Court File No.: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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

Applicants (Respondents)

- and –

ONTARIO SECURITIES COMMISSION

Respondent (Appellant)

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS
(Pursuant to s. 40(1) of the Supreme Court Act, RSC, 1985, c S-26 and
Rule 25 of the Rules of the Supreme Court of Canada)

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and gave the $6 million. Those are the facts.

MS. COLLINS: But that's why I'm asking him about the conversation where they came to him and told him that they were going to give him the shares in Adelaide Square Developments. I would like to know about that conversation.

MR. MANN: That's different than what you just asked before. So, if you're asking him, tell me about the conversation, he will give you that answer.

MS. VAILLANCOURT: She just asked the question. She --

MS. COLLINS: I did ask that question.

THE WITNESS: The conversation was very straightforward. They called me, I went and met with them, and they said that they wanted to thank me for the value of the deal, they made a lot of money on the deal, and they wanted to give me some shares in the company. And they decided that they were going to give me 11 percent of the shares and we did the paperwork for that.

They then said to me, as part of the dividend, they were going to give me a

A. Correct.

416 Q. Thank you.

Ms. Vaillancourt, do you have further questions on that issue?

MS. VAILLANCOURT: No. That's fine. We can move on. Thanks.

BY MS. COLLINS:

417 Q. Okay, so question number five in the written questions, one of the written questions asked for the --

MS. VAILLANCOURT: Sorry, Stephanie, I just had one question.

BY MS. VAILLANCOURT:

418 Q. That conversation you told us about where they decided to give you shares, who was that conversation with at the Adelaide company, Mr. Furtado?

A. I believe I answered that question earlier. All the conversations were with Angelo Pucci.

419 Q. Okay, thank you.

BY MS. COLLINS:

420 Q. Okay, so question five talks about the answers to the written questions, and the answers note that the Class D unitholder

155 Q. For that non-refundable deposit, you advanced the funds for that non-refundable $800,000 deposit from Go-To Spadina Adelaide LP?

A. Correct. Funds were advanced.

156 Q. Okay. But your holding company, Furtado Holdings, entered agreements entitling it to be paid a $400,000 fee less legal expenses from Adelaide Square Developments for providing the non-refundable deposit?

A. There have been two agreements that have been sent to the Securities Commission. The first one was to assume the risk between Furtado Holdings and the LP. In case the 800,000 was lost, Furtado Holdings would have to pay the 800,000 back to the LP. To assume that risk, the LP had to enter into an agreement with Adelaide Square that if that deposit was lost -- sorry, if the deal goes through, the return would be paid to Furtado Holdings for assuming that risk.

157 Q. Okay. I would like to take a look at one of those memos that you have mentioned. Mr. Baik, if you could pull up 4918?

MR. MANN: Sorry, give me a second. For some reason -- there we go. Everything went off on my computer. I have it up now. I have the memorandum of agreement amongst Mr. Furtado, Adelaide Square Developments Inc., and Go-To Spadina Adelaide Square LP.

MS. HOULT: Can you just scroll to the bottom of this document, Mr. Baik? This document is dated March 26th, 2019. For the sake of the record, we will mark it as Exhibit 8.

EXHIBIT NO. 8:
Memorandum of Agreement dated March 26, 2019.

MS. HOULT: You can scroll back up to the top, Mr. Baik.

BY MS. HOULT:

158 Q. This is one of the documents that Mr. Davide Di Iulio prepared; is that correct, Mr. Furtado?

A. Correct.

159 Q. The signatures on this document are -- and Mr. Baik can scroll down. Did you sign this document in two places?

A. I did.

160 Q. Okay. And the third

signature on this document indicates that it is from Angelo Pucci. Do you see that?

A. Yes, I do.

161 Q. Were you present when Mr. Pucci signed this document?

A. I wasn't.

162 Q. Okay. Who did you negotiate this agreement with on behalf of Adelaide Square Developments?

A. Alfredo Malanca would have been my primary contact.

163 Q. Okay. And so if you can scroll up a little bit, Mr. Baik -- that is fine. The final paragraph before the date line refers to a fee of 50 percent of 800,000 being $400,000 less legal expenses. Do you see that, Mr. Furtado?

A. Yes, I do.

164 Q. So I just want to know, to whom were the legal expenses to be paid?

A. Adelaide Square was going to pay it to Furtado Holdings for $400,000 less legal expenses. So they were incurring the legal expenses.

165 Q. So Adelaide Square was incurring the legal expenses?

ASD on April 15, 2019?

A. Correct.

185 Q. And I understand you went to a meeting with Mr. Pucci that day. Is that correct?

A. At his solicitor's office, yes.

186 Q. Okay. Who was his solicitor? What office is that?

A. I believe it was Concorde Law.

187 Q. Concorde Law. Is there a particular counsel there?

A. I don't recall his name. It will come to me. I don't recall. Louis is his first name. I know that.

188 Q. Louis?

A. I don't recall his last name.

189 Q. Okay. Who was at that meeting? Yourself, Louis, Mr. Pucci. Anybody else?

A. Alfredo Malanca was at that meeting too.

190 Q. Okay. So it was just the

four of you?

A. I believe so, yes.

191 Q. Was that the only time you met Mr. Pucci in person?

A. I have met him in person a few times. Once with -- a handful of times.

192 Q. Okay. Was that the first time you met him in person or had you previously met him in person?

A. I previously met him.

193 Q. Okay. What context did you previously meet him, Mr. Pucci, in person?

A. It was a general meeting with Alfredo Malanca.

194 Q. With Alfredo Malanca and Mr. Pucci?

A. Yes.

195 Q. Okay. Approximately when was that?

A. It was prior to the deal. I don't recall how many months or days. It was just a lunch meeting.

196 Q. Okay. When you say "prior to the deal", what do you mean by "prior to the deal"?

A. Pre-April 4th, 2019.

197 Q. Okay. What was discussed at the lunch meeting with Mr. Pucci and Mr. Malanca?

A. Just introductions. Generally, you go to -- 80 percent of lunch -- because there's no business talk. There's nothing -- it was just a lunch to meet someone.

198 Q. Okay. So you didn't discuss the project or the opportunity?

A. High level, the future potential of the project. Just high level.

199 Q. Okay.

A. I don't recall all the things discussed at the lunch.

200 Q. Did the lunch pre-date the offer Go-To made in December 2018?

A. I don't recall if it was before or after.

201 Q. Okay. So you had a lunch with Mr. Pucci and Mr. Malanca, and you met Mr. Pucci and Mr. Malanca at Louis' office on April 15th, 2019. Were there any meetings with Mr. Pucci in person between the lunch and the meeting of April 15th, 2019?

A. I don't recall any meeting.

202 Q. Okay. Have you seen Mr. Pucci in person since April 15th, 2019?

A. There was a brief meeting in the summer, after the closing of the deal. Again, I didn't keep track of the date.

203 Q. Okay. Who was at that summer of, I guess, 2019?

A. It would have been Alfredo Malanca and myself.

204 Q. And Mr. Pucci?

A. Yes.

205 Q. And where did that meeting happen?

A. At one of the restaurants in Woodbridge. We go from restaurant to restaurant from these three key restaurants they like to meet at, Alfredo likes.

206 Q. Right. And what -- sorry?

A. I wouldn't recall which restaurant. I know it is in Woodbridge.

207 Q. That is fine. What was discussed at that summer 2019 restaurant meeting

with Mr. Pucci and Mr. Malanca?

A. There was discussion about -- and Alfredo had the lead in the discussion, discussion about wanting to -- the plan was to give me the 6 million out of their profit share from -- because they did quite well on the deal and they saw the potential of doing future deals with me at the table in the city of Toronto.

208 Q. Okay. So I would like to know everything that you can recall about that discussion. How was it introduced? Who said what?

A. Alfredo was the primary guy that did the majority of the talking with -- he referred to Angelo Pucci as "we". And he did the majority of the talking. They wanted to acknowledge the value that I brought to the project to close the deal. And I was surprised with the amount because I knew I had shares in the company and I was a minority holder of one class of shares. So was just surprised that -- I was more thankful than anything else. There was nothing more discussed.

They did -- as I recall, there

was -- they did bring up the fact that there was another big property in downtown Toronto that they had considered (indiscernible) parking lot with the city of Toronto who was looking to sell. There was potential to do a high-rise development on it and they were looking to get me involved, but nothing -- I don't believe anything came out of that discussion. I never heard -- I heard a little bit more about the property. Then I believe the city -- there was some public announcement and the city changed their strategy on the property and that was it. They were just talking about the huge potential.

209 Q. Okay. So it was in the summer of 2019 that they discussed that they were going to pay you a dividend?

A. It was discussed they were going to pay me the 6 million when they had the funds, when they became (inaudible).

210 Q. When they became in funds? Is that what you said?

A. When they had the funds to pay.

211 Q. Okay. Why 6 million? Was there any discussion of that? Where did the

number come from?

A. You have to ask them.

212 Q. Was that the last time you saw Mr. Pucci in person, that summer 2019 meeting?

A. Correct.

213 Q. Okay. So you only recall three times that you met Mr. Pucci in person? That lunch before the deal closed, the meeting at Louis' office in April 2019, and then a summer 2019 lunch. Is that correct? Sorry, I didn't hear that.

A. Correct.

214 Q. Okay. Sorry. Thank you. I would like to pull up a document you have provided to us. Paul, 4970.001.

MR. MANN: Sorry, just give me one second. My computer keeps -- okay.

MS. HOULT: Are you all right, Mr. Mann?

MR. MANN: Generally or specifically?

MS. HOULT: Specifically on the --

MR. MANN: I have the

This is Exhibit "81" referred to
in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

A COMMISSIONER FOR TAKING AFFIDAVITS

Michelle Spain, a Commissioner, etc.,
Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

entity, insofar as a couple of matters are concerned. You're asking why was it that that particular lawyer drafted the documents as opposed to Torkin Manes? I don't see that as being an appropriate question at all. That also, if it doesn't come close to, it certainly engages issues of privilege.

BY MS. HOULT:

177 Q. Mr. Furtado, you also mentioned that you entered into a memorandum between the LP and Furtado Holdings whereby Furtado Holdings assumed the risk of the loss of that $800,000 deposit; is that correct?

A. That is correct.

178 Q. By which you meant if the transaction didn't close, then the $800,000 deposit was lost, then Furtado Holdings was to reimburse the LP?

A. Right.

179 Q. What assets did Furtado Holdings have when it assumed the risk of that $800,000 deposit?

A. I don't recall offhand.

180 Q. Would you be able to find out?

REF MR. MANN: Let me understand. You're asking -- once we -- we're going to see the agreement, the MOA. Once we see that MOA, you're asking whether Mr. Furtado, in general terms, can put together a net worth statement as at that particular date insofar as the assets are concerned, assets and liabilities, perhaps?

We're not going to do that. We're not going to -- this isn't a make-work project. So if you want to ask Mr. Furtado other questions, we will certainly consider them. But unless he has a net worth statement that was prepared as at a certain date for the relevant entity, we're not going to go down that path.

BY MS. HOULT:

181 Q. Did Furtado Holdings have a net worth statement in and around March of 2019?

A. Not that I recall.

182 Q. Pre-dating March of 2019?

REF MR. MANN: That wouldn't be relevant, then, anything prior to -- if you're saying that the operative date of the memorandum of agreement insofar as the risk being assumed is dated March of 2019, I don't think we have pulled up that document. We'll have to assume that is

accurate. Any other date is not relevant.

MS. HOULT: I don't accept that position, Mr. Mann. We're allowed to inquire into the assets and liabilities of persons under investigation, which includes Furtado Holdings.

Mr. Furtado says he cannot tell me what assets Furtado Holdings had in March of 2019. So I would like to know what it would take for you to make that assessment, whether you had existing -- whether you have existing net worth statements or financial statements for Furtado Holdings and when those types of statements are prepared.

MR. MANN: So we're not going to do that, but if I could address your previous statement about what you're entitled to do, you're entitled to ask relevant and proper questions.

You asked questions about a net worth statement as of March of 2009. He said none existed. And then you asked, did Furtado Holdings have one prior to that? So if Furtado Holdings had one 30 years prior, that is not relevant or proper. If you wanted to ask, well, did you have one, you know, a month earlier or six weeks earlier, I may entertain that question. But

asking it in the way in which you asked it is neither relevant nor proper. I'm not making this personal, Ms. Hoult. I have a different view of it, and we're also not going to undertake to do what you just asked us to do.

MS. HOULT: I obviously disagree with the position you've stated, Mr. Mann. We can take this in bite-size pieces.

BY MS. HOULT:

183 Q. I would like to know if you have any documents, Mr. Furtado, that would have spoken to the assets and liabilities of Furtado Holdings in and around 2019, and if so, what those documents are.

MR. MANN: You have my position, Counsel. If I could suggest, Ms. Hoult, why don't you put all your questions in this regard on the record and I will take them all under advisement. That might be the only question you're asking in this regard, but if you want to put all your questions in this respect on the record, then I will take them all under advisement.

MS. HOULT: I think the questions have been posed. The question is: What

assets and liabilities did Furtado Holdings have when it assumed the risk on the $800,000 deposit? U/A

MR. MANN: And I don't believe that for the reasons I indicated that's relevant, proper. He has already indicated that no net worth statement existed as of that time. If one existed, it might be a relevant document to be provided to staff that existed. As a result, he is not going to answer -- we will take the question that you just asked under advisement, and if there are any other questions in this regard, I invite you to ask them so that we can deal with them all at once.

MS. HOULT: I have your position. My position is the question is a proper one and ought to be answered and we will be moving on.

MR. MANN: Okay. Thank you.

BY MS. HOULT:

184 Q. I would like to talk about Adelaide Square Developments Inc. and the shares you received in that company, just so you can know what we're talking about now.

So you, Mr. Furtado, through Furtado Holdings, first became a shareholder in

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in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

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Michelle Spain, a Commissioner, etc.,
Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

A. Correct.

166 Q. Okay. And would those have been expenses with Mr. Di Iulio?

MR. MANN: Do you know?

THE INTERVIEWEE: I don't know.

BY MS. HOULT:

167 Q. Okay. Were you provided with any invoice or information as to the deduction incurred for those legal expenses?

A. No, I just received the net payment.

168 Q. Okay. That net payment was 388,000 and some change on April 15th, 2019. And we can remove this document from the screen, Mr. Baik.

Do you recall that the payment that you received -- that Furtado Holdings received was approximately $388,000?

A. Yes, I do.

169 Q. Okay. Why did Furtado Holdings receive a T5 indicating that that $388,000 was a dividend?

A. I was asked how I wanted the payment, and for tax reasons I said if they

can be given to me as a dividend, it's more tax effective for me.

170 Q. Did you tell investors in the Go-To Spadina Adelaide LP that Furtado Holdings was going to and did receive this $388,000 payment from Adelaide Square Developments?

A. Sorry, did I tell who?

MR. MANN: Your voice lapsed.

BY MS. HOULT:

171 Q. Unit holders in the Go-To Spadina Adelaide LP. Did you tell investors that you were going to receive this $388,000 payment?

A. No, I didn't.

172 Q. Sorry, I didn't hear you.

A. No, I didn't tell them.

173 Q. Okay. I apologize. I had Mr. Baik take it off the screen. We may not need it back. I would like to know where that memorandum of agreement, where was it kept in the LP's records?

MR. MANN: Do you know?

THE INTERVIEWEE: I don't recall offhand where we kept it.

BY MS. HOULT:

A. I have no idea.

250 Q. Okay. The next payment on this document is to RAR Litigation Lawyers, $200,000. What is your understanding of why Adelaide Square directed $200,000 to RAR Litigation Lawyers?

A. (Indiscernible).

251 Q. Sorry?

A. I have no idea.

252 Q. Then we see a payment to AKM Holdings Corp. of $388,087.33. What is your understanding of why AKM Holdings received that amount?

A. Again, I have no idea why he received the amount.

253 Q. Or was directed. I take your point, Mr. Mann. Why is it the exact same amount that Furtado Holdings was directed to receive?

A. Again, I have no idea why it's the same amount and why he got paid.

MR. MANN: If he got paid.

THE INTERVIEWEE: Or even if he got paid.

BY MS. HOULT:

This is Exhibit "88" referred to
in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

A COMMISSIONER FOR TAKING AFFIDAVITS

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Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

put something to him to challenge what he has said? No?

MS. HOULT: Mr. Baik, 1579. This is an email exchange ending February 16, 2019, from yourself to Mr. Malanca. And I will get Mr. Baik to scroll through it so you can see the exchange.

MR. MANN: Is this a document that we provided to you; Counsel?

MS. HOULT: That is something you can check, but I'm not --

MR. MANN: I don't think it is a document that we provided to you in advance of this examination. I specifically asked to be provided with a copy of any documents that staff intended to put to Mr. Furtado. That request, while you may not agree with it, was rejected by staff. And I would like an opportunity to review this document with Mr. Furtado because this is not, as best as I can recall, unless you can direct me otherwise, was a document that -- is a document that was asked of us or that we provided to staff.

So is there some way that we can review this document alone? I don't know how

we can do that. If you want to email it to me and then I can destroy it after we review it, but Mr. Furtado is clearly entitled to an opportunity to review any documents that we haven't been asked to provide or provide to staff with counsel.

MS. HOULT: We can take a break and we can have -- I believe that there is a way for you to control the scrolling or perhaps not, and if not, Mr. Baik can scroll through, and of course you can mute yourself but we're --

MR. MANN: Do you mind if we go off to discuss the --

MS. HOULT: Yes, we can go off the record.

MR. MANN: Thanks.

--- (Off-the-record discussion)

MS. HOULT: It is 2:01 p.m. and we have off the record permitted Mr. Furtado and Mr. Mann to scroll through this document 1579 and we're going to take a five-minute break and return at 2:06. Off the record.

--- Recess taken at 2:01 p.m.

--- Upon resuming at 2:08 p.m.

MS. HOULT: We're back on the record at 2:08 p.m. We will have that document on

the screen again. Mr. Baik, 1579, our 1579.

Just to confirm, if I haven't, this is Exhibit 17, which is an email chain dated February 16th, 2019.

MR. MANN: Sorry, Counsel, how are you making this as an exhibit when we are not attesting to its legitimacy or anything of the sort? So if you're marking it as an exhibit, it has to be -- it has to qualify as an exhibit. If you want to mark it for identification, I'm happy to do that. But it is not an exhibit in the true sense of evidence.

MS. HOULT: We mark these documents as exhibits to the examinations, and I believe you raised this question previously. And yes, it is fine. They are for identification on the examination, so it's 17. Can you scroll to the top, Mr. --

MR. MANN: Let me just be clear. I haven't raised it in this context in terms of emails or the sort. In this context, you are putting to Mr. Furtado a document that staff hasn't provided to us prior to this moment, and you're purporting to mark this document as an exhibit strictly for identification purposes; is

that correct?

MS. HOULT: That is fine.

MR. MANN: Okay. Exhibit 17 is an email exchange between Mr. Furtado and Mr. Malanca, M-A-L-A-N-C-A, in February 2019 -- actually, February 16, 2019. That document, Madam Reporter, is marked strictly for identification purposes. Thank you.

EXHIBIT NO. 17: Email exchange between Mr. Furtado and Mr. Malanca, dated February 16, 2019 (For identification)

MS. HOULT: Just so we're clear, the fact that it hasn't been provided to you in advance is something you have noted. That is accurate, but to be clear, our position is there is no issue with that. This is not an examination for discovery in a civil proceeding.

MR. MANN: I think it is more egregious, quite frankly, when it's a regulatory proceeding. As a matter of fairness, Mr. Furtado and any person Mr. Furtado choose ought to be afforded with the opportunity to review documents

not five minutes ahead of time but well in advance, which is specifically why I asked, I think, a couple of weeks ago for documents, and clearly counsel have a different view as to how documentary disclosure ought to take place. But that is fine. We can agree to disagree.

MS. HOULT: Yes, we can agree to disagree. You have our position and it is within staff's discretion as to whether or not to provide documents in advance of an exam, and I know your position is different. I just want to be clear --

MR. MANN: Staff discretion is not unfettered. There is an absolute obligation to deal with matters fairly, but we can agree to disagree as to whether this is being handled properly or not.

MS. HOULT: And we will continue. Mr. Baik, please scroll down on this first page so that we can see the email. Stop.

