at the time).

[91] We disagree. We do not construe "in connection with" as Staff proposes. Staff relies on *Mega-C* in support of its submission that the words "in connection with" are to be interpreted broadly.[30] However, that case involved disclosure of compelled evidence entirely within one Tribunal proceeding, with no mention of any other proceeding, and we see nothing in the cited paragraph that supports a broad reading of "in connection with".

[92] There are words elsewhere in the *Mega-C* decision that if read out of context could suggest support for Staff's position here:

> The Commission is a public body, exercising its statutory powers in the public interest. It is important, in our view,

[29] Staff's Written Submissions at para 89
[30] *Mega-C* at para 31

> that it fulfill its mandate as transparently as practically possible.[31]

[93] Read in the context of the entire decision and the rest of the paragraph, however, the words "the Commission" in the passage above clearly speak about the Tribunal. The paragraph continues:

> This means that matters coming before the Commission, including the details about those matters, be made public, to the broadest extent possible, absent special circumstances that would warrant some degree of confidentiality. Where such circumstances exist, the Commission should exercise its discretion narrowly, so as to provide the public with as much information about the proceedings before the Commission as possible in the circumstances. [emphasis added]"

[94] There is nothing in this paragraph, either, that supports Staff's position in this case. This is so because there is no discussion of what the Commission, performing its executive function, might do as applicant in a court proceeding. Nor is there a collision between the language in *Mega-C* and the Supreme Court of Canada's exhortation in *Deloitte* that an order authorizing disclosure permit only such disclosure as is necessary.[32] In the above-quoted words from *Mega-C*, the panel expressly acknowledged that the Tribunal's general interest in being transparent was limited by what is "practically possible" and subject to "special circumstances that would warrant some degree of confidentiality".[33]

[95] Staff also relies on *Crown Hill Capital Corporation et al*,[34] where the Tribunal said that there were "a number of [unspecified] decisions" in which it was found that the words "in connection with", among others, were to be interpreted broadly and given significant latitude. However, this analysis concerned the language in s. 11(3) of the Act, which describes the permissible scope of an investigation:

> For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,
>
> (a) the affairs of the person or company in respect of which the investigation is being made, including any trades [etc.] to, by, on behalf of, or in relation to or connected with the person or company…; and
>
> (b) the assets [etc.], the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company… [emphasis added]

[96] The context for the use of the words is very different between a s. 11 investigation order (the fruits of which are protected by the confidentiality restrictions in s. 16) on the one hand, and a mechanism that would intrude on

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[31] *Mega-C* at para 36
[32] *Deloitte* at para 29
[33] *Mega-C* at para 36
[34] 2014 ONSEC 25, (2014) 37 OSCB 8294 (***Crown Hill***) at para 21

those protections on the other. We are not prepared to attribute the general and unsubstantiated proposition in *Crown Hill* to the present case.

[97] The words "in connection with" an existing or proposed Tribunal proceeding do not clearly extend to a different proceeding in a different venue. Had the legislature intended the result Staff seeks, it could have used words such as "arising out of the same facts as" or "involving the same events". To us, the words "in connection with" do not convey that meaning.

6. The Commission's actions defeated Mr. Sharpe's reasonable expectations and did not limit impairment of his privacy interests to the extent necessary in these circumstances

[98] We turn now to consider whether the Commission's choice to disclose publicly the compelled evidence aligned with Mr. Sharpe's reasonable expectations, and whether that choice minimized impairment of his privacy interests. We conclude that the answer is no in both cases.

(a) The Commission's actions were not consistent with Mr. Sharpe's reasonable expectations; rather, they defeated those expectations

[99] We begin by considering Mr. Sharpe's reasonable expectations. We conclude that the Commission's actions defeated rather than met those expectations.

[100] As the Tribunal has previously stated, a witness's reasonable expectations of privacy and confidentiality are a significant factor for the purposes of the Tribunal's s. 17(1) public interest jurisdiction.[35] Staff asserts that the Commission's disclosure of compelled evidence in this case was in accordance with the reasonable expectations of Mr. Sharpe. We disagree.

[101] This issue requires us to consider objectively the reasonable expectations of a compelled witness, as opposed to the actual expectations of Mr. Sharpe, about which we had no evidence, and nor should we have.

