

CONFIDENTIALITY OF COMPELLED TESTIMONY IS AFFIRMED BY THE ONTARIO SECURITIES COMMISSION

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Compelled testimony provided to the Ontario Securities Commission attracts certain statutory protections. One of these protections is that the information is confidential. Disclosure of such information is subject to certain requirements under the *Securities Act*.^[1]

This regime begs the question as to what happens if Commission Staff disclose compelled information without complying with the Act. Those circumstances led to the motion considered in the Commission decision in *Sharpe (Re)*.^[2] Counsel for one of the individual respondents sought an order revoking the investigation order underpinning Commission Staff's examination. The Commission agreed that Commission Staff improperly disclosed information gathered during its investigation, but held that revocation of the investigation order was not an available remedy.

Background

Commission Staff obtained an order under section 11 of the Act to conduct an investigation into Bridging Finance Inc. During the investigation, Commission Staff summoned Bridging's CEO to attend and submit to an examination. This is a common process in securities investigations.

What is less common is what followed. Without an order of the Commission or notice to the CEO, Commission Staff filed the contents of the compelled examination with the Ontario Superior Court of Justice as evidence in support of an application to appoint a receiver over the assets of Bridging.

After obtaining the order, the receiver disclosed the compelled evidence on a website that was linked to by the Commission, effectively revealing the sworn and confidential testimony to the public.

The Commission's disclosure of compelled testimony was not permitted

The Act contains a statutory scheme for collection and use of compelled testimony. Individuals can be summoned and compelled to testify under section 13. Information gained from that testimony cannot be disclosed by any person or company due to section 16 of the Act, which only makes the testimony available "for the exclusive use of the Commission".

Section 17 of the Act allows disclosure in three situations: when the Commission makes an order, when a court with jurisdiction over a prosecution under the *Provincial Offences Act* makes an order or when an investigator (Commission Staff) makes disclosure in connection with an existing or contemplated proceeding before the Commission.

Even when disclosure is permitted under section 17, notice must be given to the individual who provided the evidence and the order must be in the public's interest. Further, the disclosure must only be ordered to the extent it is required for the Commission to carry out its mandate.^[3]

In *Sharpe (Re)*, no section 17 order was obtained. The Commission rejected Commission Staff's argument that the Commission was permitted by the Act to freely decide how to use the testimony. The Commission noted that the powers of the Commission Tribunal and Commission Staff are distinct – only the Commission Tribunal possesses the power to make a disclosure order. Commission Staff cannot rely on its executive function to skip this step.^[4] Further, bypassing the Commission Tribunal took away a necessary opportunity for the Commission to review and limit the extent of disclosure made by Commission Staff.^[5]

In assessing Commission Staff's ability to disclose compelled testimony, the Commission considered the balance between the "extraordinary" power of Commission Staff to compel testimony and its consequential obligation to maintain the privacy of individuals providing this testimony.^[6]

Finding that disclosure was not available to the Commission Staff, the Commission turned its attention to whether its actions were consistent with the CEO's expectations and whether the disclosure was only to the extent necessary. For both issues, the answer was no. The reasonable expectation of a compelled witness was that Commission Staff would act only as it is required to under the Act.^[7] Further, there was no valid excuse for Commission Staff's failure to obtain a sealing order to limit disclosure in the court proceeding.^[8]

Revoking an investigation order is not an available remedy for the improper disclosure

Despite the CEO's right to the privacy of his testimony being infringed, the Commission did not go as far as revoking the underlying investigation order. The Commission rejected the CEO's argument that the disclosure was a fact that, if known, would have changed the decision to issue the investigation order, as the decision to issue the investigation order and the later decision to disclose the testimony were both made by Commission Staff.^[9] There was also not a sufficient connection between the investigation order and the inappropriate disclosure to support crafting a remedy of this nature, as revoking the investigation order would have no effect on restraining the already public disclosure of the testimony and would not be in the public's interest.^[10]

The Commission held that revocation of the section 11 investigation order would not in any way reverse the public disclosure of the compelled evidence; nor would revocation offer any other relief, other than perhaps

greater vindication or similar satisfaction. It could also involve punishment. These were insufficient reasons to invoke the Commission's rarely-used authority to revoke the order.^[11]

The Commission did not entirely close the door to revoking an investigation order in future cases, concluding that situations could arise that would justify departing from established precedent to apply this remedy.^[12] Specifically, section 144 of the Act permits revocation of a section 11 order.^[13] It is clear this will be done rarely.^[14]

Conclusion

This decision is important for both Commission Staff and parties under investigation for securities offences, as it reaffirms the statutory protections available for compelled evidence.

The power of Commission Staff to compel testimony during an investigation is, as recognized by the Commission in *Sharpe (Re)*, "extraordinary".^[15] To balance this, the Act contains provisions intended to ensure that testimony remains confidential outside of specific exceptions. Here, the Commission recognized that Commission Staff overstepped their statutory abilities by freely disclosing testimony, providing an important caution about Commission Staff's use of compelled testimony in future cases.

It remains to be seen what remedy may flow from Commission Staff's disclosure in *Sharpe (Re)*. Certainly the decision may be raised by counsel about any subsequent attempted use of the testimony – perhaps in a civil context, for pending or future claims against the respondents named in the Commission proceeding. That may not be an insignificant use. Many counsel whose clients are examined by Commission Staff through compulsion will claim protections related to the uses of the information given.

But what of matters before the Commission itself? The Bridging case continues to work its way through the Commission and it will be interesting to see what role, if any, this wrongful disclosure may play in adjudication of the merits of the allegations.

[1][ps2id id='1' target=''] RSO 1990, c S.5 [Act].

[2][ps2id id='2' target=''] 2022 ONSEC 3 [*Sharpe (Re)*].

[3][ps2id id='3' target=''] *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61.

[4][ps2id id='4' target=''] *Sharpe (Re)* at para 65.

[5][ps2id id='5' target=''] *Sharpe (Re)* at para 68.

[6][ps2id id='6' target=''] *Sharpe (Re)* at para 50.

[7][ps2id id='7' target=''] *Sharpe (Re)* at para 115.

[8][ps2id id='8' target=''] *Sharpe (Re)* at para 129.

[9][ps2id id='9' target=''] *Sharpe (Re)* at para 142.

[10][ps2id id='10' target=''] *Sharpe (Re)* at paras 150, 164.

[11][ps2id id='11' target=''] *Sharpe (Re)* at para 150.

[12][ps2id id='12' target=''] *Sharpe (Re)* at para 162.

[13][ps2id id='13' target=''] *Sharpe (Re)* at para 136.

[14][ps2id id='14' target=''] The Commission cited another example of a request to revoke an investigation order, *X Corp.*, 2004 ONSEC 19. As in *Sharpe (Re)*, the remedy was not granted.

[15][ps2id id='15' target=''] *Sharpe (Re)* at para 50.

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A Cautionary Note

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