BY MS. HOULT:

346 Q. This email chain, which we have marked as Exhibit 17, contains an email that appears to have been written by you, Mr. Furtado, on February 16th, 2019, that says:

"I understand the numbers below are for Adelaide Square Developments Inc. to close." (As read)

And it then continues on. The email says, among other things:

"I need 30 in equity, less lift 18. Need to get to 12 in equity." (As read)

What do those statements mean? What did you mean by that?

A. Okay. First, to clarify, the 54.9 million represents approximately -- because the price was changing, approximately the price of the two properties that we would be picking up, 46 Charlotte and 355 Adelaide.

The $30 million in equity represented the total equity that the LP would have to raise to close the deal. So you have to include the lender's fees that include the broker lender fees, the interest reserves, everything you have to have to include and come up with the equity. The equity -- the 30 million was the net amount required.

The 18 million, it was representing that these were Alfredo Malanca's words that I picked up from him in another context. The 18 million represented what Alfredo Malanca -- representing Adelaide Square. Adelaide Square would reinject 18 million into the LP so that they could close the deal because we didn't have the money.

If you recall, originally, I said that Hans Jain was supposed to bring all the equity required for this deal and he didn't. So Adelaide Square, to make the deal happen, was open to reinjecting potential profitability into the deal as equity. And then that would leave me with the remaining -- at the time that this email was written, it appeared to be 12 million that I would need to still raise from private equity investors. That was the math over here that you see.

347 Q. So at the time of this email, Adelaide Square Inc. -- Adelaide Square Developments Inc. was -- you were contemplating that they would invest 18 million into the LP as equity?

MR. MANN: Sorry, Mr. Furtado never said he was contemplating. He said they

were contemplating this. He never said he was contemplating it at all, so please don't misstate his evidence.

BY MS. HOULT:

348 Q. Why did you write "less lift 18" in your email? You were not contemplating that, Mr. Furtado?

MR. MANN: He said that what's -- using Mr. Malanca's words. That's what he said. That's where he got it from. If you want, the reporter can read that back.

MS. HOULT: I understand where he got it from. Now I'm asking what he was expecting or contemplating at the time, and your objection is unclear. This is Mr. Furtado writing to Mr. Malanca.

BY MS. HOULT:

349 Q. So were you not anticipating the reinvestment of the lift?

A. I am purely stating what -- Alfredo Malanca would get on the phone with me and discuss scenarios. This is a scenario he put on. I was summarizing what I understood him to be saying. That is all I did here. It's his view that he -- that Adelaide Square would inject that

amount. I wasn't contemplating this would happen or another scenario would not happen.

350 Q. Did that come to pass, that scenario of reinjection of -- or injection of equity by Adelaide Square Developments into the LP take place?

A. No.

351 Q. No. So Adelaide Square Developments never became a unit holder in the LP?

A. No.

352 Q. Okay. All right. We can remove this document from the screen.

MR. MANN: Counsel, could I get a copy of that document, please?

MS. HOULT: I will take that away, but as I've told you previously, our practice is not to provide copies of exhibits with our examinations.

MR. MANN: I don't know that you and I ever had that discussion about copies of exhibits.

MS. HOULT: I think you have had it with staff at previous exams.

MR. MANN: Well, I don't think I have ever been provided with an email exchange,

a document purporting to be an email exchange of this sort, but that's fine. I have asked and I have your answer.

MS. HOULT: We're going to pull up another email exchange, 1369, and Mr. Baik can scroll through it with you before I'll ask Mr. Furtado questions about it.

MR. MANN: Counsel, are there going to be more than this document? Like, how many other similar documents are we going to be presented with?

MS. HOULT: There are a limited number of them, Mr. Mann.

MR. MANN: Can you help me? Limited being ten? Two? I'm trying to do this efficiently, Counsel. If there are a series of these documents, I would like an opportunity not to review each one on its own with my client, but to review all of them with my client at once, which is fair. It is not an unfair process. It is not designed to be an unfair process.

Mr. Baik has pulled up a top of an email, again between -- that purports to be between Mr. Malanca and Mr. Furtado. This one has a date of 2019-02-01. At least that's the top of

the document. If there are other emails in or around this time frame, Mr. Furtado is surely entitled to look at all of them so that his answers can be comprehensive, accurate and fair.

Will you please allow us to look at all of these types of documents now?

MS. HOULT: No. We're going to proceed through the examination in the manner that we see appropriate and fair, which is what we are doing.

MR. MANN: So we will then respond accordingly. Could you -- we're going to go off the record --

MS. HOULT: No, we're not going to go off the record. This is my examination.

MR. MANN: All right. Go ahead. Ask --

MS. HOULT: Mr. Baik, and again for the sake of the record, we have pulled up this document, which is an email with an attachment. It is dated February 1, 2019, to Alfredo Malanca from Oscar Furtado. A short doc ID on the first page is 1369, and we will mark it as Exhibit 18 for the sake of the record.

EXHIBIT NO. 18: Email exchange between Mr. Furtado and Mr. Malanca, dated February 1, 2019 (For identification).

MS. HOULT: Mr. Baik, can you please scroll through this document so that Mr. Furtado and Mr. Mann can see it?

MR. MANN: Exhibit 18, once again, like Exhibit 17, is strictly for the purpose of identification; correct?

MS. HOULT: Yes. You can take that for all subsequent exhibits. This is not the hearing. If you're going to raise any objections to the authenticity of what appear to be Mr. Furtado's own emails, you can do so at a later date.

MR. MANN: Well, no, I'm raising many other objections insofar as this document is concerned. So we're not agreeing that it has any evidentiary value whatsoever, but because you are making reference to a document that you have seen fit to never disclose to us to this point, it needs to be identified for the

purpose of the record, which is why it is only being marked for identification purposes. We are not agreeing in any way to its authenticity.

MS. HOULT: Mr. Baik, you can continue scrolling. I would like to direct your attention to the notes at the bottom of this second page. You can stop, Mr. Baik.

There is a heading, "Equity to close (Go-To Development at purchase price of 74.25 mill)", under which the second line says, "Net lift of 16.25 mill".

MR. MANN: I can't read -- I can't read the font.

BY MS. HOULT:

353 Q. Please zoom in, Mr. Baik.

So the second line under the heading "Equity to close" reads:

> "Net lift of 16.25 mill (3 mill to structure deal, 6.625 mill to Go-To, 6.25 mill to investor group)". (As read)

What does the statement "3 mill to structure deal" mean?

MR. MANN: Sorry, I'm still reviewing the document and I'm just making notes of the document, everything I can write down.

This delay is most unfortunate. Again, had we received the documentation ahead of time, none of this would have been required.

Please don't say a word. Can you please go to the top of this chart or spreadsheet? I don't -- could you please scroll down? Okay. Now can you please go back to the email? Okay. Do you want to go to that notes portion that you were reading from, please? Okay. Can you scroll down? Can I see the entirety of that part of the document, please, Mr. Baik? We're still on the record, correct, Madam Reporter? Thank you. Thank you.

BY MS. HOULT:

354 Q. Mr. Furtado, what does the statement "3 mill to structure deal" mean?

MR. MANN: I would like an opportunity to discuss this document with my client. Are you going to afford us that opportunity?

MS. HOULT: No, I would like

to hear the witness' answer.

MR. MANN: No, that is so unfair, Counsel, that a document that has not been provided to Mr. Furtado until this moment, notwithstanding specific requests, and I would like an opportunity to discuss this document with my client before he is answering questions under solemn affirmation. And you're not going to allow us to do that, in which case you can put all your questions on the record and we will take them under advisement.

MS. HOULT: Mr. Mann, this is an email and an attachment that originated from Mr. Furtado. We're not going to go on and off the record for you to have conferences with him about documents that he is a party to. This is not an unfair manner of proceeding and it is consistent with staff's practices.

BY MS. HOULT:

355 Q. So I will ask you this, Mr. Furtado: Did you send documents like this to Mr. Malanca in the course of your negotiations?

REF MR. MANN: Don't answer that question.

MS. HOULT: On what basis?

MR. MANN: The fact that, Counsel, you may say that this is consistent with staff's practices, I will just say it -- how can I say it as eloquently as I can? It does not make it right. And all I'm asking for, and my client is entitled to it, is to have a discussion between solicitor and client concerning a document that has not been disclosed to him.

We're not even going to authenticate the document. It hasn't been proffered in a manner that you're even trying to authenticate it because it is only for identification purposes. We're not saying it was sent, nor received. So I don't even know how you got the document. You need to put it forward to say, "We received it this way and this is how it is authentic." You haven't even done that.

So we're going to be taking these questions under advisement, Counsel, unless you give us an opportunity to discuss this document and any other similar documents that you have in your -- or Mr. Baik has available that you intend to provide to him.

Happy to answer all proper questions, but surely Mr. Furtado has the right to

prepare for an examination and discuss matters with his counsel. If this were a hearing, surely the document would have been put to him well in advance. You know that. Or if it wasn't, the panel would give us an opportunity to discuss it, clearly.

So if you would like to put all your questions on the record, we'll take it under advisement, or you can let us discuss this email, document and other documents in private. Within five minutes -- I'm sorry I exceeded five minutes last time. It was 6.5 minutes. We're not trying to delay the process. We came back within six minutes' time and answered the questions. I'm happy to do it now. Whatever you prefer, Counsel.

MS. HOULT: For the sake of the record, your position is Mr. Furtado cannot answer questions about an email that appears to be from him without consulting with counsel. We will take a five-minute break now and we will come back. It is 2:29. We will take a break to 2:34.

--- Recess taken at 2:29 p.m.

--- Upon resuming at 2:34 p.m.

MS. HOULT: Back on the record. Can you please bring up Exhibit 18 again,

Mr. Baik? Ms. Collins, I think you're off mute. I can hear noise from you.

MS. COLLINS: Yes, I am off mute.

MR. MANN: Sorry, what are we doing?

BY MS. HOULT:

356 Q. Sorry. We're back on the record and we're looking at Exhibit 18. The bottom of the second page of that says "Equity to close", and the line -- two lines under that says "Net lift of 16.25 mill".

My question to you, Mr. Furtado, what does this statement, "3 mill to structure deal" mean?

MR. MANN: So the purpose of that five-minute break was to enable us to review the document with Mr. Baik scrolling it. Mr. Baik left the room. We had no access to that document. We have not had an opportunity to review the document. Not the fault of our own.

MS. HOULT: You were taking notes before we took the break, Mr. Mann, and you didn't ask anyone to stay on, so why didn't you raise this?

MR. MANN: Counsel, you said Mr. Baik will scroll through the document, and the notes that I took are far from comprehensive, so I don't think that you should assume that I took -- or what I took notes of. So we have not had a chance to scroll through the entirety of the document, which is what you said just prior to the break that we would have an opportunity to do.

MS. HOULT: That's what we did before the last break. You took -- anyway. We will -- I am surprised that you didn't flag that in the course of the break but took the break and didn't raise it.

MR. MANN: We were sitting here. There was no one to talk to. All of you guys left. There was no video or audio. Okay? Everyone left. All of your pictures were taken off, and I'm not going to send emails during the course of the interview. I thought Mr. Baik, in fairness to him, went to the washroom or something for a minute or two, so we kept coming back --

MS. HOULT: Well, let's cut this off. 2:36. We're going off the record for five additional minutes and Mr. Baik will again scroll through document.

MR. MANN: Great. Thank you.

--- Recess taken at 2:36 p.m.

--- Upon resuming at 2:46 p.m.

BY MS. HOULT:

357 Q. The time is 2:46 p.m. We still have Exhibit 18 on the screen and we're looking at the bottom part of page 2 of that exhibit.

Mr. Furtado, what does the statement "3 mill to structure deal" mean?

A. The 3 mill to structure deal was an allocation of profit to Go-To, the Go-To limited partnership. This whole scenario -- this is one of many scenarios discussed with Mr. Malanca. This one, we had someone that was going to invest 25 million. So he brought the scenario and we brainstormed scenarios, just trying to see different ways we could close the deal. Obviously, we didn't close the deal this way.

358 Q. All right. So 3 mill to structure deal was to go to Go-To. What is the reference -- under this proposed structure, what is then the reference to 6.625 mill to Go-To?

A. That is also the profit

share to Go-To. If you look at total profit, the net profit identified of 8.3, that was going to come to Go-To, which is the limited partnership.

359 Q. Under this proposed scenario, who is the investor group contemplated?

A. That investor group would have been a private investor that Alfredo Malanca had identified. I never met them. I don't know who they are.

360 Q. You don't know what the name of that private investor is even now?

A. He brought multiple partners to the table to try to strike a deal in multiple different ways. This is just one scenario.

361 Q. Again, what does net lift refer to in particular? Because you're talking about profit, but profit on what? The land acquisition?

A. The subsequent sale of the land when you go through the approval process. As explained in previous answers, that value could be 10 million, 12 million, 15 million, depending on the scenario you go forward with on the submission to the city. That is the profit that

the deal would make, and that would -- depending on how big your investors are versus these other ones, we had to decide how much -- in this case, how much he was giving up to them, how much he would leave in the LP.

So, many scenarios have been discussed. This may have been a ten-minute discussion out of two and a half years of discussions with Alfredo Malanca. That is why I was taken by surprise.

362 Q. I just want to understand the concept of net lift here and what transaction or however you want to characterize that it relates to, because this section refers to "Equity to close", "Go-To Developments at purchase of 74.25 mill". The next line then says, "Go-To cost is 175/square foot at 330,000 square feet, 58 million raw"; right?

A. That is what it says.

363 Q. And then it says, "Net lift of 16.25 mill". So is the lift referring to profit on the land acquisition between the Go-To cost and the purchase price of 74.25 mill?

A. Right. That is what it is meant to reflect, but keeping in mind that the

profit number keeps changing based on the price per square foot you believe you're going to sell it at, what you're going to build. There were many different scenarios being discussed. And this scenario was short-lived because -- I don't even believe -- I may have or may have not met this investor because I met multiple, multiple people through Alfredo that he would bring to the table to try to solve it when he didn't know with certainty that Hans Jain was going to come up with the equity. He was looking for ways to close the deal.

364 Q. My question is about the lift on the land acquisition. Was this scenario contemplating that Go-To would receive part of the lift on the land acquisition itself?

A. No. This was always referring to lift on the subsequent sale of -- a lift of our profit, the profit when you close the deal, what's left, who gets what share of what's left if you bring a big investor that wants a big piece of the pie.

365 Q. How does that make sense with the numbers on the page, Mr. Furtado? It says purchase price, 74.25 mill, and then Go-To

cost, 58 million raw -- that's the next line. Then there are other words, and then net lift of 16.25 million. So are you telling me that the 58 mill raw and the 16.25 million lift don't go together to form the purchase price?

A. If you look at the right-hand column numbers, that's the total that they were looking for equity to close. And if you scroll up, you will see that 30 million, I believe -- if you scroll up on the page. Scroll up. What's the equity to close? Right there. Equity to close at APS, $30,414,000. So the right and left-hand columns don't match. Go back down again. In the right-hand column, that narrative doesn't match the columns, is what I'm trying to get at. That 30,414,000 is a breakdown of the equity required. That's 25 million, right? So that is how we came up with the 30 million. The one major investor would bring in that money.

366 Q. But the major investor is listed as bringing in 25 million, and then there is above that, "lift from Go-To reinvested", among other things.

MR. MANN: Sorry, yes, that is what it says.

BY MS. HOULT:

367 Q. So was Go-To, in this scenario, contemplated to get a portion of the lift, by which I mean the difference between the price to the sellers of the properties and the owners of the properties at that time and the price paid by Go-To Developments?

A. No.

368 Q. No. All right. We will scroll up on this document, Mr. Baik, to the main chart, under "Land transfer cost". There, under the heading "Land transfer cost" there are several entries, the second one of which is "Finder fee", 5 million. Under this scenario, who was expected to receive a finder fee?

A. Again, these numbers -- when we did these scenario analyses, Alfredo Malanca would get on the phone with me and say, "I want to work through a scenario analysis. You've got the spreadsheet. Let's key in these numbers and see what it comes out with." And that is what you are now submitting back to me, what he has received.

They would have potentially, in this case, asked for 5 million or 25 million as

part of a fee to them. That is how these groups work. But this information would have been input on a phone call with Alfredo on the phone with me.

369 Q. Sorry, so you're saying the finder fee on this document, it was a number that Mr. Malanca gave to you and it reflected a fee requested by his investor group?

A. My understanding is it would have been, because that is the only way I would get that number.

370 Q. So you don't know under this scenario who the intended recipient of that $5 million finder fee would have been?

A. That would have been the investor group. I don't know who that group was and they never came to the table.

371 Q. All right. We can close that document, Mr. Baik.

MR. MANN: We had the same exchange about my request for that document. Your position would be the same; correct?

MS. HOULT: Correct.

BY MS. HOULT:

372 Q. So you just told me in answer to those questions, Mr. Furtado, that you

would discuss scenarios on the phone with Mr. Malanca, and then you would input them and send them back to him in the style of chart?

A. Yes. When we knew that the deal was going to run into potential problems with finding the (inaudible) --

373 Q. Sorry, I can't hear you at all now, Mr. Furtado. You said the deal was going to run into potential problems? I think Mr. Mann's computer may have frozen. That may be the issue. Is it possible for Mr. Furtado to unmute and for you to speak to us through your computer? Can you attempt that with Mr. Mann, Mr. Furtado, unmuting your computer?

MR. MANN: Okay. My computer, for some reason, isn't allowing -- it kicked me off of the site. I'm not going to suggest anything, so we're going to be sitting closer to each other and just using Mr. Furtado's laptop.

MS. HOULT: Okay. Mr. Furtado, you were answering --

MR. MANN: Sorry, go ahead.

MS. HOULT: You were answering and got cut off. I am getting some feedback. I don't know if, Mr. Mann, your computer is still on

somehow.

MR. MANN: Okay. I will shut it, yeah, because it says I have no internet right now. Do you still have the -- I'm not -- through my computer, Erin, I'm not on the --

MS. HOULT: I think it's okay now.

MR. MANN: It's okay now? Okay. I have closed out. I'm not on the call through my computer. We're both using Mr. Furtado's.

MS. HOULT: There certainly is some feedback, but I can hear them.

MR. MANN: Sorry. Okay.

BY MS. HOULT:

374 Q. Mr. Furtado, you were in the middle of an answer to a question. You said that when it became clear that the project might run into some problem, and that is where you cut off. Can you resume?

A. Yes. So the original plan when I came to the table was that the introduction to Hans Jain was because Hans Jain was bringing all the equity required for the deal. Any shortfall potentially would come from Adelaide

Square. And now -- and I ran the pro forma for my 74, what my cost to close would be, what I need in equity. What I need in equity was -- it was all coming from Hans Jain. I plugged that number in with probably no referral fee that would be required because it is coming from a partner that's going to be in the deal.

If it's coming from -- if it wasn't coming from them in this scenario that you just saw there -- there's an injection of 25 -- then he had the piece coming in, the 5 million potential fee there. This is just one of many scenarios.

What I would do is I would be on the phone with Alfredo. He usually called me and said, "Pull out the spreadsheet. I probably have someone. Let me see how this works out." And I would key the numbers in and I would flip it back to him. Sometimes he actually keyed right into my spreadsheets. I gave it to him in an Excel format and sent it back. This is how we tried to save the deal.

So the information -- some of the information, because these are not final pages, have information on different scenarios

mixed into one, but only focusing on the top part of the page.

So these are all at a point in time and not part of the transaction that closed. In fact, the transaction that closed, it almost didn't close. Our only focus was, leading up to the transaction, is can we close the transaction? We don't have any -- it was highly at risk to close. That's all we did.

375 Q. So the initial plan was that you were not -- you, Mr. Furtado, and Go-To were not going to raise any equity?

A. I made that clear at the front end of today's examination, and that was when I first said, okay, let me look at the deal. Remember, if you recall, I said that the original plan was to bring the deal onto our books. There was no equity coming from Go-To. I didn't have to raise equity because I knew I couldn't. I don't have the ability to bring that many people in or that type of dollars in. I don't have the network or the -- I know a lot of accredited investors but I don't know that many. So, realistically, I said no to the deal at the beginning.

But then he came back to me

and said, "Oh, we've got a wealthy individual who has his own money, being Hans Jain, and he's part of the Jain family. He's got significant money. They can do the deal." Hans' father is giving him -- I heard every story. Hans' father is giving him 100 million. He has the money. He's going to do the deal. That's why I came to the table. Then I started working with different scenarios to see how it's going to work when the first guy failed to come up with the money.

376 Q. When you mean the first guy, you're referring to Mr. Jain there?

A. Hans Jain, yes. At the end he came in with $3 million, I think, of which he requested 1 million back right after the deal closed because it was excess cash. He didn't have any personal funds to really properly close.