[102] Staff cites *Black* in submitting that Mr. Sharpe should reasonably have expected that his compelled evidence could be disclosed "for the purposes of a regulatory proceeding under the Act".[36] This submission misunderstands the Tribunal's words in that case, and in particular the words "a regulatory proceeding". The excerpted words must be read in the context of the decision and of the entire paragraph from which they are drawn:

> A witness is entitled to expect that the confidentiality provisions set out in section 16 of the Act will be respected and that compelled evidence will only be released where disclosure is in the public interest or for the purposes of a regulatory proceeding under the Act.

[103] Those words do two things. First, they reinforce the reasonable expectation of a witness that s. 16 will apply. Second, they contemplate two scenarios in which compelled evidence will be released:

a. where disclosure is in the public interest; or

[35] *Black* at para 123
[36] *Black* at para 119

b. for the purposes of a regulatory proceeding under the Act.

[104] This short list of two scenarios aligns structurally with s. 17, which provides only two ways in which compelled evidence will be released, *i.e.*, made available in some way (as opposed to being provided under compulsion as contemplated by s. 17(5), by which a court may order production under certain circumstances). The two methods of release in s. 17 are:

a. by an order under s. 17(1), which requires the Tribunal to consider "the public interest" (and thereby to consider limitations that might be placed on the disclosure); and

b. that permitted by s. 17(6), which in relevant part permits disclosure "only in connection with… a proceeding commenced or proposed to be commenced before the Commission or the Director [emphasis added]".

[105] In *Black*, the Tribunal assessed a witness's reasonable expectations in light of these prescribed exceptions. Nothing in s. 17 or in *Black* suggests that a witness should reasonably expect unrestricted disclosure in connection with a receivership application.

[106] We note the finding by the Divisional Court in *A Co. v Naster* (***Naster***) that the compelled witness "can have had virtually no expectation of privacy in what he divulged upon his examination."[37] It is difficult to reconcile this statement with the Supreme Court of Canada's holding in *Deloitte* that "the OSC has a duty to [compelled witnesses] to protect [their] privacy interests and confidences" and to limit disclosure as much as possible.[38] Given that *Naster* was decided in 2001, and *Deloitte* was decided in 2003 without reference to *Naster*, we are bound to follow *Deloitte*, as this Tribunal previously has.[39]

[107] The importance of protecting privacy interests having been established, we turn to Staff's assertion that the Commission's actions were justified because, in part, compelled evidence is "routinely disclosed without s. 17(1) authorization in connection with regulatory proceedings under the Act". Staff cites five examples.

[108] First, Staff notes that it discloses compelled evidence in Statements of Allegations, which are public documents. We do not find that argument to be persuasive. An allegation is not evidence. Explicit references in Statements of Allegations to evidence having been compelled are rare, and when they appear they typically relate to an allegation that a respondent misled Staff in a compelled examination. Such disclosure is authorized by s. 17(6). No s. 17(1) order is required.

[109] Second, Staff notes that it discloses compelled evidence to respondents in accordance with Staff's disclosure obligations. Again, this disclosure is authorized by s. 17(6).

[110] Third, Staff notes that respondents sometimes tender compelled evidence in Tribunal proceedings. That is true. However, when they do, they do so under authority of s. 17(6), because the disclosure is "in connection with" (*i.e.*, in) the

[37] *Naster* at para 15
[38] *Deloitte* at para 29
[39] For example, see *Katanga Mining Limited (Re),* 2019 ONSEC 4, (2019) 42 OSCB 803 at para 17

very proceeding in which the disclosure was made to the respondents in the first place.[40]

[111] Fourth, Staff submits that parties openly refer to compelled information in their submissions before the Tribunal and that compelled witnesses are not entitled to notice in those circumstances. We do not accept this broad and unsubstantiated description. A closer examination would be required in order to understand the context, to distinguish different types of situations, and to understand whether parties were referring to information that had already been made public in the course of the hearing or otherwise.