377 Q. But you eventually did raise equity from unit holders, as we all know, so when did your position on that change? Why did you decide to raise equity directly?

A. Because the view was that they believed they could get the equity without getting smaller pieces of equity. The numbers changed every day. I said if I do raise, I don't

think I can raise more than 3 or 4 million because I don't have the people to call. I called -- one of the first persons I called was Gerry Brouwer, and I know that he had a lot of -- he is a high net worth individual and he's a joint venture partner with me. He has invested in other deals. I knew that he had funds, so it was a one-stop shop for me there. But I didn't have that many people to call.

378 Q. So my question is just when did you decide to start raising equity?

A. I can't pick the actual date. I started telling people about the deal, but initially I thought -- I was telling people about the deal, saying that also potentially there might be a good opportunity to sell batches of condos in this unit to the investor group. Most of the investor group wants downtown Toronto for property. So I started telling people about the deal. I started telling them there might be an opportunity. I was just having a backup plan, if anything. I didn't go and disclose to Alfredo fully, "I've got all this money lined up" because it wasn't a lot to begin with. I just said just in case these guys come short, then this deal can

still happen. But I was not the primary equity raiser on this deal.

It wouldn't have happened had they not brought Anthony Marek to the deal and he put in the 16.8 million. But he is unhappy. I didn't negotiate the fee to him either. I was told the flat fee is $2.7 million and I wrote the paperwork to get it done. That's it.

379 Q. Who told you that the fee was $2.7 million for Marek?

A. Alfredo Malanca did.

380 Q. And you didn't negotiate it?

A. No. No. There were no --

381 Q. Can you just come a little closer into frame, Mr. Furtado? I'm getting sort of a "Phantom of the Opera" view of you right now.

A. Yes.

MS. HOULT: All right. Mr. Baik, can you put 2185 on the screen? For the sake of the record, this is an email March 13, 2019, to Alfredo Malanca from Oscar Furtado, with the subject, "Lift analysis". We will mark it as

Exhibit 19 for the sake of the record. Mr. Baik will scroll through it.

MR. MANN: And again, this is strictly for identification purposes?

MS. HOULT: Yes. As said previously, you don't need to repeat that after each one.

EXHIBIT NO. 19: Email from Mr. Furtado to Mr. Malanca, dated March 13, 2019 (For identification).

MS. HOULT: If you can go back to the second page of the document, Mr. Baik. Perhaps zoom out so that Mr. Furtado can see the whole of it and then zoom back in. I think you have to zoom out further just so, again, he can see the whole page, Paul. Okay. And zoom back in.

BY MS. HOULT:

382 Q. What does this document calculate, Mr. Furtado?

MR. MANN: Counsel, how do you want to proceed? Are you going to let us look at it and discuss it? I know this is challenging for

us, but I want to have an opportunity to review the document with my client. This has not been disclosed to us prior to this moment in time. Or we can have the same discussion that we had about the last two or three documents --

MS. HOULT: Yes, I have no interest in repeating the discussion. Your position is your position. Our position is it's appropriate. This is an email from Mr. Furtado himself and the questions should go without a break. You have requested a break. We will take a break now. It is 3:07. Mr. Baik will scroll through the document. We will come back in five minutes. Direct him on the scrolling as you need.

MR. MANN: Thank you.

--- Recess taken at 3:07 p.m.

--- Upon resuming at 3:15 p.m.

BY MS. HOULT:

383 Q. Back on the record at 3:15. We are looking at what we have marked as Exhibit 19, the second page. Mr. Furtado, I asked, what does this document calculate?

A. As I mentioned earlier, there were countless scenarios. This is just one of many. In this scenario, this scenario did not

involve the LP. There were no investors involved. It was how could we do the deal amongst ourselves and what would the profit share be if we had different individuals, as Alfredo has got some names identified. He said this is how we split the profit. We each find a way to bring the money to the table personally, whether you take charges on your personal properties -- whatever you did, this is another scenario. It didn't go anyplace.

384 Q. Okay. So this was a scenario -- when you say there weren't going to be any investors, you mean no Go-To LP in unit holders?

A. Correct.

385 Q. Okay. So who are the -- maybe you can zoom out a little bit, Mr. Baik.

MR. MANN: Couldn't hear you. Didn't hear what you just said.

MS. HOULT: I just asked him to zoom out on the document, Mr. Mann.

There's a reference to a VTB in the middle -- higher up and in the middle of the page.

MR. MANN: Erin, you're breaking in and out.

MS. HOULT: You are too.

MR. MANN: Okay. Let's --

MS. HOULT: And your camera is a little fuzzy, Mr. Mann. I think there is an issue. Perhaps we could just go off the record, Lisa.

--- (Off-the-record discussion)

BY MS. HOULT:

386 Q. This document, Exhibit 19, it refers to a VTB in two places. I understand that to mean vendor take-back. Is that understanding correct? And in this scenario, who was going to be the vendor -- who was going to be providing a vendor take-back?

A. Okay. Once again, these are Alfredo's numbers in this scenario. So he would have been -- potentially been negotiating a vendor take-back with one of those parties, most likely 355 Adelaide. But I was not a party to those discussions, if there was going to be a vendor take-back or not. Obviously in the final deal that we did, there is no vendor take-back from Adelaide Square because we would have assumed it, right? So this is just one of his scenarios. Different ways he was going to try to restructure

his deals to make this thing work.

387 Q. All right. There is a reference in the middle of this page to "A/Scotty/Michael". Who are these people? What does that line refer to?

A. My understanding is those are individuals that Alfredo has -- that are in his business network. I don't know them.

388 Q. You don't know last names for them?

A. I don't know, yeah.

389 Q. What was the 1.15 million next to that line? What was that representing?

A. I have no idea. This would have been, as I recall, I said Alfredo would get on the phone with me because he said, "Oh, you type better -- you're better at Excel spreadsheets." So he would walk me through what he wanted to put on there. And as I said, this is one of many scenarios that he just came up with. It is what it is. I don't know what the 1,150,000 was. Is it a referral fee for them? I have no clue.

390 Q. Okay. Can you position the camera to get a little more of Mr. Furtado?

I'm not seeing much of him. Okay.

So even though the email appears to be from you to Mr. Malanca, you would have typed this document while you were on the phone with him and just sent Mr. Malanca the document?

A. Correct.

391 Q. All right. Can you scroll down a bit, Mr. Baik? There is a line -- that is fine. There is a line -- the last line on the left-hand side says "Alfredo/Hans/Oscar", and next to those three names is 1,052,000. What did that represent, to your understanding?

A. Hans?

MR. MANN: Here.

THE INTERVIEWEE: Sorry.

MS. HOULT: You can zoom in, Mr. Baik.

MR. MANN: We have it.

THE INTERVIEWEE: It seems to be the same one fifty --

MR. MANN: Listen to the question.

THE INTERVIEWEE: Okay. Yeah, I --

MR. MANN: The question is: What does that number --

THE INTERVIEWEE: I don't know. I don't recall what it represented.

BY MS. HOULT:

392 Q. What about the lines -- the four lines to the right referring to Roco, Hans, Alfredo and Oscar with varying amounts? What does that represent?

A. I don't know what the first one represents. I believe the other three, depending on whether they came to the table, would potentially be our profit if we did a deal -- somehow managed to do a deal with him internally.

393 Q. Sorry, what do you mean, "if we somehow managed to do a deal with him internally"? What are you referring to?

A. The specific individuals. Hans Jain, Alfredo Malanca, myself, and I don't know which Roco that he's referring to.

394 Q. So you don't recall from the discussion what Roco he was referring to?

A. No.

395 Q. Is there more than one Roco?

A. It's a common Italian name.

396 Q. Is there more than one Roco that you recall discussing with Mr. Malanca in relation to the Spadina Adelaide project?

A. Yes. It's multiple. I remember an Italian guy. Alfredo introduced me to hundreds of people in the Italian community.

397 Q. Mr. Furtado, that is not my question. This is a document that you typed up on a phone call with Mr. Malanca about a possible scenario. There are four names in a block on this piece of paper: Hans, Alfredo, Oscar. Is that Hans Jain, Alfredo Malanca and Oscar Furtado? Is that fair?

A. Yes.

398 Q. So who was the Roco referred to in this proposed scenario, to your knowledge?

A. I actually -- I don't recall. I'm struggling. I'm thinking back. Remember, you are showing me a page that is one of many, many different scenarios that we spent probably 15 to 20 minutes on it and it never went anyplace. So I don't recall the conversation.

399 Q. Okay. And this calculation contemplated -- you mentioned it didn't contemplate any unit holders in Go-To Spadina LP. So I want to scroll just back to the front page of this exhibit. Right to the top, Mr. Baik.

This email is dated March 13, 2019. Had you already raised funds from equity investors at that time, Mr. Furtado?

A. Yes, I did, and the plan would be if you're not going forward with it, that you return the funds. We were exploring different scenarios, as I said.

400 Q. And did you tell the investors that invested up to that point that if the deal didn't go ahead you would return their funds?

A. That was always an understanding with every investor.

401 Q. And did you tell them that it would be a possibility that you would personally enter a deal to acquire the properties and if you chose to do so, you would return their funds?

A. It would not be realistic

to tell them that considering I just said this discussion was literally probably a 15 to 20-minute discussion. I can't call the investors and tell them about every 20-minute discussion I have.

402 Q. So were you entertaining this document that Mr. Malanca had with you of potentially doing the deal personally and removing the investors? I just want to understand what --

A. I listened to all the discussions he had and we went back and forth on many discussions. The majority of them could not be entertained, didn't make sense, didn't work, and we moved on to the deal at hand.

403 Q. All right. We can close that document, Mr. Baik.

Was it open to you, Mr. Furtado, to make a deal to acquire the Spadina -- pardon me, the Adelaide and Charlotte properties with Mr. Malanca and others and to return the investor funds you had already raised?

MR. MANN: What do you mean, was it open to him?

BY MS. HOULT:

404 Q. Was that permissible in

your view?

REF MR. MANN: Don't answer the question.

MS. HOULT: Let's open 2416, Mr. Baik. And the basis for the last refusal, Mr. Mann, was which?

MR. MANN: The last refusal, about whether something was permissible?

MS. HOULT: Yes.

MR. MANN: You're calling for legal conclusions and it is an improper question for other reasons.

MS. HOULT: What other reasons?

MR. MANN: There has to be some semblance of relevance or propriety to the question. I don't see any whatsoever to the matter that staff is investigating.

MS. HOULT: Well, it is very clearly relevant to the matter staff is investigator, but let's move on to this document.

It is an email March 20th, 2019, to Alfredo Malanca from Mr. Furtado. The subject is "Numbers run using Louis spreadsheet". For the sake of the record, we will mark it as

Exhibit 20. Mr. Baik will scroll through the document.

MR. MANN: I know you don't like me to say it but I am going to say that it is marked strictly for identification purposes so that when the reporter indicates it in the record, she will indicate it as such.

EXHIBIT NO. 20: Email from Mr. Furtado to Mr. Malanca, dated March 20, 2019 (For identification)

MR. MANN: I can't read this, so I don't know how we're going to look it up.

MS. HOULT: We will have to zoom in and scroll.

MR. MANN: We're going to go on mute right now.

MS. HOULT: For the sake of the record, I will just note the time is 3:28. We can go off the record while we scroll through the document.

--- Recess taken at 3:28 p.m.

--- Upon resuming at 3:39 p.m.

BY MS. HOULT:

405 Q. All right. We're back on the record. It is 3:39 p.m.

We have on the screen what we have marked as Exhibit 20. My question, Mr. Furtado, is: What was the purpose of this closing calculations document?

A. Okay. So just to clarify, as I have said, we have gone through many scenarios in structuring a deal. This is one of the more latest ones. And I remember this one very clearly as this one, this entire page you have in front of you, was produced and prepared by Louis Raffaghello -- I can't say his name right -- the lawyer from Concorde Law. He sent it to Alfredo. Alfredo then forwarded it me and said, "Please review." I saw a couple of changes -- errors in it. I don't recall which errors were in the -- especially in the write-up, because I made the changes and sent it back to him and said here is the -- here is -- I cleaned up some points. I'll review it tomorrow or the next day. I remember because it was late at night.

So that is the story behind the spreadsheet. If you look at the top of the page, it actually states, "Mu client, Adelaide

Square Developments Inc."

MR. MANN: And then it says "Adelaide Square" in quotation marks and parentheses.

BY MS. HOULT:

406 Q. Okay. Sorry, just to -- so you mean that is Louis of Concorde Law? He is stating that because Adelaide Square Developments Inc. is his client?

A. Correct.

407 Q. Okay. So if we can scroll down on this page, Mr. Baik, there is a heading that says "To be paid by". You can stop, Mr. Baik, there.

Under the "To be paid by" heading, there is a reference to "Additional second", "$2 million", "2 million from Chris". What is that a reference to?

A. I believe that Chris, if I recall correctly, is -- I think his last name is Slightham, I believe, if I remember correctly. Chris is one of Alfredo's guys that was going to provide financing to Hans Jain to get -- to invest into the project. Hans Jain didn't have the cash flow and stuff to do that first 3 million. I

believe 2 million came this way with the understanding that 1 million would come back right after closing.

MR. MANN: Sorry, when you say "came this way" --

THE INTERVIEWEE: It's just accounting -- it's just the tracking of funds.

MR. MANN: It was going to come?

THE INTERVIEWEE: It was going to come, that's right. Correction, it was going to come.

BY MS. HOULT:

408 Q. Okay. There is a line that says "Purchaser's cash", 9 million, "Oscar 5 plus Hans 3 plus Tito 1". Can you explain who those three people are and how the Hans 3 relates to the 2 million from Chris, if at all, given what you have just said to me about Chris potentially loaning money to Mr. Jain?

A. Sure. So I can explain -- remember, this is done by --

MR. MANN: First of all, she asked you several questions.

THE INTERVIEWEE: Yes.

MR. MANN: Just answer one at a time. Who are the three people who are referred to there?

THE INTERVIEWEE: Oscar represents the limited partnership, 5 million that I -- the investors approximately -- the investors I had brought in myself that I know. Hans Jain was the principal. He was supposed to inject 3 million. Tito is -- I believe his name is Fernando Tito. He is also an equity investor and he was a contact of Hans Jain. That's why he's listed separately.

Now, again, this spreadsheet was not done by me. It was done by Louis Raffaghello based on his discussions with Alfredo.

BY MS. HOULT:

409 Q. Okay. And then there is a reference to a day loan of 16.5 million. Who was to provide that day loan at that point in time? What was the expectation?

A. The reference to the day loan, I believe, was they were making reference to Anthony Marek coming up with 16.5 million, because Anthony Marek is a client of Louis Raffaghello. He would inject the 16.5, which would really be

brought in as equity.

410 Q. But Mr. Marek ended up putting in 16.8. At this point they had calculated 16.5?

MR. MANN: Wait. Sorry, he has already indicated this is a discussion as between Louis and Alfredo. He wasn't a party to that discussion. This is what he believes they discussed and that Louis then reflected.

In fact, Mr. Baik, can we just go back to the first page, just for a moment? Right. That is why it is called "Louis deal calculations", right? So that's the Louis whose name -- whose his last name we all have challenges pronouncing with respect to him. That is the Louis, yes. And the subject line is "Numbers run using Louis spreadsheet". There you go.

MS. HOULT: I appreciate the help, Mr. Mann, but I do want to make sure I have the witness evidence.

BY MS. HOULT:

411 Q. Sir, do you adopt your counsel's answer there, Mr. Furtado?

A. Yes, I do.

412 Q. All right. So looking at

the email that is at top of this Exhibit 20, you wrote to Mr. Malanca:

"Note the access cash you have has to go to Anthony for the 2.7 mill fee."

The reference to Anthony is Marek, presumably?

A. Correct.

413 Q. And then it says:

"Which leaves 1.8 mill in the LP to go towards a lift payment."

What is the lift payment referred to there?

A. Okay. So keeping in mind that these are not the final numbers, right? As we've just said. Based on these numbers, I concluded, at whatever time in the morning I was doing this when he flipped this to me, was that there was that much excess cash left in this calculation when the LP closed the deal. Keeping in mind that the LP still owes -- Anthony Marek's money has to be returned back to him, that he invests with his fee of 2.7 million. There was going to be about 1.8 -- estimated at this time,

1.8 million in excess cash. That excess cash then would be part of that original profit that is not -- that is still left over. And I believe that that would have been in relation to that first redirection they did on excess cash being paid out.

It's not exactly (indiscernible) because this is not the final day and this is not the final numbers, but I believe that that is the excess cash that they would have distributed. It's part of their lift payment, meaning their profitability that would be left in liquid cash.

414 Q. Whose lift payment?

A. Adelaide Square Developments.

415 Q. So this means that they were -- and appreciate they're not the same calculations that actually took place, but I just want to understand what a lift payment means in this context, and you're saying that that would have been 1.8 million that Adelaide Square Developments could have paid out?

A. In liquid cash. That's what they would be left with in liquid cash,

because bearing in mind that a big portion of their profit was being used to pay Anthony Marek on behalf of the LP for this initial 16.8 and his 2.7 million in returns.

416 Q. All right. We can close that document, Mr. Baik.

We have been talking about Mr. Malanca. I know he is at Goldmount Financial. He has some role with Adelaide Square Developments Inc. but you're not clear on what that title is. Is he associated with AKM or that is only his wife's company?

A. As far as I'm concerned, he was, but I wouldn't be able to answer you. That's his wife's company.

417 Q. Does Alfredo Malanca have a role at Go-To Developments, any Go-To Developments entity?

A. In the Adelaide Square LP, he has assisted in managing the application process because -- yes, assisted in managing the application process in bringing in the architect, bringing in the planner, all the different consulting groups.

I have been alongside with him

This is Exhibit "89" referred to
in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

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Michelle Spain, a Commissioner, etc.,
Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

Elfrida. Thank you.

MS. HOULT: Thanks. We can take that off the screen, Mr. Baik.

BY MS. HOULT:

324 Q. Mr. Furtado, you did not negotiate or obtain any compensation for the Elfrida LP for using its property as security for the obligations relating to Spadina Adelaide under the MOU with FAAN Mortgage Administrators?

A. Sorry, could you repeat that question? You said a lot of entities.

325 Q. You did not negotiate or obtain any compensation for Elfrida for using its property as security for the obligations relating to Spadina Adelaide?

A. No.

326 Q. And you did not negotiate or obtain any compensation for Eagle Valley LP for pledging its properties for the obligations of Spadina Adelaide to Scarecrow Capital?

A. No.

327 Q. Okay. Mr. Furtado, in the real estate context, what is a lift?

MR. MANN: Sorry, you're asking him what a lift is in what context?

MS. HOULT: A real estate context.

MR. MANN: I don't understand the question. If you want to put something to him as to what you say a lift is -- I don't see how this question is a proper or relevant question out of the blue, what Mr. Furtado's understanding is of that term in the real estate context.

BY MS. HOULT:

328 Q. Was there a lift in relation to the acquisition of the 355 Adelaide and 46 Charlotte properties, Mr. Furtado?

A. I don't understand what you're getting at.

329 Q. You don't know what the term "lift" means in that question?

A. "Lift" is not a real estate term, but sometimes it's calculated as the difference of the profitability in the project. It's how much profit a project is making.

330 Q. How much profitability what is making?

A. A project is making.

MR. MANN: Sometimes it can relate to that, and he also said it's not a real

estate concept in his mind.

BY MS. HOULT:

331 Q. Okay. What kind of concept is it in your mind?

REF MR. MANN: We're not -- don't answer that.

BY MS. HOULT:

332 Q. Was there a lift in relation to the acquisition of the 355 Adelaide and 46 Charlotte properties, to your knowledge, Mr. Furtado?

MR. MANN: Do you understand what is meant by that?

THE INTERVIEWEE: I don't understand in what context you're asking.

MR. MANN: He doesn't understand what you mean by "lift".

BY MS. HOULT:

333 Q. So that is not a term that you use, Mr. Furtado?

A. It was a term used in conversations with Alfredo Malanca on profitability that he was making on -- that Adelaide Square Developments was making, but not -- so when you -- I don't understand the

context of the question.

334 Q. And in those discussions with Mr. Malanca, what was he referring to when he referred to "lift"? What does that mean?

MR. MANN: Sorry, what did he say he was referring -- did Mr. Malanca tell you what he was referring to when he used the word "lift"? Did he say that?