[112] Fifth, Staff submits that there are numerous statutory provisions that contemplate the Commission being a party to court proceedings in which, according to Staff, the Commission would be expected to disclose compelled information. However, none of the provisions cited by Staff refers to compelled information, and there is nothing about any of the provisions that would necessarily mean that information called for would have been obtained by compulsion. More importantly, there is nothing about any of those provisions that would prevent the Commission from seeking proper authorization from the Tribunal to disclose compelled evidence if it were necessary.

[113] Staff also identifies three previous Tribunal decisions that it says resulted in public disclosure of some compelled evidence:

a. *Dunn* – There are no reasons for decision in this case; simply the order that resulted. Three individuals applied under s. 17(1) for an order permitting disclosure of compelled evidence at their criminal trial. Notice was given to the two compelled witnesses whose transcripts formed part of the compelled evidence. Neither witness appeared to contest the application. We see nothing in this order that assists Staff.[41]

b. *Amato* – The Tribunal authorized disclosure of two compelled examination transcripts to alleged victims of a Ponzi scheme who were seeking the use of those transcripts in a court proceeding against their lawyer. There was no longer a need to protect the integrity of the investigation, and there were no persisting privacy interests, since the transcripts had previously been disclosed to the receiver. Disclosure to the receiver had occurred because one of the compelled witnesses was deceased, and the other did not object. Again, nothing in this decision assists Staff.[42]

c. *Y* – The Tribunal authorized the use of certain compelled evidence, to assist parties in defending criminal proceedings. The Tribunal imposed a long list of terms to limit use of the compelled evidence as much as possible. This approach is consistent with the obligation to protect privacy interests as much as possible, and is of no assistance to Staff in this case.[43]

[114] Is there any other basis for how Staff describes a witness's reasonable expectations? Staff rightly concedes that this case is novel. While the Commission's actions here may not have been unprecedented, in that (according

[40] *Mega-C* at para 31
[41] *Frank Dunn et al (Re),* (2012) 35 OSCB 441
[42] *Amato v Welsh,* 2015 ONSEC 16, (2015) 38 OSCB 5111 at paras 1-2, 11 and 27-28
[43] *Y (Re)*, 2009 ONSEC 29, (2009) 37 OSCB 11271 at paras 94 and 100

to Staff) the Commission has publicly disclosed compelled evidence before in connection with a receivership application, we have no reason to believe that those prior situations have ever come to anyone's attention outside the proceedings in which they arose.

[115] In the absence of any jurisprudential basis for the reasonable expectations that Staff describes, how then could the Commission's actions be said to be in accordance with Mr. Sharpe's reasonable expectations? We see no basis for that argument. Mr. Sharpe attended three examinations as required, was accompanied by experienced counsel, and demonstrated caution by expressly asserting his rights under relevant statutes. The only reasonable expectation that a compelled witness in Mr. Sharpe's position could have would be that the Commission and its Staff would act as they were required to, limiting the extent of disclosure only to that necessary to carry out the Commission's mandate and as they had in the past, to the extent there was public knowledge of the Commission's conduct in other cases.[44]

[116] These factors, taken together, would create the expectation in any reasonable person that if the Commission intended to put compelled evidence before the Court, it would do so in a manner that properly respected the high degree of confidentiality associated with that material.

(b) The Commission did not proceed in a way that impaired Mr. Sharpe's privacy interests only to the extent necessary

[117] Mr. Sharpe's reasonable expectations aside, Staff makes a number of submissions to suggest that the Commission proceeded in the only reasonable way available to it. As we address each of these submissions in turn, we will assess the Commission's action in this case against the governing principle – was the Commission's action one that minimally impairs a compelled witness's privacy interests while at the same time fulfilling the Commission's mandate?

i. Obligation of full and fair disclosure to the Court

[118] Staff correctly notes that in the receivership application, which the Commission brought without notice to any other party, the Commission had to make full and frank disclosure to the Court. Staff suggests that this obligation required Staff to present a comprehensive record, the obvious implication being that there was no room for Staff or the Court to limit the material filed in the public record.

[119] We disagree. The obligation to make full and frank disclosure, while real, would not preclude an alternative route that would meet that obligation while at the same time giving Mr. Sharpe an opportunity to make submissions about the appropriate extent of material that would be publicly disclosed. We address that alternative route in the following paragraphs.

[120] At the hearing, we asked Staff whether it would have been practicable, and consistent with the Commission's legitimate interest in seeking the appointment of a receiver, for a cloak of confidentiality to be placed over the compelled evidence until after the receiver had been appointed, at which time Mr. Sharpe

[44] *Deloitte* at para 29

could have been given an opportunity to make submissions about the extent to which that cloak of confidentiality should be maintained.

[121] We asked in particular about the Tribunal's recent decision in *B (Re)*[45]. That case did not involve a receivership, and arose because of a private party's (B's) application, not Staff's. However, the mechanism employed in that case is instructive.

[122] As part of an investigation authorized by a s. 11 order, a summons was issued to B to attend and answer questions at an examination. B wished to cooperate but was concerned that doing so would violate a confidentiality provision in B's employment contract. B sought a declaration from the Tribunal that complying with the summons would not violate that contract.[46] The Tribunal held that it was not empowered to give B the requested declaration. Instead, the Tribunal issued a confidential order under s. 17(1), permitting B to disclose, on a confidential basis, such information as was necessary to commence a court application.[47] Proceeding confidentially was essential, since the alternative would have destroyed the very confidentiality that was at issue.

[123] In the hearing before us, Staff responded to our questions about whether a similar method could or should have been employed in this case. However, following the conclusion of oral submissions, Staff asked for, and we granted, an opportunity for the parties to exchange further brief written submissions "about the potential application to this case of the process that was followed in the *B* decision".

[124] In those supplementary submissions, Staff argued that it would not be appropriate to follow that process, principally because it would defeat the Commission's ability, set out in s. 129(3) and used in this case, to apply for the receiver without notice to any party. We disagree. The following process, similar to that used in *B*, could have been employed here (and there may be others):

a. Staff applies to the Tribunal for a confidential order under s. 17(1) authorizing the Commission to disclose, on a confidential basis, all the compelled evidence (or such portion of it as the Commission sees fit to request) to the Court;

b. the Tribunal grants the order if appropriate, on terms (as permitted by s. 17(4)) that the Commission's *ex parte* (without notice) application to the Court for a receiver include a request that the Court consider whether, in light of s. 16, the confidentiality restrictions applicable to the compelled evidence should continue; and

c. if the Court determines that it is appropriate to grant the order for a receiver, it does so, but having been alerted to the s. 16 issue, it can also consider whether it is appropriate to maintain the confidentiality of certain of the material in the court file, pending an opportunity (after the receiver has been appointed) for a compelled witness to make submissions to the Court about the extent of any confidentiality protection.

[45] 2020 ONSEC 21, (2020) 43 OSCB 6719 (***B***)
[46] *B* at paras 2-3
[47] *B* at para 47

[125] Contrary to the receiver's submissions, the first step above would neither limit the evidence that could be put before the Court nor would it fetter the Court's discretion. We reject the receiver's contention that the Tribunal would be improperly interjecting itself in the Court's process.

[126] The point of the above process or one like it is that it engages rather than ignores the privacy interests of a compelled witness, and it respects the admonition of the Supreme Court of Canada in *Deloitte*.[48] Further, while it is for a court, not this Tribunal, to assess compliance with an *ex parte* applicant's compliance with the obligation of full and frank disclosure to a court, Staff has put this issue before us. We cannot ignore it. We question whether the Commission's decision not to mention s. 16 to the Court, and not to raise the question of whether a temporary sealing order would be appropriate, meets an *ex parte* applicant's obligation.

[127] We derive little comfort from Staff's suggestion that the Court was able to issue a sealing order if one were warranted, even though the Commission chose not to raise the issue with the Court. In our respectful view, that approach reflects an unrealistic view of a court's capacity to receive voluminous material on short notice and to anticipate on its own, unassisted by counsel, any issue that might arise. We are concerned that the Commission's actions did not align well with its obligation to balance the competing interests at play in a case such as this one.