THE INTERVIEWEE: No.

BY MS. HOULT:

335 Q. What was your understanding, Mr. Furtado?

MR. MANN: Sorry, understanding of what? What --

MS. HOULT: Mr. Furtado has said that the term "lift" was used in conversations with Mr. Malanca. I want to know what your understanding of that term was, Mr. Furtado.

MR. MANN: It was used by Mr. Malanca, not Mr. Furtado. And that's all that he said. And you're asking him -- you're asking Mr. Furtado to say what Mr. Malanca meant by that term?

MS. HOULT: I'm asking what

Mr. Furtado understood.

THE INTERVIEWEE: As I said earlier, I understood that "lift" could imply many things. It could imply the profit differential, how much a project is making, profitability. Sometimes projects are flipped. You see how much profit you can make in that -- after you buy and sell a project. So the profitability that we are making on Adelaide Square in our LP, right now we've targeted a profit to the investors. Eventually the project will be sold.

MS. HOULT: Right.

THE INTERVIEWEE: (Simultaneous speaking) could be the profitability that could be considered. If you want to use the term loosely, "lift", it could be the differential, it could be the profit.

BY MS. HOULT:

336 Q. Okay. So in the context of Adelaide Square Developments, did it earn a lift on the assignment of the properties to Go-To?

MR. MANN: Sorry, Ms. Hoult, you're asking, first of all, what Mr. Furtado's understanding or use, perhaps, of the term is. He has told you -- the way I have heard his evidence,

it's not a defined term. It could mean a number of different things, and he has given you some examples of what it can mean.

He told you that Mr. Malanca -- I think he said used or may have used the term. You asked him what he understood, what Mr. Furtado understood by what Mr. Malanca meant. He's given you an answer. Again, it could have meant a number of things, but generally what it could have meant.

Now you're asking, was there a lift on a particular transaction? There is no definition as to what a lift is, necessarily. So if you want to put -- you're clearly -- it's not my first rodeo, Ms. Hoult. You're clearly referring Mr. Furtado to certain evidence that you have, in my view, from some other person or persons and putting evidence to Mr. Furtado, asking him questions along those lines.

If you want to put evidence to Mr. Furtado directly, that would be a fair way of this aspect of the examination. But to ask him now, was there a lift experienced or enjoyed in connection with a particular transaction, given all of his evidence to this point, is not a fair

question at all.

BY MS. HOULT:

337 Q. It's a perfectly fair question. Mr. Furtado, you were negotiating the transaction to acquire 355 Adelaide and 46 Charlotte for the Spadina Adelaide LP; right?

A. Correct.

338 Q. And you agreed to acquire those properties at a price higher -- from Adelaide Square Developments at a price higher than that which was owed to the current owners of those properties; correct?

MR. MANN: Sorry, we have gone over this --

MS. HOULT: Mr. Mann --

MR. MANN: Ms. Hoult, hold on. We have gone over this. You can restate evidence, you could review evidence. This was examined on, again, not just this morning but previously. Why was $74 million paid or whatever that amount was? And he has indicated to you how that price was arrived at, why it was arrived at. He told you about appraisals from either Cushman or Colliers. There was no negotiation about the price. That's the price that was given.

So you keep going over the same evidence. I'm not just directing this to you, Counsel, but to staff. This line of questioning has got to end at some point. If you have a question to ask, please ask it, but don't go over evidence again and again and again.

MS. HOULT: Mr. Mann, your interjections are inappropriate. The length at which you are going on is inappropriate, and it is perfectly fair for me to ensure that the witness understands the premise of my question. Where I have summarized premises earlier in this examination, you have asked me to break them down, and now you are objecting to me breaking them down.

So I don't think anything is going to be gained from debating this at any further length, but I want to make clear that it is my view that you're interfering inappropriately in this examination.

MR. MANN: My objection to the premises was when you stated that you have information and you declined to share it with us, which is unfair, and that was the premise that I objected to. If you have a question that you want

to put to Mr. Furtado that hasn't been asked before, by all means, Ms. Hoult, ask away. But don't ask the same questions that have been asked countless, countless times. We don't need to review previous evidence.

That is what is taking days and days, days and a dozen or around a dozen questions and answers going back years, when staff asks questions that are previously asked to which answers were given. It has got to end at some point. That is all I'm saying. So we don't need a premise, so please just ask the question, and if we need a premise, then we will ask for the premise.

MS. HOULT: I will conduct the examination as I see fit, Mr. Mann, and again, your objections are unnecessarily long and, in my view, inappropriate.

MR. MANN: As long as it takes to bring it home.

BY MS. HOULT:

339 Q. Mr. Furtado, when you were negotiating for the purchase of Adelaide and 46 Charlotte for the Go-To Spadina Adelaide LP, was it your expectation or intention to receive

personally a benefit from the mark-up on the price between what was being paid to the then owners of those properties through Adelaide Square Developments and to the Go-To LP?

MR. MANN: I couldn't follow that question. I'm sorry, Ms. Hoult, could you restate it? I will make a note of it.

MS. HOULT: I guess this is why premises are important.

MR. MANN: No, this is not a premise. Your question was quite -- and you can roll your eyes all you want, Counsel. If I don't follow your question -- it's not a premise. I couldn't -- it was very long -- some might say convoluted, but long question. And that is why I'm asking you just to repeat it, please.

BY MS. HOULT:

340 Q. Mr. Furtado, the price paid to acquire 355 Adelaide from the then owner was 36.8 million; correct?

A. Correct.

341 Q. And the price paid to obtain 46 Charlotte was 16.5 million on closing plus density bonus; correct?

A. Correct.

342 Q. And the price that Go-To paid to acquire those properties, the total price which incorporates the assignment fee to Adelaide Square Developments, was 74.25 million plus density bonus; correct?

A. Correct.

343 Q. So my question for you is: Did you negotiate, did you expect, did you intend, to receive part of the benefit of the assignment fee agreement for the price differential between what was paid to the owners versus what Go-To -- of the properties versus what Go-To Development paid to acquire them when you were negotiating that transaction?

A. No.

344 Q. You had no expectation, intention or plan of receiving any of the benefit of the -- and I will use the term "mark-up" -- between the price paid to the owners of the properties that benefitted Adelaide Square Developments?

MR. MANN: How is that different than the last question you asked where he answered unequivocally "no"? It's exactly the same question. Same answer. If it's a different

This is Exhibit "90" referred to
in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

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Michelle Spain, a Commissioner, etc.,
Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

because bearing in mind that a big portion of their profit was being used to pay Anthony Marek on behalf of the LP for this initial 16.8 and his 2.7 million in returns.

416 Q. All right. We can close that document, Mr. Baik.

We have been talking about Mr. Malanca. I know he is at Goldmount Financial. He has some role with Adelaide Square Developments Inc. but you're not clear on what that title is. Is he associated with AKM or that is only his wife's company?

A. As far as I'm concerned, he was, but I wouldn't be able to answer you. That's his wife's company.

417 Q. Does Alfredo Malanca have a role at Go-To Developments, any Go-To Developments entity?

A. In the Adelaide Square LP, he has assisted in managing the application process because -- yes, assisted in managing the application process in bringing in the architect, bringing in the planner, all the different consulting groups.

I have been alongside with him

in every one of those meetings to walk through the process and make sure that a submission went into the city. Any -- so that's basically his role going forward, is helping us to advance the project.

418 Q. Sorry, can you come a bit more into frame again, Mr. Furtado?

All right. Does Mr. Malanca have a title at Go-To?

A. Yes, he has an email account and --

MR. MANN: A title?

THE INTERVIEWEE: Not a title at Go-To.

BY MS. HOULT:

419 Q. Okay. He has an email account at Go-To?

A. Yes.

420 Q. And under what name?

A. He asked us to -- Alfredo -- I don't know how to spell it. Alfredopalmeri@gotodevelopments.com. I don't know how to spell "Palmeri".

BY MS. HOULT:

421 Q. Okay. Why does he have

an email address at Go-To under that name instead of under Alfredo Malanca, to your knowledge?

A. He asked us -- when he wanted to open -- he was having problems with emails, so to show that we could give him proper support, I said, "You can open an email account with us," and he said, "Please use Alfredo Palmeri. A lot of people know him as Alfredo Palmeri which is, I believe, his maiden name for his mother's side.

422 Q. So Alfredo Palmeri and Alfredo Malanca are the same person?

A. Right.

423 Q. Do you know why he uses his mother's maiden name --

MR. MANN: He just indicated. He just gave an answer to that.

THE INTERVIEWEE: Yes.

MS. HOULT: No, he indicated that that was the name he asked to be used and that some people know him by that name, and I'm asking, do you know why that is?

MR. MANN: You asked Mr. Furtado why, to your knowledge, did he ask for that, and Mr. Furtado told you that he asked that

an email address be set up in that name because people know him by that name.

BY MS. HOULT:

424 Q. Yes, and now I'm asking, do you know why some people know him by that name?

MR. MANN: You didn't ask that question.

MS. HOULT: Well, I'm asking it now, Mr. Mann.

MR. MANN: Okay. Do you know why some people know him by that name, Mr. Furtado? Yes or no?

THE INTERVIEWEE: No.

BY MS. HOULT:

425 Q. When he asked you to put the email address in that name, did you ask him why it was a different name? The only reason was the one you have given me today?

MR. MANN: Sorry, I don't understand the question. You asked a couple of questions there.

BY MS. HOULT:

426 Q. Yeah. You know Alfredo Malanca. You said you would set up an email address for him and he asked for it to be in

Palmeri. You have told me the explanation that some people know him by that name. Did you ask any further questions about why it would be in that name?

A. I didn't ask him why he wanted to use that name, no.

427 Q. So with some of the answers that you provided to us since our last exam, you provided a copy of a Cushman & Wakefield appraisal for the Charlotte Adelaide properties effective June 30th, 2020. The version we got was a draft. It's not signed.

So my question is: Is there a final signed version, and can you provide us a copy with a final version if it exists?

A. It doesn't exist.

428 Q. Okay. Is there a reason it wasn't finalized?

A. It's standard in the industry not to ask for a final version unless a lender or someone has asked for the final version so that you don't have to repay for the appraisal and get it done all over again when the lender asks for it. There was no request for a final version so we didn't have one in place.

This is Exhibit "91" referred to
in the Affidavit of Stephanie Collins
sworn before me, this
6th day of December, 2021

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Michelle Spain, a Commissioner, etc.,
Province of Ontario, for the Government of Ontario,
Ontario Securities Commission.
Expires March 22, 2024.

period, what's happening with the job, and, you know, I would be interested if you would give me fulfilment of some of the parameters that I'm looking for.

113 Q. Right. Was Malanca able to answer any of those questions?

A. No.

114 Q. Okay. And do you know -- sorry. Did I cut you off?

A. Well, I don't think he definitely knew exactly the amount of money they were looking for either. I think that it was -- the way I understood and the take-off that I got from there is there are several things happening at the same time and they can't quantify the exact number that they're looking for.

115 Q. I see. Do you know what Mr. Malanca's role was in the project?

A. I just know that he was associated with the job. I didn't go into specifics on ownership or role or anything else.

116 Q. Okay. We'll get back to Mr. Malanca a little bit later. Well, maybe I will ask now. Did you ever come to learn what Mr. Malanca's role in the project was?

A. At that meeting, no.

MR. NASTER: Ever?

THE INTERVIEWEE: Ever? Sorry. After the fact, I found out that he was titled under Go-To Developments and he was also associated with Goldmount Financial, I think the name is.

117 Q. Okay. So when you say after the fact, do you mean after you invested or what is the time period of after the fact?

A. My best recollection, I think it was months later.

118 Q. Sorry, months later than what?

A. Just for clarification, we're talking about the beginning introduction and the dealings with the original monies that they're looking for. If you're asking me for a timeline, which I think you're trying to, for clarification purposes, I didn't know the full extent of his role within the project at those original meetings of March 2019.

119 Q. Okay. So you would say that you learned more about his participation several months after the initial meeting; is that

fair?

A. That is correct.

120 Q. You said something about GTDH title. What does that mean?

A. I'm sorry, what was that? GTDH?

MR. NASTER: Go-To.

THE INTERVIEWEE: Go-To.

BY MS. COLLINS:

121 Q. Sorry, Go-To Developments Holdings titled. What does that mean?

A. I learned that that was a land development firm in Oakville whose face was Oscar Furtado.

122 Q. But did you understand -- you said that in relation to Mr. Malanca. Did Malanca have a role at Go-To Developments Holdings?

A. At that point in time, when I first met him on that first meeting, I didn't know what his role was with respect to Go-To Developments.

123 Q. But did you come to learn what his role was?

A. I came to learn several

months later. Specifically, if I could just ask for clarification, are you asking me during that time period or did I learn further down the road what his role was?

124 Q. Well, really, at any point in time. I guess what I'm asking you is: Does Malanca work for Go-To Developments Holdings? Did you come to learn that?

A. I came to learn further down the road that he has a title, and I couldn't specifically define if he worked for them or not.

125 Q. And what was that title?

A. I would have to check, but off the top of my head, I think it was called business development manager of some sort.

126 Q. Okay. Did he have that job title under the name Alfredo Malanca or was it under a different name?

A. That is a very good question because I received emails under Alfredo Malanca and Alfredo Palmeri.

127 Q. Did you ever ask about the difference in those two names?

A. Interesting question. I learned about that several months later.

128 Q. Sorry, what did you learn about several months later?

A. I was at home on a Friday night and I was questioning myself, which Alfredo am I speaking with here? Not knowing if Malanca is Malanca or Palmeri is Palmeri. I didn't know -- I have never checked a person's ID. I have never checked anything.

So I typed in the name "Go-To Developments" and wanted to see the history, and I would see a caricature of all the people that Go-To was involved in from a company perspective. Then I did the same thing for "Goldmount". And then I typed in "Alfredo Palmeri". Not much came up. And then I typed in "Alfredo Malanca".

And I recall on a Friday night, the first thing that popped up was some sort of LinkedIn description of him for Goldmount Financial. Either the second or third thing, one was an Alfredo Malanca, beekeeper. Another one was a video shot on YouTube for some sort of boat cruise on the Toronto Harbour. And the fourth or fifth one was some sort of definition of a lawsuit for the largest cocaine dealer in Canada whose person name was Alfredo Italo Malanca.

I read that and I had sort of a bit of an ill feeling and I decided to go on the next page of Google search and I'm wondering how many Alfredo Malancas there are, because they were referring to a person with the middle name Italo.

That next morning I woke up -- this is months later in the dealings with them that I have after -- I asked Mr. Furtado for further clarification on is the person that I met this person that I read about on the Google searches? And he further requested me to meet him at his office to go over what I wanted to find out, if this is the person we're dealing with or not.

Mr. Furtado said, "Yes, that is the person." And I said, "How interesting. I'm not sure what I got myself into here." I asked Mr. Furtado in confidence not to speak to Mr. Malanca about my knowledge of him knowing it because I really didn't want to get involved with people with a storied past, if you will, especially after they qualified him as the largest dealer in Canada and various other descriptions which I wasn't too happy to read about.

Mr. Furtado then said that he

had the same issues with his wife and that Mr. Malanca had, if you will, turned the corner, corrected his life, got married, has a child and is now a businessman who runs with his wife a financial company and he's on the up and up, and I gave him the benefit of the doubt to see where it goes from there.

We had a subsequent meeting and Mr. Malanca and myself and Mr. Furtado sat in at Mr. Furtado's office and he came in and he smiles at me and he says, "Yep, I'm the one. I was the one that did time", and we spoke about his issues that he had and how he went through the motions of spending time in jail and he's now gone through that portion and passed that story in his life and he is now what he qualifies himself as a bona fide businessman running a company with his wife and doing his business as business goes on.

129 Q. Okay. One of the things you said when you were talking to Mr. Furtado about Malanca was that he had the same issues with his wife. Does that mean -- was Furtado saying that his wife was a convicted drug dealer or --

A. No, he was having issues, if I could qualify that, that his wife really

didn't want him to have dealings with a person with a storied past either.

130 Q. So why was Furtado willing to do business with Malanca? Did he ever talk to you about that?

A. Mr. Furtado said that Mr. Malanca was bringing him business opportunities in the form of development opportunities which he evaluated and then proceeded forward with on those projects.

131 Q. Okay. And (audio distortion) --

MR. NASTER: Sorry, you're breaking -- we cannot hear you.

THE REPORTER: Sorry, Ms. Collins, you were cutting out. I didn't get that.

MS. COLLINS: Sorry.

MR. NASTER: You were breaking up, so you have to start again.

BY MS. COLLINS:

132 Q. So I heard your explanation for why Furtado said he dealt with Malanca, but that doesn't really seem like a great explanation. Did you ever question him further on that?

A. Question Furtado or question Alfredo on it?

133 Q. Sorry, question Malanca. No, sorry, question Furtado. Sorry. I will get this right.

A. Okay.

134 Q. When Furtado gave that explanation to you, did you question him further about why he was dealing with Malanca?

A. During that Saturday when I met with him at his office, he gave me an explanation that time had passed, time had elapsed. He has turned into a family man and, in turn, now he has straightened the boat, if you will, on the right path. And he brings Mr. Furtado land deals which he analyzes, and what they do with that, I didn't question any further.

135 Q. Okay. Did Mr. Furtado or Malanca ever confirm with you that Malanca and Palmeri are the same person?

A. Yes.

136 Q. Did you ask why Malanca sometimes goes by Palmeri?

A. Yes.

137 Q. And what was his

response?

A. He said because of his storied past, he could not get financing, if you will. I think he described it as that because would do a check on him and most likely the case is that he would not fall within the requirements of what a borrower -- what a lender would be looking at from a borrower.

138 Q. Okay. During the period that you found out this information about Malanca, had you already made your initial investment?

A. Can I just ask for a clarification? When you talk about initial investment, this was during my second go-around and Go-To Developments.

139 Q. Okay. So that is what I'm trying to understand. When you found out about Malanca, what was your relationship with Go-To Spadina Adelaide or Go-To Developments Holdings at that time? Were you an investment --

A. I was --

140 Q. -- at that time?

A. I was -- I came back into the deal when they called me and I was a limited partner with class A and class B shares.

141 Q. Yes. And that was the 6 million times two; right?

A. That was $12 million that I invested in. That's correct.

142 Q. Had you already --

A. If you will, and if I could qualify, that was my second time involved with Go-To, just to clarify the timeline.

143 Q. Right. And were you -- did you own those 12 million shares at the time you found out about Malanca's past?

A. Yes.

144 Q. Okay. I think you actually invested a million or so more maybe about a year ago in June 2020 (audio distortion) --

MS. HOULT: Yes --

THE INTERVIEWEE: I'm not sure --

MS. COLLINS: Can you hear me now?

MR. NASTER: Now we can. Try again.

BY MS. COLLINS:

145 Q. So I think after the 12 million, you also invested an additional -- at

least 1 million in about June of 2020. At the time you invested the first additional million, did you know about Malanca's criminal history?

A. When I put in that additional million, yes, I knew about his past.

146 Q. Probably sometime between September 2019 and about June 2020 is when you found out about Malanca's past. Is that fair?

A. That's correct.

147 Q. Okay. Now, before, we were actually doing the questions out of order, which is absolutely fine. But I just want to see if Ms. Hoult has any additional questions about Malanca before I move on to a different topic.

MS. HOULT: Thank you, Ms. Collins.

BY MS. HOULT:

148 Q. You may not be able to answer these questions, Mr. Marek, but I thought I would ask in case it brings clarity about dates.

Do you know the date or the approximate date of when you first met -- had lunch with Mr. Raffaghello and met Mr. Malanca?

A. I could find out because I think I paid for the bill at the Vietnamese

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

AFFIDAVIT OF OSCAR FURTADO
(sworn December 14, 2021)

I, OSCAR FURTADO, of the Town of Oakville, in the Regional Municipality of Halton, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS**:

II. BACKGROUND

A. Go-To Developments

4. GTDH operates a property development business. GTDH is an Ontario corporation with its head office in Oakville, Ontario. Attached hereto as **Exhibit "D"** is a copy of a Corporate Profile Report dated December 13, 2021.

5. GTDH conducts its business through an organizational structure that includes a number of limited partnerships (collectively, with GTDH, "**Go-To Developments**"). GTDH is the sole shareholder in respect of each of the corporate general partners in the structure. An organizational chart in respect of Go-To Developments is attached hereto as **Exhibit "E".**

6. I am the sole officer and director of each of the Moving Parties in this proceeding except for Go-To Major Mackenzie South Block Inc. and Go-To Major Mackenzie South Block II Inc. I am the sole director, President and Secretary of those two corporations, and Mike Smith (a project manager at the construction management firm retained in respect of certain development projects) is also listed as an officer for these two entities in accordance with a request from Tarion (formerly known as the Ontario New Home Warranty Program).

7. The corporate respondents, other than GTDH, Furtado Holdings and Go-To Developments Acquisitions Inc. ("**GTDA**"), are the general partners (the "**GPs**") of the limited partnership (the "**LPs**") respondents in this proceeding. Although there are nine Go-To Developments projects (collectively, the "**Projects**"), there are ten GPs and ten LPs, as one project (*ie*, Major Mackenzie South Block) has two of each.

B. The Real Properties

8. Each of the LPs owns, alone or with others, one or more Real Properties in Ontario. Attached as **Exhibit "F"** hereto is a list of the Real Properties.

C. The Investors

9. Between May 2016 and June 2020, Go-To Developments raised approximately $60.5 million from Ontario residents (collectively, the "**Investors**") via distributions of units of the 10 LPs. Most if not all of the Investors are my friends and family, and were known to me or I was known to them. This amount includes an aggregate amount of approximately $24.3 million raised by Adelaide LP from 23 investors between February 15, 2019 and June 18, 2020. I note that the paragraphs 18 and 21 to the Collins Affidavit (as defined below) include incorrect information in this regard.

III. THE ONTARIO SECURITIES COMMISSION

A. Staff Investigation

10. The Enforcement Branch ("**Staff**") of the Ontario Securities Commission (the "**Commission**") has been conducting an investigation of GTDH since before March of 2019.

11. I first learned of the Commission's interest in Go-To Developments in late March of 2019, when Staff delivered an Enquiry Letter in respect of GTDH.

B. Interviews by the Commission

12. In the course of its investigation of Go-To Developments, the Commission interviewed me three times (collectively, the "**Furtado Interviews**"), on:

(a) September 24, 2020;

(b) November 5, 2020; and

(c) July 7, 2021.

13. The Collins Affidavit contains a number of excerpts from the transcripts of the Furtado Interviews (the "**Furtado Transcripts**"). However, despite requests, the Commission has refused to provide me or my counsel with copies of either the Furtado Transcripts or the exhibits thereto.

14. In addition to my three interviews, I, through counsel, provided dozens of written responses and extensive supporting documentation to more than two dozen separate Staff requests for information and documents.

15. I understand from my review of the Collins Affidavit that the Commission has also interviewed Anthony Marek ("**Marek**"), and relies on excerpts from the transcripts (the "**Marek Transcripts**") of his interview (the "**Marek Interview**") in support of the Receivership Application.

16. However, despite requests, the Commission has refused to provide me with copies of the Marek Transcripts and the exhibits thereto. Given the manner in which the investigation was described in the Application, I would assume that the Commission has interviewed other investors. However, absolutely no evidence or information from any other investor, other than Marek, was disclosed on the Application or has ever been disclosed to me or to my counsel. Moreover, there is absolutely no evidence that any other investor has complained or made any allegations in support of the allegations made by the Committee in its Application. With my limited ability to review the evidence (as a result of the Commission's refusal to provide me with the Marek Transcripts and

24. I deny the Commission's allegations, conclusions or characterizations, as more particularly set out at paragraphs 38 through 68 below. However, due to the late notice of the voluminous Application Record, and Staff's failure and refusal to disclose the entirety of the evidence, including the Transcripts, I have not been provided with a meaningful opportunity to respond to the Commission.

C. Hearing of Application

25. The Application was heard by Justice Pattillo at approximately 2:00 pm EST on Thursday December 9, 2021 (the "**Hearing**"), less than 72 hours after receipt of notice of the Hearing and access to the Application Record on Monday December 6th.

26. I am advised by Mr. Mann and do verily believe that:

(a) On the morning of Tuesday December 7, 2021, he contacted Ms. Hoult by e-mail to set up a telephone call. On the telephone call in the late afternoon of Tuesday December 7, 2021, Mr. Mann advised that, given factors that included the late service of the Application Record, the massive size of the Collins Affidavit, the failure of the Commission to disclose the full Furtado Transcripts and Marek Transcripts, and Go-To Developments' need to engage independent counsel, it would not be possible for the respondents to properly respond to the Application;

(b) During the telephone call of December 7, 2021, with a view to allaying the Commission's concerns set out in its Application Record, he requested a consensual adjournment of the Application and proposed interim terms to be implemented

during the course of the adjournment. Those proposed terms included (collectively, the "**Adjournment and Proposed Terms**"):

(1) that the hearing be adjourned to a date in January, with at least a half day scheduled before the Court for the hearing;

(2) that the Freeze Directions be continued during the course of the adjournment, with certain exceptions for the payment of legal fees and living expenses;

(3) that a monitor be appointed until the return date of the Application;

(4) that the monitor, if appointed, be provided with full and unfettered access to all documents and information pertaining to the LPs and the Projects;

(5) that KSV may be appointed as the monitor;

(6) between the proposed adjournment and the return date, if the Commission or monitor discovered any new information, the matter could be returned to Court immediately; and

(7) On the return date, the Commission may seek any order in respect of the monitor, including converting the monitor's appointment into a receivership, or discharging the monitor, as necessary.

(c) On December 8, 2021, the Commission advised Mr. Mann that it would not consent to any adjournment or any terms whatsoever.

27. As such, the Hearing proceeded as scheduled, with Mr. Mann in attendance on behalf of the respondents. I was also in attendance and observed the Hearing virtually.

28. During the Hearing, Mr. Mann advised Justice Pattillo that, given factors that included the late service of the Application Record, the massive size of the Collins Affidavit and Go-To Developments' need to engage independent counsel, it had effectively been impossible for me (or the other respondents) to properly respond to the Application. As such, Mr. Mann requested an adjournment of the Application, and proposed the Adjournment and Proposed Terms, which, as detailed above, were proposed to and denied by the Commission.

29. Notably, during the Hearing, Ms. Hoult advised the Court that it was a "close call" as to whether the Commission was to proceed with or without notice. While the Commission has characterized their Application as one with notice, it was for all intents and purposes a "without notice" Application by virtue of the extreme short notice that was provided, and they have failed to produce and disclose all of the appropriate evidence and have also clearly failed to provide full and fair disclosure of all pertinent and material facts and evidence.

V. THE RECEIVERSHIP ORDER

A. Issuance of the Receivership Order

30. For the reasons set out in the Endorsement, Justice Pattillo declined to grant the adjournment and issued the Receivership Order.

COURT OF APPEAL FOR ONTARIO

BEFORE: SOSSIN J.A.

DATE: FRIDAY, DECEMBER 24, 2021

COURT FILE NO.: M53047 (C70114)

TITLE OF PROCEEDING:
ONTARIO SECURITIES COMMISSION
V. GO-TO DEVELOPMENTS HOLDINGS

DISPOSITION OF COURT HEARING:

The moving party, Go-To Development Holdings ("GTDH"), brings this motion for an Order staying the Order of Patillo J. issued on December 10, 2021, which, *inter alia*, appointed KSV Restructuring Inc. ("KSV") as receiver and manager of the moving party and other entities as well as their properties and assets (the "Receivership Order"). The Receivership Order was granted on an application by the Ontario Securities Commission (the "OSC") after its investigation led to allegations of fraud and giving false evidence against GTDH's directing mind, Oscar Furtado.

The test for a stay is not in dispute, and is adapted from the test for an interlocutory injunction set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334. The factors to be considered are whether: (a) there is a serious issue to be adjudicated; (b) there will be irreparable harm if the stay is refused; and (c) the balance of convenience favours granting or refusing the stay.

The threshold for establishing a serious issue to be adjudicated is low. Among other grounds, GTDH argues that Patillo J. erred by hearing the application on short notice and justifying this decision by the fact that the OSC could have brought an *ex parte* motion. In my view, GTDH meets the first threshold of a serious issue to be adjudicated.

With respect to irreparable harm, GTDH alleges that it will suffer significant reputational damage due to the Receivership Order, which will impact its investors, refinancing and certain business transactions. According to GTDH, the Receivership Order "will effectively end Go-To Developments as an ongoing enterprise." GTDH's arguments are speculative. There is no evidence in the record that the Receivership Order will give rise to this impact.

With respect to the balance of convenience, this court has accepted that the balance of convenience favours a public entity carrying out a public interest mandate; see, for example, *Reynolds v. Alcohol and Gaming (Registrar)* 2019 ONCA 788, 60 C.P.C. (8th) 43, at paras. 15-16, 18. Other affected parties whose interests the OSC seeks to protect, such as the GTDH investors, may also be considered in the balance of convenience analysis. The balance of convenience in this case favours the OSC, as it brought its application for a Receivership Order in order to protect investors and as part of its public interest mandate.

The three factors in a motion for a stay are not to be considered in isolation. In this case, while GTDH is seeking to adjudicate a serious issue on appeal, the OSC has the stronger

position with respect to irreparable harm and balance of convenience. Considering these factors as a whole, the interests of justice do not favour a stay. The motion is dismissed. Any costs consequences arising from this motion will be determined by the panel hearing the appeal.

L. SOSSIN J.A.

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)

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

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TABLE OF CONTENTS

FACTUM OF THE APPELLANTS

PART I - OVERVIEW

1. This factum is filed in support of an appeal from the Order of the Honourable Mr. Justice Pattillo of the Ontario Superior Court of Justice (Commercial List) issued December 10, 2021 (the "**Receivership Order**"), among other things, appointing KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacity, the "**Receiver**") of: (i) the real properties and entities listed at Schedule "A" to the Receivership Order (collectively, the "**Real Properties**"), and (ii) all the other assets, undertakings and properties of each of the parties listed on Schedule "B" to the Receivership Order (collectively, the "**Receivership Entities**"). The Receivership Order was granted upon the Application (the "**Receivership Application**") of the Ontario Securities Commission (the "**Commission**").

Reference: **Receivership Order; Appeal Book and Compendium of the Appellants dated January 13, 2022 (the "Appellants' Compendium") at Tab 2, pages 8 to 33.**

2. The Receivership Entities and respondents to the Receivership Application (the "**Appellants**") filed a Notice of Appeal dated December 14, 2021 (the "**Notice of Appeal**") in respect of the Receivership Order, and intend to seek an expedited hearing of the appeal.

Reference: **Notice of Appeal of the Appellants dated December 15, 2021; Appellants' Compendium at Tab 1, pages 1 to 7.**

PART II - THE FACTS

A. Background

3. Go-To Developments Holdings Inc. ("**GTDH**") operates a property development business. GTDH conducts its business through an organizational structure that includes a number of affiliated limited partnerships (the "**LPs**"). GTDH is the sole shareholder in respect of each of the corporate general partners (the "**GPs**", and collectively with GTDH and the LPs,

"**Go-To Developments**") in the structure. Each of the LPs owns, alone or with others, one or more of the Real Properties, all of which are located in Ontario.

Reference: Affidavit of Stephanie Collins sworn December 6, 2021 (the "Collins Affidavit"), at paras. 4, 14-15; Appellants' Compendium at Tab 4, pages 64 to 67.

4. Oscar Furtado ("**Furtado**") is the founder and guiding mind behind Go-To Developments. Furtado is the sole officer and director of each of the Appellants except for two of them, for which Furtado is sole director, President and Secretary.

Reference: Endorsement of Justice Pattillo dated December 10, 2021 (the "Endorsement"), at para 8; Appellants' Compendium at Tab 3, page 35.

B. Staff's Investigation

5. The Enforcement Branch ("**Staff**") of the Commission has been conducting an investigation of Go-To Developments since before March, 2019. Staff's investigation has focused on potential contraventions of the *Securities Act* (Ontario).

Reference: Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

6. In the course of its investigation of Go-To Developments, the Commission interviewed Furtado three times for a total of more than 2.5 days: (i) September 24, 2020, (ii) November 5, 2020, and (iii) July 7, 2021 (collectively, the "**Furtado Interviews**").

Reference: Collins Affidavit, at para 65; Appellants' Compendium at Tab 4, page 84.

7. On December 6, 2021, the Commission issued two Freeze Directions in connection with this matter (together, the "**Freeze Directions**").

Reference: Endorsement, at para. 1; Appellants' Compendium at Tab 3, page 35.

C. Notice of the Receivership Application

8. In the evening of Monday December 6, 2021, the Commission first notified the respondents of an application for the appointment of receiver and manager, being the Receivership Application returnable on Thursday December 9, 2021, and provide Mr. Mann (then acting for the Appellant on a limited retainer) with an electronic copy of the Commission's Application Record (the "**Application Record**").

Reference: Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

9. The Application Record was comprised of a number of documents, including the Collins Affidavit, which is 1,958 pages long and includes 113 exhibits.

Reference: Application Record; Appellants' Compendium at Tab 4, pages 40 to 2,077.

D. The Hearing of the Receivership Application

10. The Receivership Application was returnable before Justice Pattillo at approximately 2:00 pm EST on Thursday December 9, 2021 (the "**Hearing**"), less than 72 hours after receipt of notice of the Hearing and access to the Application Record during the evening of Monday December 6th, 2021.

Reference: Notice of Application; Appellants' Compendium at Tab 4, page 49.

E. The Appellants' Adjournment Request and Proposed Terms

11. At the outset of the Hearing, Mr. Mann advised Justice Pattillo that it was effectively impossible for Furtado (or the other respondents to the Receivership Application) to properly respond to the Receivership Application, in light of factors that included:

(a) the late service of the Application Record;

(b) the massive size of the Collins Affidavit

(c) the respondents' disagreement with the Commission's allegations; and

(d) the respondents' need to engage independent counsel.

Reference: Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

12. As such, Mr. Mann requested an adjournment of the Receivership Application, and proposed terms which included the following (collectively, the "**Proposed Terms**"):

(a) a short adjournment of the Receivership Application;

(b) a continuation of the Commission's freeze directions; and

(c) the appointment of a monitor pending the hearing of the Receiver Application.

Reference: Endorsement, at para. 4; Appellants' Compendium at Tab 3, page 35.

F. Denial of the Adjournment Request and Appointment of the Receiver

13. For the reasons set out in the Endorsement, Justice Pattillo declined to grant the Adjournment of the Receivership Application and issued the Receivership Order.

Reference: Endorsement; Appellants' Compendium at Tab 3, pages 34 to 39.

14. As set out in the Endorsement, Justice Pattillo found that the respondents (Appellants on this appeal) had received sufficient notice of the Receivership Application to have filed responding material, and dismissed the adjournment request. Justice Pattillo also found that, despite the length of time that the Commission's investigation had been ongoing,

having regard to the interests of the Investors it was necessary that the Receiver be appointed immediately.

Reference: **Endorsement, at paras. 6-7; Appellants' Compendium at Tab 3, page 35.**

PART III - ISSUES ON APPEAL

15. This appeal raises the following two issues:

(a) Whether Justice Pattillo erred in refusing to grant the Adjournment and Proposed Terms; and

(b) Whether Justice Pattillo erred in granting the Receivership Order.

PART IV - LAW & ARGUMENT

A. Standard of Review

16. The standard of review for a pure question of law is "correctness". The standard of review for a question of fact is "palpable and overriding error". Finally, for questions of mixed fact and law, the standard of review is palpable and overriding error (unless the legal aspect of the issue is readily extricable). With respect to the exercise of a Court's discretion, an appellate court shall not intervene in a judge's exercise of discretion unless the judge misdirects himself or herself, or the decision is so clearly wrong as to amount to an injustice.

Reference: ***Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.**

Reference: ***Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at paras. 16 and 18.**

B. Issue #1: Justice Pattillo Erred in Refusing to Grant the Adjournment and the Proposed Terms

17. This issue raises both a question of law and a question of mixed law and fact.

i. Justice Pattillo's Decision was Incorrect at Law

18. It is respectfully submitted that Justice Pattillo was incorrect at law and misdirected himself when he considered the Commission's option to proceed *ex parte* instead of the short-service route that the Commission ultimately opted to take.

19. The Court of Appeal has recently considered an appeal involving the denial of an adjournment request, and held as follows:

> [8] Whether to grant an adjournment in a civil proceeding is a highly discretionary decision, and the scope for appellate intervention is limited: Khimji v. Dhanani (2004), 2004 CanLII 12037 (ON CA), 69 O.R. (3d) 790 (C.A.), at para. 14 (per Laskin J.A., dissenting, but not on this point). *The inquiry on appeal must focus on whether the court below took account of relevant considerations in balancing the competing interests and made a decision that was in keeping with the interests of justice*: Toronto-Dominion Bank v. Hylton, 2010 ONCA 752, 270 O.A.C. 98, at para. 37. [emphasis added]
>
> **Reference:** ***Bank of Montreal v Cadogan*, 2021 ONCA 405 at para. 8 [*Cadogan*]**

20. With respect to the Adjournment and Proposed Terms, Justice Pattillo accurately summarized the Appellant's submissions:

> [3] At the outset of the hearing, Furtado requested a short adjournment to permit him to retain new counsel (Mr. Mann appears on a limited retainer) and file responding material. He submitted, notwithstanding the Commission Staff's investigation has been ongoing since March 2019, he was only advised of this proceeding on Monday and did not receive the Commission's material until Monday evening.
>
> [4] In support of his request, Furtado has offered terms including continuing the freeze directions (with some access for living expenses and legal fees), production of the investigation transcripts and the appointment of a monitor as opposed to a receiver at the Commission's expense.

Reference: Endorsement, at paras. 3 and 4; Appellants' Compendium at Tab 3, page 35.

21. However, in dismissing the request for the Adjournment and Proposed Terms, Justice Pattillo stated:

> [5] The Commission opposed the request. It submitted that a monitor would not be sufficient as it would leave Furtado in charge. Rather, in light of the record, a receiver was necessary to safeguard the interests of the Investors. *Further, while it could have proceeded ex parte under s. 129 of the Act, it gave Furtado notice and sufficient time to file material if required*. In that regard, in the absence of material, many of Furtado's submissions were unsubstantiated. [emphasis added]

Reference: Endorsement, at para 5; Appellants' Compendium at Tab 3, page 35.

22. As set out in *Cadogan*, the Court is required to look at "relevant considerations in balancing the competing interests." It is respectfully submitted that what the Commission could have done, but opted not to do, is not a relevant consideration in this analysis. The Commission could have chosen to take a number of different routes, but it did not do so. The determination of whether a responding party had sufficient notice is not guided by what the moving party *could have done* instead.

23. The Commission could have proceeded with an application under section 129(3) of the *Securities Act*, which authorized the court to appoint a receiver on an *ex parte* application for a period of up to 15 days, but it did not do so. Instead, the Commission proceeded with its Receivership Application under section 129(1), thereby: (i) relieving itself of the burden of the "full and frank disclosure" obligation on an *ex parte* application; (ii) avoiding the 15-day maximum initial appointment period; and, (iii) denying the respondents an

opportunity to meaningfully respond to the Commission's case in the event it sought to extend the receivership beyond the initial 15-day period.

Reference: ***Securities Act*** **(Ontario), R.S.O. 1990, c. S.5 ("*Securities Act*") s. 129(3).**

Reference: **Notice of Application of the Commission dated December 6, 2021; Appellants' Compendium at Tab 4, pages 48 to 60.**

24. Justice Pattillo erred and misdirected himself at law when he (i) considered the fact that the Commission had authority to proceed *ex parte* under the *Securities Act*, and (ii) concluded that the Commission provided sufficient notice to the Appellants. The availability of *ex parte* relief is not a relevant consideration. The Commission made a strategic and tactical decision to avoid the burdens of section 129(3) of the *Securities Act*, and as such, it would be perverse if the Commission was given the benefit of it.

25. The determination of whether notice is sufficient ought to be based solely on relevant factors, such as: (i) the actual length of time between service of materials and the hearing return date; (ii) the complexity of the matter; (iii) the nature of the relief sought and impact of the decision (*i.e.*, the competing interests of the parties); (iv) whether the responding party had a true and meaningful opportunity to respond; and/or, (v) whether circumstances exist such that the Court is justified in granting the order in the absence of a response.

26. Accordingly, it is respectfully submitted that Justice Pattillo misdirected himself and was incorrect at law when he considered irrelevant factors, such as the ability of the Commission to proceed *ex parte* under the *Securities Act*.

ii. Justice Pattillo made a Palpable and Overriding Error

27. It is respectfully submitted that Justice Pattillo made a palpable and overriding error in denying the Appellants the requested Adjournment and Proposed Terms.