[128] In its submissions, Staff spent considerable time discussing the test for a sealing order at the Court, and the extent to which that test is similar to or dissimilar from the test under s. 17(1). That discussion is irrelevant to the question we asked of counsel and to the topic about which Staff sought to make additional submissions. The process suggested above, similar to the one employed in *B*, respects s. 16 (as the Tribunal must) but defers completely to the Court making whatever determination it sees fit, according to whatever test it thinks appropriate. Nothing about the process involves the Tribunal purporting to prescribe or even suggest what the Court's decision ought to be.

[129] In summary, Staff offers no persuasive reason why such a process would interfere in any meaningful way with the appointment of a receiver, even if (and we do not assume this to be true in this case, absent evidence) there was urgency and/or a risk of dissipation of assets. We reject Staff's suggestion that the process above, even if there were multiple compelled witnesses, would be "complex". A single s. 17(1) order obtainable on short notice would have sufficed, and would have been no more complex than the temporary cease trade order that was issued in this case.

ii. Obligation to fulfill the Commission's mandate transparently

[130] Staff cites the Tribunal's comment in *Mega-C* that the Commission should fulfill its mandate as transparently as practically possible.[49] We agree, but this proposition does not assist in resolving the question in this case, which is: What is "possible", given the statutory scheme?

[48] *Deloitte* at para 29
[49] *Mega-C* at para 36

iii. A need to obtain s. 17(1) orders would unnecessarily impede the Commission's work and would serve no meaningful purpose

[131] Staff submits that in the circumstances of this case and other similar cases, a requirement that the Commission obtain a s. 17(1) order from the Tribunal would be a "roadblock" that furthers no meaningful or public interest purpose and that would "undermine the effective enforcement of Ontario securities law".[50] We emphatically reject these unsubstantiated submissions.

[132] Subsection 17(1) orders can be and routinely are applied for in writing and promptly obtained in circumstances where either: (i) no notice to any third party is required; or (ii) where no third party to whom notice was given objects. Where notice to a third party is required, the request engages that third party's privacy interests, which we discussed above. We must emphasize in this context that those privacy interests are not to be lightly dismissed.

7. Conclusion about the Commission's use of the compelled evidence without first obtaining a s. 17(1) order

[133] We summarize our discussion about the Commission's use of the compelled evidence by noting the following conclusions:

a. s. 16(1) of the Act, which prohibits any person or company from disclosing compelled evidence, other than in accordance with prescribed exceptions, applies to the Commission;

b. neither the words "for the exclusive use of the Commission" in s. 16(2) nor the words "shall not be disclosed… to any other person or company or in any other proceeding" in that same subsection assist the Commission in these circumstances;

c. the legislative scheme seeks to ensure minimum impairment of privacy interests, while permitting the Commission to perform its mandate within those constraints, and any exception to the general protection must be strictly construed, consistent with the high degree of confidentiality associated with compelled evidence and the need for strict limitations on its use;

d. the only exception to s. 16(1) that is relevant in this case is that set out in s. 17(1), which empowers the Tribunal to make an order authorizing disclosure, after: (i) where practicable, giving notice to persons who provided the compelled evidence, and (ii) determining that it is in the public interest to make the order;

e. the obligation to give notice to persons affected by the proposed disclosure gives them the opportunity to make submissions about the proposed disclosure, including the appropriate extent of disclosure and any terms that should be imposed;

f. the Commission's actions defeated Mr. Sharpe's reasonable privacy expectations;

[50] Staff's Written Submissions at paras 30 and 50

g. any similar and unchallenged disclosure by the Commission in previous instances is of no assistance to the Commission;

h. there is no Tribunal or Court decision that addresses circumstances similar to those in this case, and that supports the Commission's actions; and

i. Staff was unable to explain persuasively why the Commission could not have obtained a s. 17(1) order before publicly disclosing the compelled evidence.

[134] For all these reasons, we conclude that the answer to the first question is no. The Commission cannot, in the circumstances set out in the statement of agreed facts, publicly disclose compelled evidence without first obtaining a s. 17 order.

[135] Because of our answer to the first question, we turn now to the second question, *i.e.*, whether under the circumstances revocation of the s. 11 order is an available remedy.

C. Even where the Commission publicly discloses compelled evidence when it applies for the appointment of a receiver, without complying with s. 17 of the Act, revocation of the s. 11 investigation order is not an available remedy

1. Introduction

[136] Mr. Sharpe applies under subsection 144(1) of the Act, which empowers "the Commission" to revoke or vary a "decision of the Commission", if "the Commission" determines that doing so would not be prejudicial to the public interest. The word "decision" is defined in s. 1(1) of the Act to include an order. There is no dispute that the s. 11 investigation order falls within this definition, and that the Tribunal is empowered to revoke the s. 11 order if doing so would not be prejudicial to the public interest.

[137] Accordingly, revocation of the s. 11 order is "available" in a technical sense. While the parties before us first formulated the preliminary question to ask whether the remedy is "available", they agreed after submitting the statement of agreed facts that we should treat the question as if it asks whether that remedy could ever be available (*i.e.*, appropriate) given the circumstances set out in the statement of agreed facts.

[138] Mr. Sharpe submits that revocation would be appropriate because the public disclosure by the Commission is a new material fact that would likely have affected the Commission's original decision to issue the s. 11 order. We conclude that revocation would not be appropriate, for two reasons that we will address in turn:

a. the Commission's public disclosure of compelled evidence, made after the issuance of the relevant s. 11 order, is not a newly discovered fact that would likely have changed the decision to issue the s. 11 order; and

b. by its nature, revocation of a s. 11 order in the circumstances set out in the statement of agreed facts would be insufficiently connected to a court application later commenced by the Commission, even where that application relies on some of the compelled evidence.

2. Public disclosure after the issuance of a s. 11 order is not a newly discovered fact that would likely have changed the decision to issue the s. 11 order

[139] The Tribunal has held that it will issue an order under s. 144 only "in the rarest of circumstances".[51] Tribunal decisions have enumerated a number of grounds upon which the Tribunal may exercise its s. 144 authority. We need not review all the grounds, since Mr. Sharpe relies on only one – where "new facts come to light that were not discoverable at the time of the original hearing", and those new facts are "'compelling', *i.e.*, likely to have affected the original decision."[52]

[140] In considering whether revocation of the s. 11 order could be an appropriate remedy, we must first focus on when the "new facts" on which Mr. Sharpe relies occurred or came into existence.

[141] Mr. Sharpe does not contend that at the time the s. 11 order was issued, there were any material facts, then in existence, of which the Commission was unaware. Rather, Mr. Sharpe asks us to take an event that happened well after the issuance of the original order (*i.e.* the Commission's public disclosure of the compelled evidence) and then to ask first whether the Commission's September 2020 decision to issue the s. 11 order would likely have been different had it (the Commission itself) known that it (again, the Commission) would in April 2021, more than seven months later, publicly disclose some of the compelled evidence that would be obtained pursuant to that order.

[142] We cannot accept Mr. Sharpe's written submission that it "goes without saying that when issuing the Section 11 Order, the Commission presumed that the evidence collected pursuant to the powers granted by it would be treated in a manner that complied with the law and respected the rights of those compelled to provide evidence".[53] It was the same Commission, performing its executive function, that issued the s. 11 order and that publicly disclosed the compelled evidence in its Court application. At most, the Commission could only have intended to disclose publicly, at a then-unknown later date, certain fruits of the investigation that it had just ordered.

[143] However, we have no evidence before us about the Commission's intention at the time that it issued the s. 11 order. We cannot and will not speculate. In any event, in identifying the "new fact", Mr. Sharpe chooses the act of disclosure rather than any supposed future intention, even though the act of disclosure came later.

[144] We conclude that there was no fact at the time of the making of the s. 11 order that would likely have changed the decision to issue the order.

[145] However, a previous Tribunal decision considering an application to revoke a s. 11 order (discussed below) does leave the door open to consideration of events that arise after the order is made. The elapsed time between the order and the event complained of, and the logical connection (or lack of it) between the impugned event and the investigation authorized by the order, are both

[51] *X Inc (Re),* 2010 ONSEC 26, (2010) 33 OSCB 11380 at para 35
[52] *Pro-Financial Asset Management Inc (Re),* 2017 ONSEC 39, (2017) 40 OSCB 9159 at paras 16-17
[53] Submissions of David Sharpe, November 22, 2021 at para 90

relevant in determining whether we should exercise the authority under s. 144 in this case.