(A) Factors that Justice Pattillo Failed to Consider

28. In *Cadogan*, the Court considered whether the appellant could point to any circumstance that the motion judge failed to consider in refusing to grant an adjournment request. The Court ultimately found that the appellant could not point to such failure, that the motion judge considered all of the relevant factors, and that the motion judge reasonably concluded that to grant an adjournment would result in an abuse of the Court's process.

Reference: ***Cadogan*, at para. 9**

29. Here, Justice Pattillo failed to consider the extraordinary nature of the Receivership Order, particularly as its issuance would displace Furtado and his management team from the business without them having had the opportunity to tender any evidence, cross-examine on the Collins Affidavit, file any materials, or otherwise meaningfully respond to the serious allegations raised by the Commission.

30. The Appellants submit that the effect and impact of the Receivership Order is a "relevant factor" that Justice Pattillo ought to have considered in "balancing the competing interests of the parties". It is respectfully submitted that Justice Pattillo did not perform a balancing exercise. Rather, His Honour considered one side only, which resulted in a misapplication of the test set out in *Cadogan*.

31. It is well-established by the Courts that the appointment of a receiver is an extraordinary remedy. This is true regardless of the circumstances for which the receiver is appointed, and regardless of the statutory authority for the appointment. Some examples highlighting this well-established principle in the jurisprudence are as follows:

> "… One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window of the business that the proprietors are not capable of managing their own affairs….
>
> "… in this case the appointment of a receiver is a *very strong extraordinary relief prejudging the conduct of the defendant* Mr. Nusbaum." [emphasis added]
>
> **Reference:** ***Fisher Investments Ltd. v. Nusbaum*, 1988 Carswell Ont 180 at paras. 7-8 [*Fisher*].**
>
> "… the appointment of a receiver for this purpose is *effectively execution before judgment* and *to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy*." [emphasis added]
>
> **Reference:** ***Anderson v. Hunking*, 2010 ONSC 4008, at para. 15 [*Anderson*].**
>
> *The Application was returnable in Ottawa on December 17, 2009 on short notice… The appointment of a receiver/manager is a serious matter.* A hasty appointment made without proper foundation could cause serious financial harm and prejudice to innocent investors and third parties - Fisher Investments Ltd. v. Nusbaum (1988), 31 C.P.C. (2d) 158 (Ont. H.C.). *In the circumstances I granted the respondents an adjournment until January 22, 2010.*
>
> **Reference:** ***Romspen Investment Corp v 1514904 Ontario Ltd.*, 2010 ONSC 832 at para. 2 [*Romspen*].**

32. In a case involving a receivership application, where a court-appointed inspector raised serious concerns regarding misconduct and mismanagement, the Court still granted the respondent group of companies an adjournment and afforded them the opportunity to respond to the allegations in the inspector's court report. In doing so, the Court held:

> "[33] In the result, therefore, *although the Inspector's report establishes that there are still serious questions to be answered, it does not establish that there is an emergency facing* [the group of companies], its directors and shareholders. *Whether the Inspector's report, together with other matters such as the behaviour of the*

> *Cahills* in these proceedings and any other matters on which Mr. Murphy intends to rely, *justify the appointment of a receiver-manager is a question which should, and will, be answered in a regular special chambers procedure which will afford the respondents due process.*" [emphasis added]
>
> **Reference:** ***Murphy v Cahill*, 2012 ABQB 754 at para. 33 [*Murphy*].**

33. Justice Pattillo accurately described the Appellants' position regarding the Commission's allegations contained in the Receivership Application, when he stated:

> "[3] … *He disagrees with the Commission's allegations*, particularly that he misled Staff during the investigation and *wants to respond*." [emphasis added]
>
> **Reference:** **Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35**.

34. However, and notwithstanding that the Appellants objected to the allegations, Justice Pattillo pre-judged the conduct of the Appellants in this case, and failed to both consider (and therefore balance) their interests *vis-a-vis* the interests of the Commission, as well as the overall effect of the Receivership Order on the Appellants. Instead, Justice Pattillo imposed strong extraordinary relief against the Appellants without giving them a chance to respond to the extremely prejudicial allegations raised by the Commission.

35. As noted above, the Court in *Anderson* held that there must be strong evidence of jeopardy to the plaintiff's right to recovery when appointing a receiver. Although the Commission raised serious issues and allegations as against the Appellants and Furtado, there was no emergency in this case. In fact, the exact opposite is true and this was captured by Justice Pattillo when he accurately stated:

> "[3] … Nothing in the Commission's material indicates that anything precipitous was about to happen."
>
> **Reference:** **Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.**

36. Accordingly, and as the Court ordered in *Murphy*, the application for the appointment of a receiver ought to have proceeded by regular procedure (with full evidence) and ought to have afforded the Appellants with due process.

37. Justice Pattillo ought to have recognized that the appointment of a Receiver is a "serious matter", particularly in light of Appellants' objection to and disagreement with the Commission's allegations. The Court recognized this factor in *Romspen*, and in light of it, the Court ultimately granted an adjournment of approximately 1 month to allow the respondent the opportunity to "marshal and file materials and conduct cross examinations."

Reference: ***Romspen*, para. 2.**

38. Justice Pattillo did not turn his mind to this relevant factor in denying the adjournment. Accordingly, he made a palpable and overriding error and misapplied the test for an adjournment.

(B) Factors that Justice Pattillo Did Consider Favour the Adjournment

39. When looking at the circumstances that Justice Pattillo did consider, coupled with the serious nature of the Receivership Order, it is submitted that the Adjournment and Proposed Terms ought to have been granted and it was a palpable and overriding error to deny the Appellants' request.

40. This is not a case where the Appellants were asking for a protracted adjournment, notwithstanding that they sought to respond to nearly 2,000 pages of affidavit evidence and 113 exhibits. This is not a case where the Appellants were entirely resisting any form of

oversight into the business. This is not a case where the Appellants were acting unreasonably or were refusing to cooperate with the Commission.

41. Rather, this is a case where: (i) the Appellants requested a short adjournment; (ii) the request was to permit them to retain new counsel (as the counsel appearing was on a limited retainer); (iii) the Commission's record was voluminous; (iv) the Appellants agreed to the continued freezing order imposed by the Commission under the *Securities Act*; (v) the Appellants requested access to transcripts not contained in the Commission's record; and (vi) the Appellants suggested that a monitor be appointed to oversee the business as a opposed to a receiver.

Reference: Endorsement, at paras. 3 and 4; Appellants' Compendium at Tab 3, page 35.

42. The Adjournment and the Proposed Terms were reasonable, and at the absolute bare minimum, the Appellants ought to have been afforded the opportunity to retain a lawyer.

43. To summarize the above-referenced cases, the Court has granted an adjournment in the following circumstances:

(a) In *Romspen*, the Court granted a 36-day adjournment after a receivership application was served on "short notice" (the length of notice was not reported). The respondents had counsel in this case and were not requesting new counsel.

Reference: *Romspen*, at para. 2.

(b) In *Murphy*, the Court granted an adjournment (the length of time was not reported), where a receivership application was served on December 3, 2012 and the hearing was returnable on December 7, 2012, representing 4 days' notice. The respondents had counsel

in this case and were not requesting new counsel. In this case, the court officer's report made serious conduct allegations against the respondents.

Reference: ***Murphy*, at para. 1**

44. In this case, the Appellants (i) received less than 72 hours' notice, (ii) were served with a record containing nearly 2,000 pages of affidavit evidence, and (iii) did not have counsel to represent their interests on the Receivership Application. Yet, even though they were willing to cooperate with Proposed Terms, they were denied a "short adjournment".

45. In a British Columbia case, the motion judge denied a one-week adjournment request and granted a receivership order. In a unanimous decision on appeal, the B.C. Court of Appeal set aside the receivership order and held that the chambers judge "entirely overlooked the position of counsel for the debenture holders" and also erred "in deciding the merits of the application without affording counsel for the appellant the opportunity to make submissions in that respect".

Reference: ***British Columbia (Superintendent of Brokers) v Victoria Mortgage Corp*, 1985 CarswellBC 1035 at paras. 29 and 35 [*Victoria Mortgage*].**

46. The Court of Appeal went on to recognize that:

> [40] *There will be cases where*, on hearing an application of this kind, *a Chambers judge will be justified in making an order either ex parte or, if there has been notice and an appearance by the respondent, in abridging the respondent's right to respond. That will be so where there is sufficient evidence to create a reasonable apprehension of immediate jeopardy to investors or other creditors.* ***This is not that kind of case***. As the matter came before the Chambers judge there was obviously a question whether the appointment of a receiver was in the interests of the creditors as a whole. One group supported immediate appointment of a receiver, another group represented by Mr. Paine sought an adjournment in order to pursue the possibility of proceeding with the proposal which would have lead to a restructuring.

> [41] The judge gave no consideration to the question of jeopardy. *Hearing only the one side* he came to the conclusion that the idea of restructuring was not feasible and on that basis he made the order he did.
>
> [42] *In all the circumstances, that was clearly a breach of the most fundamental rule of natural justice*. I agree in allowing the appeal for the reasons given by Mr. Justice Hinkson." [*emphasis added*].
>
> **Reference:** ***Victoria Mortgage*, at paras. 40 to 42.**

47. In hearing only one side, Justice Pattillo concluded that the appointment of a receiver was in the best interests of the investors without due regard for the interests of the Appellants, and without due regard for the lack of urgency. In doing so, he denied the Appellants their right to due process and breached "the most fundamental rule of natural justice".

48. In light of the foregoing, there was no reason to deny the Adjournment and Proposed Terms and doing so was a palpable and overriding error that this Court ought to overturn.

C. Issue #2: Justice Pattillo Erred in Granting the Receivership Order

49. It is respectfully submitted that Justice Pattillo made an error at law when he considered certain evidence of the Commission that was inadmissible. Had the Appellants been granted the opportunity to respond, the issue of admissibility of certain evidence tendered by the Commission could have been raised.

50. In support of its relief sought, the Commission relied on evidence given by Mr. Furtado in investigatory examinations conducted by the Commission. The Commission included evidence from the examinations at various points in the Collins Affidavit, and attached

excerpts from the transcript of Mr. Furtado's various examinations as exhibits to the Collins Affidavit (collectively, the "**Inadmissible Evidence**").

Reference: **Collins Affidavit, at paras 17, 19, 24, 28, 45, 50-54, 57, 65-70, 73-78, 85; Compendium of the Appellants, at Tab 3, pages 67-71, 76, 78-79, 81, 84-90, 100.**

Exhibits 7-8, 45, 55, 58-59, 63, 71-75, 80-81, 83, 88-89, 100 to the Collins Affidavit; Compendium of the Appellants, at Tab 4, pages 136-167, 1050-1063, 1117-1121, 1160-1167, 1185-1189, 1259-1285, 1324-1340, 1348-1436, 1607-1632.

51. For the reasons that follow, it is respectfully submitted that all of the above-noted transcript and examination evidence was inadmissible and accordingly, it ought to have not been considered by Justice Pattillo in his decision to grant the Receivership Order.

(A) Statutory Requirements for Investigations, Examinations and Disclosure under the Securities Act

52. The Commission's right to examine is a statutorily conferred power.

53. Pursuant to section 11 of the *Securities Act*, *inter alia*, the Commission may, by order, appoint one or more persons to make such investigation with respect to "a matter it considers expedient", and for this purpose, the person so appointed may examine any documents or other things in respect of which the investigation was ordered.

Reference: ***Securities Act*, section 11(1) to 11(6).**

54. Pursuant to section 13 of the Securities Act, *inter alia*, a person making an investigation under section 11 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things.

Reference: ***Securities Act*, section 13(1) to 13(9).**

55. Pursuant to section 16 of the Securities Act:

> **"Non-disclosure**
>
> 16 (1) Except in accordance with subsection (1.1) or section 17, *no person or company shall disclose at any time,*
>
> (a) the nature or content of an order under section 11 or 12; or
>
> (b) ***the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, he nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13***." [Emphasis added]
>
> **Reference:** ***Securities Act*, section 16.**

56. The only two statutorily prescribed exceptions to the above-noted Non-Disclosure section are as follows:

(a) Disclosure to the person's or company's counsel or the person or company's insurer or insurance broker is permitted; or

> **Reference:** ***Securities Act*, section 16(1.1)(a) and (b).**

(b) If the Commission considers that it would be in the public interest, the Commission may make an order authorizing the disclosure, subject, *inter alia,* to the relevant provisions below.

> **Reference:** ***Securities Act*, section 17(1).**

(i) The person named in the order must be provided with an opportunity to object. The *Securities Act* specifically prescribes that no order shall be made under section 17(1) unless the Commission, where practicable, has given

reasonable notice and an opportunity to be heard to (a) persons and companies named by the Commission; and (b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

Reference: ***Securities Act*, section 17(2).**

(ii) Despite section 17(2), if the Commission considers that it would be in the public interest, ***it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure.*** [emphasis added]

Reference: ***Securities Act*, section 17(1).**

57. No order for the disclosure of Mr. Furtado's examination evidence was ever made by the Commission and no order was included in its Receivership Application record.

58. The investigative process and disclosure prohibitions set out in the *Securities Act* have been considered in the jurisprudence. The relevant principles emerging from the case law can be summarized as follows:

(a) The Commission has acknowledged that failure to maintain confidence over compelled testimony undermines the investigative process and the public confidence in its integrity by preventing investigators from securing cooperation from witnesses and causing the Commission to lose control over the evidence.

Reference: ***Re Black*, 2007 CarswellOnt 9553, at paras. 130-133.**

(b) Section 16 of the *Securities Act* (i.e., the "Non-Disclosure" provision) mirrors the common law implied undertaking rule that prohibits litigants, absent a court order, from using or disclosing evidence compelled during the discovery process for purposes unrelated to the proceeding in which the evidence was obtained. The implied undertaking rule exists to encourage complete and candid discovery by witnesses who may otherwise be reluctant to provide information. When the implied undertaking rule is seen as being too readily set aside, its purpose is undermined.

Reference: ***Juman v Doucette*, 2008 SCC 8 at paras. 4, 23 to 28 and 33 [*Juman*].**

(c) Sections 16 and 17 of the *Securities Act* are meant to provide some comfort to persons who are examined pursuant to an investigation order, that their identities and their information would remain confidential, subject to the terms of the *Securities Act*.

Reference: ***Mega-C Power Corp.*, 2007 LNONOSC 1059 at para. 29, (2010 33 OSCB 8273 (Ont. Sec. Comm).**

(d) Section 17 of the *Securities Act* sets out the Commission's oversight function in respect of the proposed disclosure of compelled information. It allows the adjudicative panel of the Commission to act as a neutral arbitrator, as opposed to the self-interested parties before it, in determining whether there is a public interest of greater weight than the values section 16 is designed to protect, including privacy and the efficient conduct of the Commission's investigation and enforcement functions.

Reference: ***Juman*, at paras. 5 and 32.**

(e) The independence of the Commission's adjudicative arm provides the first layer of *Charter* protection.

Reference: ***A. v. Ontario (Securities Commission)*, 2006 Carswellont 2739 at para. 56.**

59. To conclude, the Commission is responsible for maintaining all evidence obtained through investigation under the *Securities Act* in the highest degree of confidence. To make a disclosure of such evidence, even without notice to the party examined, requires an Order from the Commission. To do otherwise, absent properly exercising its adjudicative function, undermines the Commission's investigative powers and statutorily prescribed responsibilities.

(B) Justice Pattillo Considered Inadmissible Evidence

60. In this case, while Staff may have deemed it to be in the "public interest" to disclose the Furtado's examination details and transcript, the Commission did not make any order under section 17(1) of the *Securities Act* authorizing the disclosure to the Court and certainly did not provide Justice Pattillo with a copy of said order in its application materials.

61. However and as noted above, notwithstanding the requirement for an order in this regard and notwithstanding the "Non-Disclosure" provisions in the *Securities Act*, the Commission included the Inadmissible Evidence in the body of the Collins Affidavit and as multiple exhibits to the Collins Affidavit in support of its Receivership Application.

62. Justice Pattillo accepted and relied heavily upon the Inadmissible Evidence in reaching his decision to grant the Receivership Order. Absent the Inadmissible Evidence, there was an insufficient evidentiary basis upon which to appoint the Receiver.

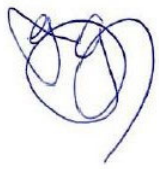
Reference: Endorsement, at paras. 6, 8-18, 22-24, 26, 31; Compendium of the Appellants, at Tab 3, pages 35-38.

63. Accordingly, it is respectfully submitted that in doing so, Justice Pattillo made an error of law in granting the Receivership Order.

PART V - ORDER SOUGHT

64. For the foregoing reasons, the Appellants seek an Order (i) setting aside the Receivership Order and Endorsement, and (ii) ordering a new hearing before the Ontario Superior Court of Justice (Commercial List) to be heard on full evidence of both the Appellants and the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2022.



Gregory Azeff

MILLER THOMSON LLP
Lawyers for Appellants

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)

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

CERTIFICATE

I estimate that 30 minutes will be needed for my oral argument of the appeal, not including any reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 13th day of January, 2022.

Gregory Azeff

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SCHEDULE "A"
LIST OF AUTHORITIES

1. ***Housen v. Nikolaisen*, 2002 SCC 33**.
2. ***Elsom v. Elsom* [1989] 1 S.C.R. 1367**.
3. ***Bank of Montreal v Cadogan*, 2021 ONCA 405.**
4. ***Fisher Investments Ltd. v. Nusbaum*, 1988 Carswell Ont 180.**
5. ***Anderson v. Hunking*, 2010 ONSC 4008.**
6. ***Romspen Investment Corp v 1514904 Ontario Ltd.*, 2010 ONSC 832.**
7. ***Murphy v Cahill*, 2012 ABQB 754.**
8. ***British Columbia (Superintendent of Brokers) v Victoria Mortgage Corp*, 1985 CarswellBC 1035.**
9. ***Re Black*, 2007 CarswellOnt 9553.**
10. ***Juman v Doucette*, 2008 SCC 8.**
11. ***Mega-C Power Corp.*, 2007 LNONOSC 1059 at para. 29, (2010 33 OSCB 8273 (Ont. Sec. Comm)**
12. ***A. v. Ontario (Securities Commission)*, 2006 Carswellont 2739.**

SCHEDULE "B"
RELEVANT STATUTES

Securities Act, R.S.O. 1990, CHAPTER S.5

Investigation order
11 (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (1).

Contents of order
(2) An order under this section shall describe the matter to be investigated. 1994, c. 11, s. 358.

Scope of investigation
(3) 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, communications, negotiations, transactions, investigations, loans, borrowings or payments to, by, on behalf of, or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any other person or company acting on behalf of or as agent for the person or company; and

(b) the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company, and any relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship. 1994, c. 11, s. 358.

Right to examine
(4) For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company. 1994, c. 11, s. 358.

Minister may order investigation
(5) Despite subsection (1), the Minister may, by order, appoint one or more persons to make such investigation as the Minister considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (2).

Same
(6) A person appointed under subsection (5) has, for the purpose of the investigation, the same authority, powers, rights and privileges as a person appointed under subsection (1). 1994, c. 11, s. 358.

Power of investigator or examiner
13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness
(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection
(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search
(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds
(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize
(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration
(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application
(8) Sections 159 and 160 of the *Provincial Offences Act* apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences
(9) For the purpose of subsections (4), (5) and (6),
"building, receptacle or place" does not include a private residence. 1994, c. 11, s. 358.

Non-disclosure

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

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

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358; 2019, c. 15, Sched. 34, s. 1 (1).

Exceptions

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

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

(b) the disclosure is to the person's or company's insurer or insurance broker, and the person or company, or his, her or its counsel,

(i) gives written notice of the intended disclosure to a person appointed by the order under section 11 at least 10 days before the date of the intended disclosure,

(ii) includes in that written notice the name and head office address of the insurer or insurance broker and the name of the individual acting on behalf of the insurer or insurance broker to whom the disclosure is intended to be made, as applicable, and

(iii) on making the disclosure, advises the insurer or insurance broker that the insurer or insurance broker is bound by the confidentiality requirements in subsection (2)

and obtains a written acknowledgement from the insurer or insurance broker of this advice. 2019, c. 15, Sched. 34, s. 1 (2).

Disclosure by Commission

17 (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

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

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

(c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

Opportunity to object

(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained. 1994, c. 11, s. 358.

Order without notice

(2.1) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153. 2013, c. 2, Sched. 13, s. 1 (1).

Disclosure to police

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) or (2.1) authorizing the disclosure of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (2).

Terms and conditions

(4) An order under subsection (1) or (2.1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (3).

Disclosure by court

(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make

full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding
(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210; 2016, c. 5, Sched. 26, s. 1.

Disclosure to police
(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

Appointment of receiver, etc.
129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Grounds
(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law. 1994, c. 11, s. 375.

Application without notice
(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days. 1994, c. 11, s. 375.

Motion to continue order
(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate. 1994, c. 11, s. 375.

Powers of receiver, etc.
(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind

up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority. 1994, c. 11, s. 375.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. 1994, c. 11, s. 375.

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 1994, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion. 1994, c. 11, s. 375.

ONTARIO SECURITIES COMMISSION and **GO-TO DEVELOPMENTS HOLDINGS INC. *et al*** Court of Appeal File No.: C70114

Court File No: CV-21-00673521-00CL

Applicant (Respondent in Appeal)

Respondents (Appellants in Appeal)

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
TORONTO

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RCP-F 4C (September 1, 2020)

Court of Appeal File No. C70114

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal – Moving Party)

– 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)

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990 c. s.5, as amended

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FACTUM OF THE MOVING PARTY (RESPONDENT IN APPEAL)
(Fresh Evidence Motion)

March 10, 2022

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TABLE OF CONTENTS

PART I – OVERVIEW

1. Justice Pattillo denied the Appellants' adjournment request and granted the receivership order based on concerns about leaving Oscar Furtado in charge of the Appellant entities (**Go-To**) and about Furtado's ability to operate Go-To in a manner compliant with securities laws.

2. The fresh evidence that the Respondent seeks to admit shows that Justice Pattillo's concerns were justified and supports the decisions below. After Furtado was served with the application record, which included a freeze direction from the Commission prohibiting him from dealing with properties derived from investor funds and a draft receivership order which, if granted, would have prevented the cancellation of contracts with the Go-To entities: (a) Furtado entered an agreement to sell the largest asset of any of the Go-To entities; and (b) his friends and family cancelled purchase contracts for pre-sale Go-To condominiums.

3. The fresh evidence also demonstrates the current commercial reality of the situation: the Go-To entities are in financial distress; the Receiver has commenced a sales process for the properties; Furtado himself supports the sale of the Go-To properties; and no other interested stakeholder of the Go-To entities (investors, creditors, suppliers, etc.) opposed the sales process.

PART II – FACTS

4. An investigation by Staff of the Commission relating to Go-To and Furtado uncovered evidence of fraud, misrepresentation, and misleading Staff by Furtado. To protect investors' best interests and for the sake of the due administration of securities law the Commission applied for: (a) the continuation of two freeze directions for assets in the hands of Furtado; and (b) the

appointment of a receiver-manager over the Go-To entities. Justice Pattillo continued the freeze directions and appointed the Receiver (**Receivership Order**).

> Order and Reasons for Judgment of Pattillo J. (**Application Reasons**) at paras. 1-2, 6, 8-18, 24, 32, Motion Record with Fresh Evidence Tendered by Respondent (**MRFE**) Tabs 4-5, pp. 110-115.

5. Since the Receivership Order, the Receiver has issued two reports relating to the Go-To entities and its receivership activities, dated December 20, 2021 and February 3, 2022. In addition, the Receiver brought a motion returnable February 9, 2022, for the approval of a sales process for the real properties belonging to the Go-To entities (**Sales Process Motion**). At that time, Furtado brought a counter-motion seeking approval of sales agreements he had obtained for two Go-To properties. In the end, the Receiver and Furtado consented to an order (**Sales Process Order**) on terms including that the Receiver would consider the sales agreements procured by Furtado as part of the sales process and that Furtado would be "restrained from engaging in any further sales or marketing efforts".

> First Report of the Receiver (**First Report**) and Second Report of the Receiver (**Second Report**), Exs. A-B to the Affidavit of Paul Baik (**Baik Affidavit**), MRFE Tabs 2A-2B.
>
> Notice of Motion of the Receiver, Notice of Motion of the Respondents (in the Application), and Order and Endorsement of Conway J (**Sales Process Endorsement**), Baik Affidavit, Exs. C-E, MRFE Tabs 2C-2E. See: Sales Process Endorsement at pp. 78-80.

6. The Fresh Evidence consists of five documents: (a) the First Report of the Receiver dated December 20, 2021 (without appendices); (b) the Second Report of the Receiver dated February 3, 2022 (without appendices); (c) the Notice of Motion of the Receiver dated February 3, 2022 for the Sales Process Motion; (d) the Notice of Motion of Furtado *et al.* dated February 8, 2022, in response to the Sales Process Motion; and (e) the Sales Process Order and Endorsement of Justice Conway dated February 9, 2022.

> Baik Affidavit para. 4 and Exs. A-E, MRFE Tabs 2, 2A-2E, p. 12.

7. The following facts emerge from the Fresh Evidence:

(a) after Furtado had been served with a Commission freeze direction that prohibited him from dealing with "*funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to GTDH*" and while Justice Pattillo's decision in the application was under reserve, Furtado caused the Adelaide LP and its general partner to enter into a conditional sales agreement for the Adelaide LP's properties;

Freeze Direction, MRFE Tab 3, pp. 82-83; First Report, ss. 3.1(2)-(3), MRFE Tab 2A, p. 19.

(b) while he had notice of the receivership application, which included a draft order that contemplated a prohibition against the cancellation of contracts with third parties, Furtado's friends and family cancelled pre-sale condo contracts;

First Report, s. 3.5(b), MRFE Tab 2A, p. 22, Receivership Order, ss. 11-13, MRFE Tab 4, p. 91.

(c) the Go-To entities are in financial jeopardy. In particular, the Receiver found "the Companies' cash balances are a small fraction of the Companies' accounts payable. The Companies do not appear to have liquidity to advance their projects or to fund overhead costs". In its First Report at s. 3.2, the Receiver includes this summary table:

(unaudited; $)	Cash	Accounts Payable	Difference
Go-To Glendale Avenue Inc.	125,933	539,624	(413,690)
Go-To Major Mackenzie South Block Inc.	4,058	971,666	(967,608)
Go-To Niagara Falls Chippawa Inc.	541	271,776	(271,235)
Go-To Niagara Falls Eagle Valley Inc.	10,374	1,315,111	(1,304,737)
Go-To Spadina Adelaide Square Inc.	12,798	7,657,763	(7,644,965)
Go-To Stoney Creek Elfrida Inc.	19,514	335,885	(316,371)
Go-To St. Catharines Beard Inc.	111	47,018	(46,906)
Go-To Vaughan Islington Avenue Inc.	9,275	497,051	(487,776)
2506039 Ontario Limited	120,869	266,489	(145,620)
Total	303,474	11,902,383	(11,598,909)

First Report, s. 3.2, MRFE Tab 2A, p. 20.

(d) the Receiver sought, and on February 9, 2022, the Commercial List granted, the Sales Process Order. Further, that Order was consented to by Furtado and unopposed by any interested person; and

(e) Furtado brought a counter-motion seeking approval of sales agreements he had obtained for certain Go-To properties. In the end, the Receiver and Furtado consented to the Sales Process Order on terms including that the Receiver would consider the sales agreements procured by Furtado and that Furtado was "restrained from engaging in any further sales or marketing efforts".

Sales Process Endorsement, MFRE Tab 2E, pp. 79-80.

PART III – ISSUES

8. The only issue on this motion is whether to admit the Fresh Evidence, which the Commission submits should be admitted.

PART IV – LAW AND ARGUMENT

a. The Test for Admitting Fresh Evidence on Appeal

9. This Court has the discretion to admit fresh evidence "in a proper case" to enable it to determine the appeal. Typically, the Court will admit fresh evidence on appeal where the evidence: (i) is credible; (ii) could not have been obtained by due diligence before the hearing below; and, (iii) either:

(a) is relevant in that it bears on a decisive or potentially decisive issue, and could be expected to affect the result; or

(b) would likely be conclusive of an issue on appeal.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(4)(b), Schedule B.

Chiang (Trustee of) v. Chiang, 2009 ONCA 3 at paras. 72-77, comparing the tests in *R. v. Palmer*, [1980] 1 SCR 759 at p. 775 and *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ONCA) (***Sengmueller***) at p. 5.

b. Fresh Evidence is Credible and Was Not Attainable by Due Diligence

10. The Fresh Evidence, comprised of Receiver's reports, notices of motion, and the Sales Process Order and Endorsement, is credible.

11. The Receiver's reports are credible evidence of the matters addressed within them. The Receiver is an officer of the court, with obligations to perform its duties fairly and neutrally. Receiver's reports are routinely accepted as evidence.

Farber v. Goldfinger, 2011 ONSC 2044 at paras. 10-11, 24-25.

Impact Tool & Mould Inc., Re, 2007 CarswellOnt 9136 (SCJ) at para. 15, aff'd 2008 ONCA 187, leave to appeal ref'd 2008 CanLII 55968 (SCC).

Potentia Renewables Inc. v. Deltro Electric Ltd., 2019 ONCA 779 at para. 40.

12. The notices of motion, the Sales Process Order and Endorsement of Justice Conway set out the positions of the Receiver and the Appellants, and the result of the Sales Process Motion.

13. As for the due diligence requirement, this criterion is also met. Most of the facts arising from the Fresh Evidence post-date the hearing of the application and as such could not have been discovered before the hearing below. With respect to the financial status of the Go-To entities and the steps taken by Furtado after he was served with the application materials, such evidence arises from the Receiver's direct access to information for the Go-To entities as a result of the Receivership Order.

Hill v. Church of Scientology of Toronto, 1994 CanLII 10572 (ONCA) at p. 107, (***Hill***) aff'd [1995] 2 SCR 1130.

Application Reasons at para. 28, MRFE Tab 5, pp. 114-115.

c. Fresh Evidence Could Affect the Result and/or Be Conclusive of an Issue on Appeal

14. With regard to the third prong, this Court retains the discretion to admit fresh evidence and has done so where:

(a) the evidence confirms the decision under appeal;

Sengmueller at p. 6; *Hill* at p. 107.

(b) it is "necessary to deal fairly with the issues on appeal" and to avoid an injustice, and

Sengmueller at p. 6.

(c) the evidence provides the Court "with a full picture of the background and commercial reality of the situation."

Katokakis v. Williams R. Waters Ltd., 2005 CanLII 4090 (ONCA) at para. 5.

15. The Fresh Evidence meets the third prong and is relevant to the appeal in two ways:

(a) First, it shows further misconduct by Furtado after he was served with the application materials. The Fresh Evidence thus reinforces Justice Pattillo's decisions to deny the adjournment request and appoint the Receiver based on the concern that leaving Furtado in charge would be contrary to investors' interests given Furtado's historical lack of compliance with laws; and

(b) Second, it provides this Court with information about the current commercial reality: the Go-to Entities are in financial distress and Furtado himself is in favour of selling the properties (which the Receiver is in the process of doing). Further, there are multiple stakeholders in the Go-To entities, and none opposed the Sales Process Motion.

Fresh Evidence Demonstrates Further Misconduct by Furtado

16. The Appellants challenge Justice Pattillo's denial of their adjournment request. In denying the adjournment, Justice Pattillo concluded that "[b]ased on the allegations concerning Furtado's actions…it was necessary having regard to the interests of the investors to deal with the application rather than adjourn it to a future date and leave Furtado in charge." Further, Justice Pattillo found the evidence established that Furtado arranged to personally profit from property acquisitions, misused other limited partnership assets as security for those acquisitions and misled Staff of the Commission during the investigation. He concluded the potential breaches of the *Securities Act* raised "significant concerns about Furtado's ability to operate in capital markets in a manner compliant with securities laws."

Application Reasons at paras. 6, 23-26, MRFE Tab 5, pp. 111, 113.

17. The Fresh Evidence confirms that Justice Pattillo's concerns were well-founded, as it demonstrates further misconduct and self-dealing by Furtado after he was served with the application materials. Furtado received notice of the application on December 6, 2021. The application was heard on December 9th. Justice Pattillo's decision was received at approximately 10:00 p.m. on December 10th. The Fresh Evidence shows that:

(a) on December 9th, seven purchasers of pre-sold condominium units "terminated their agreements of purchase and sale for units in the Glendale Project". All presales were to "friends and family" of Furtado; and

First Report, s. 3.5(b), MRFE Tab 2A, p. 22.

(b) on December 10th, while Justice Pattillo's decision was under reserve, Furtado entered the Adelaide LP and its general partner into an agreement to sell the Adelaide LP's properties. The Receiver also noted: the agreement contained "an insignificant deposit",

which had not even been paid; the properties were apparently offered to only a small number of persons; and, the opportunity to purchase was presented to the proposed purchaser "at a price suggested by Mr. Furtado".

First Report, ss. 3.1(2)-(3), MRFE Tab 2A, p. 19.

18. Furtado's conduct while the application was outstanding only reinforces Justice Pattillo's conclusion that Furtado could not be trusted to continue to operate the Go-To entities. Such conduct shows a disregard for the authority of the Court and the Commission, and is particularly egregious given that Furtado's submission before Justice Pattillo was that an adjournment would be appropriate as there was no evidence from the Commission that "anything precipitous was about to happen". In particular, Furtado's friends and family cancelled contracts and he entered an agreement to sell the Adelaide LP properties notwithstanding that:

(a) he was subject to a freeze direction issued by the Commission that prohibited him from dealing with "*funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to GTDH*", which had been served on him in the application materials;

(b) the receivership order sought (and ultimately granted by Justice Pattillo) included stay provisions (at paras. 11-13) that prohibit the cancelling of any contracts with the Go-To entities, which draft order had been served on Furtado in the application materials; and

(c) as above, Furtado's submission before Justice Pattillo was that the Commission did not have evidence that "anything precipitous was about to happen."

Freeze Direction, MRFE Tab 3, pp. 82-83.

Receivership Order at ss. 11-13, MRFE Tab 4, p. 91.

Application Reasons at para. 3, MRFE Tab 5, p. 111.

Fresh Evidence Provides Necessary Context About the Go-To Entities and the Receivership

19. Additionally, the Fresh Evidence provides this Court with relevant information about the current state of the Go-To entities and the receivership proceeding. In particular, the Fresh Evidence demonstrates:

(a) the Go-To entities are facing difficult financial circumstances;

(b) the Commercial List granted the Sales Process Order regarding the Go-To entities' real properties with Furtado's consent, and without opposition from any interested party; and

(c) Furtado himself was trying to sell Go-To properties during the Receivership, although he is now restrained from making such efforts.

20. Given that the Appellants seek discharge of the Receiver, the foregoing facts may be decisive of an issue. The Fresh Evidence demonstrates that discharge is not warranted or prudent in light of the financial difficulties facing the Go-To entities and the court-approved sales process which is underway. In any event, the Fresh Evidence should be received so that the Court may have a full appreciation of the circumstances of the Go-To entities and the receivership, in order to deal fairly with the issues on appeal. The evidence before Justice Pattillo did not indicate financial jeopardy for the Go-To entities, nor did the hearing include potential stakeholders other than Furtado (e.g. investors, creditors, suppliers, etc.). The Fresh Evidence illustrates to this Court both the magnitude of the risk to stakeholders, which includes investors, given the financial precarity of the Go-To entities as well as the absence of any opposition to the Receivership by any interested party except Furtado.

Application Reasons at para. 28, MRFE Tab 5, pp. 113-114.

PART V – ORDER SOUGHT

21. The Commission requests this Court admit the Fresh Evidence and grant it costs of the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2022

Erin Houlton
Senior Litigation Counsel, Enforcement

Braden Stapleton
Litigation Counsel, Enforcement

Lawyers for the Ontario Securities Commission

Schedule "A" – Cases and Authorities Cited

1. *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 93 OR (3d) 483.
2. *Farber v. Goldfinger*, 2011 ONSC 2044, 200 ACWS (3d) 1228.
3. *Hill v. Church of Scientology of Toronto*, 1994 CanLII 10572, 18 OR (3d) 385 (CA), aff'd [1995] 2 SCR 1130.
4. *Impact Tool & Mould Inc., Re,* 2007 CarswellOnt 9136 (SCJ), aff'd 2008 ONCA 187, leave to appeal ref'd 2008 CanLII 55968 (SCC).
5. *Katokakis v. Williams R. Waters Ltd.*, 2005 CanLII 4090, 194 OAC 353 (ONCA)
6. *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 ONCA 779.
7. *R. v. Palmer*, [1980] 1 SCR 759.
8. *Sengmueller v. Sengmueller*, 1994 CanLII 8711, 17 OR (3d) 208 (CA).

Schedule "B" – Statutory Provisions

***Courts of Justice Act*, RSO 1990, C C.43**

Powers on Appeal
134(1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
(b) order a new trial;
(c) make any other order or decision that is considered just.

Interim orders
134(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

Power to quash
134(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact
134(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
(c) direct a reference or the trial of an issue,
(d) to enable the court to determine the appeal.

Scope of decisions
134(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

New trial
134(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

Idem
134(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

Court of Appeal File No. C70114

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

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

FACTUM OF THE MOVING PARTY
(RESPONDENT IN APPEAL)
(Fresh Evidence Motion)

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Court of Appeal File No. C70114

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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)

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990 c. s.5, as amended

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FACTUM OF THE RESPONDENT

March 14, 2022

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AND TO: Service List in Commercial List File No. CV-21-00673521-00CL

TABLE OF CONTENTS

PART I – OVERVIEW

1. Justice Pattillo refused Oscar Furtado's adjournment request and appointed the Receiver because he concluded that the evidence of fraudulent misconduct demonstrated a risk to investors if the application was delayed and Furtado was left in charge. Those discretionary decisions should not be disturbed, especially given that the fresh evidence[1] shows Justice Pattillo's concern was justified. In particular, after he was served with the Commission's application materials, which included a freeze direction prohibiting him from dealing with property derived from investor funds and a draft receivership order that included terms that would prohibit the cancellation of contracts: (a) Furtado entered an agreement to sell the largest asset of any of the appellant entities (**Go-To**); and (b) his friends and family cancelled purchase contracts for pre-sale Go-To condominiums.

2. Furtado provides this Court with no substantive response to the evidence that Justice Pattillo concluded raised serious concerns of fraud, self-dealing, and providing false or misleading evidence during the investigation. Instead, Furtado argues for the first time that certain evidence before Justice Pattillo was inadmissible based upon an illogical reading of the *Securities Act*.

3. Since the Receivership Order was granted, the receivership has progressed. The Receiver found the Go-To entities in serious financial jeopardy and has commenced a Court-approved sales process for their properties, which was supported by Furtado. The receivership affects the rights of numerous persons including, e.g., creditors, investors, suppliers, purchasers of pre-sold units, etc., none of whom have challenged the receivership. The interests of justice support dismissal of the appeal.

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[1] The Commission has brought a motion to introduce fresh evidence comprised of materials from the receivership post-dating the Receivership Order.

PART II – FACTS

4. The Appellants provide no details of the facts of the application. Accordingly, the Respondent states the facts as follows.

A. The Investigation

5. During an investigation under the *Securities Act* of Furtado and the Go-To entities (**Investigation**), Staff of the Commission uncovered evidence of potential breaches of securities law. Among other things, the Investigation uncovered evidence that:

(a) between 2016 and 2020, Furtado raised almost $80 million from investors for nine real estate projects by selling limited partnership (**LP**) units of the Go-To LPs;

Reasons for Judgment dated December 10, 2021 (**Reasons**) at para. 8, Respondent's Compendium (**RC**) Tab 1 p. 6. See also: Affidavit of S. Collins sworn December 6, 2021 (**Collins Affidavit**) at para. 18 and App. B, RC Tabs 5, 7 pp. 47, 81.

(b) beginning in February 2019, Furtado raised capital from investors to acquire and develop two properties in downtown Toronto by selling LP units in the Adelaide LP;

Reasons at para. 9, RC Tab 1 pp. 6-7; Collins Affidavit at para. 21 and App. C, RC Tabs 5, 8 pp. 48, 84.

(c) Furtado negotiated the purchase of the properties for the Adelaide LP with Alfredo Malanca (**Malanca**), as a representative of Adelaide Square Developments Inc. (**ASD**). At the time, Malanca was Furtado's "go-to brokerage person" for arranging debt financing for Go-To projects;

Reasons at para. 11, RC Tab 1 p. 7; Collins Affidavit at para. 24, RC Tab 5 pp. 48-49.