[146] We turn now to consider those two factors.

3. Revocation of a s. 11 order is insufficiently connected to a court application later commenced by the Commission, even where that application relies on some of the compelled evidence

[147] While it is open to us to consider facts that arise after the making of the s. 11 order, we conclude that revocation of the s. 11 order in this case could not be an appropriate remedy in response to the Commission publicly disclosing compelled evidence without adhering to s. 17. That remedy is insufficiently connected to the conduct complained of.

[148] Before we analyze the question before us, we must address Staff's request that we consider the fact that Mr. Sharpe has suffered no prejudice. We decline this invitation. This hearing is confined to the two agreed-upon questions, as directed by the Tribunal before the hearing. Neither question contemplates that the parties could tender evidence about any alleged harm or prejudice.

[149] Had our ultimate conclusion been that revocation of a s. 11 order could be an appropriate remedy on the limited facts before us, this proceeding would have moved to a subsequent hearing, at which issues regarding the actual effect on Mr. Sharpe would have been canvassed. Accordingly, at this stage we disregard any submission by Staff about a lack of harm or prejudice to Mr. Sharpe.

[150] Turning to consider whether revocation of this s. 11 order could ever be an appropriate remedy in these circumstances, we agree with Staff that revocation in response to the public disclosure could only be properly described as punitive. Revocation would not in any way reverse the public disclosure of the compelled evidence; nor would revocation offer any other relief to Mr. Sharpe, other than perhaps greater vindication or similar satisfaction. That is an insufficient reason to invoke the Tribunal's rarely-used authority under s. 144, and s. 144 does not exist to punish.

[151] We distinguish the Court of Appeal of Alberta decision cited to us by Mr. Sharpe, in which the Court upheld a decision to terminate a discipline proceeding on the basis that the investigator had improperly disclosed confidential information. However, a detailed review of that decision is warranted.

[152] *Clark v Complaints Inquiry Committee*[54] arose out of a complaint received by the Institute of Chartered Accountants of Alberta about Mr. Clark. The Institute's prosecutorial branch, the Complaints Inquiry Committee, determined that an investigation was warranted. An Institute employee was assigned to investigate.[55]

[153] At the direction of the Institute's employee, Mr. Clark and others provided relevant information by sending it to the e-mail address of the Institute employee's wife.[56]

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[54] 2012 ABCA 152 (***Clark***) at para 18
[55] *Clark* at para 2
[56] *Clark* at para 3

[154] At the beginning of the discipline hearing against him, Mr. Clark asked that it be dismissed because the employee, by using his wife's e-mail address, had contravened the relevant statutory provision prohibiting disclosure of confidential information obtained during an investigation.[57]

[155] The Discipline Tribunal dismissed Mr. Clark's application to terminate the proceedings. Mr. Clark was successful in his appeal to the Appeal Tribunal, which found that the investigation was an abuse of process; in particular, it held that disclosure of confidential information in the course of the investigation was prohibited and unacceptable.[58]

[156] The Court of Appeal of Alberta found that the Appeal Tribunal's decision to stay the proceeding was a discretionary one and that the Court should review that decision using a reasonableness standard. Significantly, the Court concluded that the Appeal Tribunal panel was concerned about abuse in the investigative process itself.[59]

[157] The *Clark* case differs from the one before us in three material ways:

a. Mr. Clark's complaint was about conduct that was part of the investigation, whereas there is no such complaint before us;

b. Mr. Clark did not seek a revocation of whatever instrument (if any) was employed to commence the investigation – indeed, there is no reference in the Court decision to such an instrument, and contrary to Mr. Sharpe's written submission, Mr. Clark sought a stay of the proceeding, not a stay of the investigation; and

c. Mr. Clark's requested stay was of a proceeding governed by the same body that governed the investigation, whereas here, to the extent that Mr. Sharpe's complaint is in connection with a proceeding, it is about a proceeding before the Superior Court of Justice, over which this Tribunal has no jurisdiction.

[158] We therefore conclude that the *Clark* case is of no assistance to Mr. Sharpe. It is neutral on the questions before us.

[159] For similar reasons, we distinguish the Tribunal's 2004 decision in *X Corp*[60]. In that case, a corporation named in a s. 11 investigation order asked the Tribunal to revoke the order. The applicant maintained that it was suffering prejudice during the investigation, and that the investigation was going on too long.[61] The Tribunal dismissed the application, but did say that it could consider "all relevant facts, past or present".[62]

[160] The panel in *X Corp.* concluded that the matters being investigated were serious and that it remained in the public interest for the investigation to continue. The panel was "unable to conclude… that the new facts which have arisen since [the

[57] *Clark* at para 6
[58] *Clark* at para 9
[59] *Clark* at paras 14 and 16
[60] 2004 ONSEC 19 (***X Corp***)
[61] *X Corp* at para 28
[62] *X Corp* at para 31

s. 11 order's] issuance permit us to form an opinion that a revocation or variation of the s. 11 order would not be prejudicial to the public interest."[63]

[161] The complaint in *X Corp.* was that the conduct of the investigation itself was abusive. Had the Tribunal been sympathetic to X Corp.'s substantive arguments, a revocation of the order authorizing the investigation would have brought an end to the conduct complained of. The connection would have been immediate and direct. No such connection exists here.

[162] The remedy Mr. Sharpe seeks is unprecedented. That does not mean that it is never available, but Mr. Sharpe has not met the burden of showing why we should exercise our discretion to depart from established precedent, including from the established principle that revocation of an earlier order should result only in the rarest of cases, and for sound reasons, which reasons do not exist in this case.

[163] Before leaving this issue, we note the agreed fact, emphasized in Staff's written and oral submissions, that Mr. Sharpe has not taken any action in the Superior Court of Justice related to the materials filed in support of the receivership order. In our view, that fact is not relevant to the issue before us and we accord it no weight.

IV. CONCLUSION

[164] We agree with Staff's submission that the alleged unlawful act by the Commission does not affect the legality or appropriateness of the s. 11 order. No matter what evidence Mr. Sharpe might adduce about specific harm or prejudice, if this proceeding were to advance to a full hearing on the merits we would be unable to conclude that it would not be prejudicial to the public interest to revoke the s. 11 order.

[165] We answer the two questions before us as follows:

a. the Commission is bound by s. 16 and was not entitled to bypass s. 17 of the Act in publicly disclosing Mr. Sharpe's compelled evidence; and

b. on the agreed facts, revocation or variation of the s. 11 investigation order cannot be an appropriate remedy.

[166] Accordingly, we dismiss Mr. Sharpe's request for a revocation or variation of the s. 11 order in this case.

[167] As noted above, that leaves Mr. Sharpe's request that the adjudicative records in these two proceedings (except for the written submissions) be kept confidential, without access by the public. If Mr. Sharpe wishes to maintain this request, then by 4:30pm on April 14, 2022, he shall serve and file:

a. a notice that, without grounds or submissions, specifies briefly but precisely the extent of his request, including identification of the documents that are the subject of the request, and for each document, whether he seeks redactions (which redactions, if any, shall be specified in the notice) or confidentiality protection of the entire document; and

b. written submissions of not more than five pages.

[63] *X Corp* at paras 36-37

[168] If Mr. Sharpe does not file the notice and submissions by the prescribed deadline, we will dismiss the request for confidentiality.

[169] If Mr. Sharpe files the notice and submissions, then Staff and the receiver shall serve and file any responding submissions, of no more than five pages each, by 4:30pm on April 28, 2022.

[170] The parties may request a different schedule for the above steps, by submitting to the Registrar by 4:30pm on April 14, 2022, either an agreed-upon schedule or competing submissions of no more than one page each.

Dated at Toronto this 30th day of March, 2022.

"*Timothy Moseley*"

Timothy Moseley

"*M. Cecilia Williams*"

M. Cecilia Williams

"*Lawrence Haber*"

Lawrence Haber

ONTARIO SECURITIES COMMISSION	and	**GO-TO DEVELOPMENTS HOLDINGS INC. *et al***
Applicant (Respondent in Appeal)		Respondents (Appellants in Appeal – Moving Party)

Court of Appeal File No.: C70114
Court File No: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
TORONTO

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANTS

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RCP-F 4C (September 1, 2020)