(d) to acquire the properties, the Adelaide LP took assignment from ASD of two purchase and sale agreements with the properties' owners (at purchase prices totaling $53.3 million on closing) and paid an "Assignment Fee" of $20.95 million to ASD;

Reasons at para. 12, RC Tab 1 p. 7; Collins Affidavit at paras. 33-35 and Exs. 33, 35, RC Tabs 5, 10, 11 pp. 51-52, 92, 98.

(e) Furtado pledged the assets of two other Go-To LPs to secure obligations of the Adelaide LP during its property acquisitions, in breach of the applicable LP agreements;

Reasons at para. 13, RC Tab 1 p. 7; Collins Affidavit at paras. 81-86, RC Tab 5 pp. 70-72.

(f) within two weeks of the Adelaide LP's purchase of the properties, Furtado's holding company (**Furtado Holdings**) received shares and a payment of $388,087.33 from ASD. Less than six months later, Furtado Holdings received a $6 million "dividend" from ASD;

Reasons at paras. 15-16, RC Tab 1 p. 7; Collins Affidavit at paras. 10, 44, 47-48, 58-60, 66, RC Tab 5 pp. 45, 55-56, 60-61, 63 and Exs. 37, 43, 49, 51, 53, 64, 68, 77, 78, RC Tabs 12-13, 15-18, 20-22.

(g) Malanca's spouse's company received the same quantum of shares and payments from ASD that Furtado Holdings did, on the same dates;

Reasons at paras. 15-16, RC Tab 1 p. 7; Collins Affidavit at paras. 44, 48, 59, RC Tab 5 pp. 55-56, 60 and Exs. 44, 53, 67, RC Tabs 14, 17, 19.

(h) Furtado used monies from ASD on personal expenses, investments, and in the operation of the Go-To businesses, including to make payments due to investors; and

Reasons at paras. 17-18, RC Tab 1 p. 7; Collins Affidavit at paras. 61-64 and App. D, RC Tabs 5, 9 pp. 61-62, 85.

(i) during the Investigation, Furtado gave false and/or misleading evidence under oath about his dealings with ASD and the payments Furtado Holdings received from ASD.

Reasons at paras. 19, 24, RC Tab 1 pp. 7-8. See also: Collins Affidavit at paras. 65-75, RC Tab 5 pp. 63-67 and Applicant's Factum at Sch. C, RC Tab 24 pp. 173-177.

B. Freeze Directions And Application By The Commission

6. Given the evidence uncovered by the Investigation, to protect the interests of investors and for the due administration of securities laws, on December 6, 2021, the Commission:

(a) issued two freeze directions under s. 126 of the *Securities Act* to secure assets in the hands of Furtado derived from investor funds (**Directions**);

(b) brought an application returnable at the Commercial List at 2 p.m. on December 9, 2021, pursuant to ss. 126 and 129 of the *Securities Act*, for a continuation of the Directions and for the appointment of the Receiver over the Go-To entities; and

(c) served the Appellants with the application materials, including the Directions, that evening.

Reasons at paras. 1-3, RC Tab 1 p. 6.

C. Justice Pattillo's Decision

7. The application proceeded on December 9, 2021 before Justice Pattillo. The Appellants were represented by counsel and made submissions at the hearing. His Honour heard and denied the Appellants' request for an adjournment, and proceeded to hear the application. Justice Pattillo granted the orders sought by the Commission (**Receivership Order**) after 10 p.m. on December 10th. Justice Pattillo's key findings included:

(a) in respect of the adjournment request: "Based on the allegations concerning Furtado's actions… it was necessary having regard to the interests of the investors to deal with the application rather than adjourn it to a future date and leave Furtado in charge"; and

(b) in relation to the application:

1. the Investigation "revealed evidence of undisclosed payments to Furtado arising from Adelaide LP's purchase of the Properties, resulting in misappropriation and improper use of Adelaide LP funds through his dealings with ASD";

2. the evidence before him established that Furtado: "a) Arranged to personally profit from Adelaide LP's purchase of the Properties; b) Misused other Go-To LP assets to secure Adelaide LP's acquisition of the Properties; and c) Gave false and/or misleading evidence to Staff about his dealings with ASD and Furtado Holdings' receipt of shares and moneys from ASD"; and

3. "the gravity of the potential breaches of the Act indicated by the evidence raises significant concerns about Furtado's ability to operate in capital markets in a manner compliant with securities laws".

Reasons at paras. 6, 22-27, 31-32, RC Tab 1 pp. 6, 8-9; Email from Pattillo J., RC Tab 3 p. 37; Receivership Order, RC Tab 2.

D. Stay Motion

8. On December 24, 2021, the Appellants moved for a stay of the Receivership Order pending this appeal. Justice Sossin denied the motion in reasons released December 29, 2021.

Endorsement of Sossin J.A., RC Tab 4.

E. Fresh Evidence

9. Since the Receivership Order was granted, the receivership has progressed. The Commission seeks to introduce fresh evidence consisting of materials from the receivership (**Fresh**

Evidence). The Commission addresses the admissibility and import of that evidence in its motion factum. In summary, however, the Fresh Evidence is of relevance to the appeal in two ways.

10. First, it demonstrates that after Furtado received the application materials, he engaged in self-interested conduct to the potential detriment of stakeholders in the Go-To entities and in contravention of the Directions and the terms of the draft receivership order sought, namely:

(a) on December 9th, despite the terms of the draft receivership order which, if granted, would prohibit cancellation of contracts, seven purchasers of pre-sold condominium units who were "friends and family" of Furtado terminated their agreements of purchase and sale for units in the Glendale project;

First Report of the Receiver (**First Report**) at s. 3.5(1)(b), Motion Record – Fresh Evidence Tendered by the Respondent (**MRFE**) Tab 2A p. 22; Receivership Order at ss. 11-13, RC Tab 2 p. 18.

(b) on December 10th, while Justice Pattillo's decision was under reserve and despite the Direction that prohibited him from dealing with property derived from investor funds, Furtado caused the Adelaide LP and its general partner to enter an agreement to sell the Adelaide LP's properties.

First Report at ss. 3.1(2)-(3), MRFE Tab 2A p. 19; Direction, RC Tab 23 pp. 138-139.

11. Second, the Fresh Evidence provides the Court with information about the status of the Go-To entities and the receivership itself, including that:

(a) the Receiver has found the Go-To entities to be in financial jeopardy; and

(b) the Receiver sought, and on February 9, 2022, the Commercial List granted, an order (**Sales Process Order**) relating to the real property belonging to the Go-To entities. That Order was unopposed by any interested person and consented to by Furtado.

First Report at s. 3.2, MRFE Tab 2A pp. 20-21; Second Report of the Receiver at ss. 2.0(4), 3.2, MRFE Tab 2B pp. 30, 32-35; Order and Endorsement of Justice Conway, MRFE Tab 2E pp. 78-80.

PART III – THE RESPONDENT'S POSITION ON ISSUES RAISED BY THE APPELLANT

A. Justice Pattillo Denied The Adjournment To Protect Investors

12. The Commission sought the appointment of the Receiver pursuant to its public interest mandate. To protect the interests of investors, Justice Pattillo denied Furtado's adjournment request. He committed no error in doing so given the evidence of Furtado's misconduct and the absence of any substantive response from Furtado.

1. Justice Pattillo's Decision Was Discretionary And Is Entitled To Deference

13. A decision to deny an adjournment or to abridge the time for service is discretionary. In deciding whether to grant an adjournment, judges must balance the various interests of the parties, the administration of justice, and the considerations of the particular case and make a decision "in keeping with the interests of justice". The court will consider the evidence, including any that supports the adjournment request.

Bank of Montreal v. Cadogan, 2021 ONCA 405 at para. 8; *Bottan v. Vroom*, 2001 CarswellOnt 1172 (Div Ct) at para. 17; Rule 3.02 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194., Sch. B.

Khimji v. Dhanani, 2004 CanLII 12037 (ONCA) (***Khimji***) at para. 14; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 (***Hylton***) at paras. 37-38.

14. Discretionary decisions are entitled to deference and will only be set aside where the judge below "misdirected themselves or their decision was so clearly wrong as to amount to an injustice."

Visic v. Elia Associates Professional Corporation, 2020 ONCA 690 at para. 8(5), citing *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27.

Khimji at paras. 14, 36.

2. Justice Pattillo Properly Exercised His Discretion

15. The Reasons demonstrate that Justice Pattillo weighed and considered the relevant factors in declining the adjournment, including: (1) the submissions of each of the parties; (2) the length of the notice provided; (3) the seriousness of the allegations against Furtado; and (4) most importantly, the regulatory context and the interests of investors.

> Reasons at paras. 3-7, RC Tab 1 pp. 6.

a. Adjournment Denied To Protect Investors

16. In declining the adjournment request, Justice Pattillo made two reasonable conclusions based on the evidence before him:

> (a) first and foremost, that it was "*necessary having regard to the interests of the investors to deal with the application rather than adjourn it to a future date and leave Furtado in charge*"; and
>
> (b) Furtado had sufficient notice to file material.

> Reasons at para. 6, RC Tab 1 p. 6.

17. The seriousness of the allegations against Furtado and the interests of investors were of primary importance in the denial of the adjournment. As Justice Pattillo found, "the gravity of the potential breaches of the Act indicated by the evidence raise significant concerns about Furtado's ability to operate in capital markets in a manner compliant with securities laws." Furtado's misconduct while the decision was under reserve only reinforces Justice Pattillo's conclusion.

> Reasons at paras. 6, 22-27, RC Tab 1 pp. 6, 8. See also: Respondent's Fresh Evidence Factum (**RFE Factum**) at paras. 16-18.

18. The Appellants have not shown that Justice Pattillo misdirected himself or that his discretionary decision to proceed was 'clearly wrong'. To the contrary, Justice Pattillo's denial of the adjournment was in keeping with the interests of justice, particularly given the regulatory context of the application. The Receiver was sought in pursuit of the Commission's public interest mandate. The application was not a dispute between ordinary counterparties – it was a proceeding brought by a regulator to protect the public.

b. Appellants Could Have Responded To The Application But Did Not

19. Justice Pattillo reasonably concluded that Furtado had sufficient notice to file material. Furtado was represented in the Investigation and before Justice Pattillo by the same counsel. The Appellants had approximately three days' notice of the application, and the Commission's case was set out in a 25-page factum and 30-page affidavit. Despite the Appellants' assertion that the Collins Affidavit is "1,958 pages long and includes 113 exhibits", the body of the Affidavit is 30 pages. The vast majority of the exhibits are documents of which Furtado already had possession or knowledge.[2] Furtado had time to respond, in substance, with materials, but did not do so. The Appellants adduced no evidence, either in response to the application or in support of their request for an adjournment, but their counsel made submissions on both the adjournment request and the application for a Receiver.

Reasons at paras. 3, 6, 19, 25, 28, RC Tab 1 pp. 6-9; *Hylton* at para. 38.

[2] See Application Record Index, RC Tab 6 pp. 73-79. For example: 469 pages are copies of the Go-To LP agreements (Exs. 15-24, 40); 385 pages are land registry documents for the Go-To properties (Exs. 47, 97-99, 103-112); 396 pages are other Go-To documents (marketing, subscription agreements, correspondence to investors, banking records, transaction documents, etc.) and written correspondence from Furtado's counsel (Exs. 5-6, 9-14, 28-36, 41, 46, 56, 61-62, 76-78, 82, 84-87, 95-96, 101-102); 117 pages contain only appendix or exhibit stamps. The balance of the exhibits include, among other things, excerpts from Furtado's examinations, banking records for Furtado and Furtado Holdings, ASD shareholding documents, corporation profile reports, and excerpts from an investor's examination.

20. The Appellants come before this Court as they did before Justice Pattillo: with no substantive response to the serious concerns of fraud, self-dealing and providing false or misleading evidence during the Investigation. This is particularly notable given the Appellants initially indicated that they would introduce fresh evidence from Furtado in support of the appeal. After the Commission indicated it would oppose, cross-examine Furtado and file its own further evidence as may be needed, the Appellants changed their position to object for the first time to the admission of the transcripts of the examination of Furtado.

> Certificates Respecting Evidence of the Appellants and Respondent, RC Tabs 26-27 pp. 194-195, 198.

c. Justice Pattillo Made No Error In Denying The Adjournment

21. The Appellants argue that Justice Pattillo erred in refusing the adjournment request for essentially three reasons. In particular, the Appellants argue that Justice Pattillo:

(a) erred in denying the adjournment as there was no "emergency" and the Appellants proposed reasonable terms for the adjournment;

(b) failed to consider the extraordinary nature of a receivership order and its effect on Furtado and the Go-To entities; and

(c) erroneously considered an irrelevant factor, namely that the Commission could have moved *ex parte* for a Receiver.

22. All three arguments are without merit. In summary:

(a) the urgency to deal with the application was the nature of Furtado's misconduct – namely, the evidence was demonstrative of fraud, self-dealing and providing false or misleading evidence during the Investigation;

(b) the Reasons show Justice Pattillo, an experienced Commercial List judge, was alive to the nature of a receivership order; and

(c) Justice Pattillo did not rely on the fact the Commission could have moved *ex parte* in making his decision (and, in any event, it would not have been an error to do so).

i. Misconduct In Issue Justified Denying The Adjournment

23. The Appellants' argument that there was no "emergency" requiring the denial of the adjournment relies on a mischaracterization of Justice Pattillo's decision and distinguishable cases.

24. Justice Pattillo found it "necessary" to deal with the application and rejected Furtado's proposed adjournment terms because of the type of misconduct in issue. Furtado's proposal for a monitor was opposed by the Commission and unacceptable to the Court because that scenario would have left Furtado in charge of the Go-To entities, despite the evidence which raised serious concerns of fraud, self-dealing and providing false or misleading evidence during the Investigation. Misconduct of that nature demonstrates a lack of integrity and reasonably supports a concern that further misconduct may ensue.

Reasons at paras. 5-6, RC Tab 1 p. 6.

Sibley & Associates LP v. Ross, 2011 ONSC 2951 at paras. 63-64.

25. Further, Furtado's proposed terms included that the Commission should pay for the monitor and that he should have some access to the funds frozen by the Directions while the application was adjourned. These terms were properly opposed by the Commission and rejected by the Court. People who engage in serious misconduct like that at issue should not get a 'second chance' to behave in accordance with securities laws at the potential expense of investors and the literal expense of the Commission.

Reasons at paras. 4, 6-7, 26-27, 31, RC Tab 1 pp. 6, 8-9.

26. Indeed, the Fresh Evidence demonstrates that Justice Pattillo was rightly concerned that Furtado should not be left in charge. As above, while Furtado had notice of the receivership application and the Directions, he again engaged in self-dealing (given the cancelled contracts of his friends and family) and dealt with property purchased in part with investor funds, by entering into a conditional sales agreement for the Adelaide LP properties. Such conduct is all the more concerning given that the Appellants submitted to Justice Pattillo that "[n]othing in the Commission's material indicates anything precipitous was about to happen."

Reasons at paras. 3, 6, RC Tab 1 p. 6. See also: RFE Factum at paras. 7, 17-18.

27. The adjournment cases relied on by the Appellants are all distinguishable. The first two both arise in the civil – not regulatory – context and:

(a) in *Romspen*, an application for a receiver was brought by a secured creditor based on an outstanding debt. There were no allegations of fraud; and

(b) *Murphy* concerned a receivership application brought by an investor against a corporation run by his sister. There, the Alberta court denied leave for an emergency hearing, pursuant to its procedural rules – it did not grant an adjournment. In that case, there was already a court-appointed Inspector in place. The judge found that the concerns identified by the Inspector did not pose an emergency nor justify the applicant's assertions that the company was being looted.

Romspen Investment Corp v. 1514904 Ontario Ltd., 2010 ONSC 832 at paras. 1, 4; and *Murphy v. Cahill*, 2012 ABQB 754 at paras. 1-8, 17, 22-33.

28. The regulatory case relied upon by the Appellants – *BC (Superintendent of Brokers) v. Victoria Mortgage Corp.* – is also distinguishable. In summary, the BCCA decision illustrates:

(a) no concerns of fraud or misleading the regulator (paras. 6-7);

(b) the Superintendent and the company were engaged in a parallel case at the Corporate and Financial Services Commission (**CFSC**) about a proposed restructuring of the company. A one-week adjournment of the receivership application was sought because counsel for the company and for some debenture holders in that CFSC case were near a resolution (paras. 8-9, 13-16, 29-30);

(c) the judge denied the adjournment because he concluded that no useful evidence could be forthcoming. He made no findings of urgency or potential jeopardy if the adjournment was granted (paras. 21-25, 40); and

(d) the judge did not allow the parties to make submissions on the receivership application. Rather, he only heard submissions about the adjournment (paras. 31-35).

BC (Superintendent of Brokers) v. Victoria Mortgage Corp., 1985 CarswellBC 1035.

29. In contrast, in this case: (a) the relevant misconduct raises integrity concerns; (b) there were no parallel proceedings or potential resolution to the issues at stake in the application; (c) Justice Pattillo found that it was "necessary" to deal with the application given potential jeopardy to investors if there was delay; and (d) Justice Pattillo heard submissions on behalf of the Appellants about the request for a receiver, and considered them in coming to his decision.

Reasons at paras. 3-6, 19, 25, 28, RC Tab 1 pp. 6-9.

30. Justice Pattillo's discretionary conclusion that it was "necessary" to determine the application given the evidence of Furtado's misconduct should not be disturbed.

ii. Nature Of Receivership Order Considered

31. Contrary to the Appellants' submissions, Justice Pattillo did not fail to consider the nature of a receivership order. The Reasons show that the Appellants' submissions concerning the adjournment request and the potential effects of a receivership were considered. Justice Pattillo rejected the assertion that a receivership would be a "death knell" and noted protective aspects of the Receivership Order.

Reasons at paras. 3-4, 28, RC Tab 1 pp. 6, 8-9.

32. Further, Justice Pattillo identified and applied the correct test for the appointment of a receiver under the *Securities Act*. As a public interest regulatory remedy, the test under the *Securities Act* differs from the tests for a receiver under the *Courts of Justice* or the *Bankruptcy and Insolvency* Acts, which underlie the cases cited by the Appellants.

Reasons at paras. 20-28, RC Tab 1 pp. 8-9; *Securities Act* s. 129, Sch. B; Appellants' Factum paras. 31, 34-38.

33. In any event, reasons for judgment need not refer to every piece of evidence or argument presented. The Reasons set out the key issues, the necessary findings of fact and the chain of reasoning. Justice Pattillo was an experienced Commercial List judge, undoubtedly familiar with the nature of a receivership order. He concluded the matter required urgent disposition and delivered the Reasons **at 10 p.m.** the day after the hearing. The Reasons must be read as a whole, and in context.

Email from Pattillo J., RC Tab 3 p. 37.

LMC 477R Corp. v. Metropolitan Toronto Condominium Corporation No. 1046, 2021 ONCA 677 at para. 21, citing *Welton v. United Lands Corporation Limited*, 2020 ONCA 322 at para. 60.

iii. No Reliance On The Fact That The Commission Could Have Moved *Ex Parte*

34. Contrary to the Appellants' arguments, Justice Pattillo did not deny the adjournment because the Commission could have moved *ex parte*. The Reasons only refer to that fact in summarizing the Commission's position (just as it had earlier set out the Appellants' position):

> The Commission opposed the request. **It submitted** that a monitor would not be sufficient as it would leave Furtado in charge. Rather, in light of the record, a receiver was necessary to safeguard the interests of the Investors. Further, while it could have proceeded *ex parte* under s. 129 of the Act, it gave Furtado notice and sufficient time to file material if required. …

Reasons at para. 5 [emphasis added], RC Tab 1 p. 6. See also: paras. 3-4 of the Reasons, which summarize the Appellants' position.

35. Rather, Justice Pattillo denied the adjournment to protect investors and because he concluded Furtado had time to respond.

Reasons at para. 6, RC Tab 1 p. 6.

36. Even if Justice Pattillo had relied on the ability of the Commission to proceed *ex parte*, that would not have been an error. All the circumstances of the case may be considered in deciding an adjournment request. Whether a moving party could have proceeded without notice is a factor that may be considered.

Children's Aid Society of Ottawa v. C.S., 2005 CanLII 44174 (Div Ct) at paras. 10-13.

37. The Appellants argue that the Commission provided notice to avoid the strictures of the full and frank disclosure standard imposed in *ex parte* matters. This is not so. Again, the Commission is not an ordinary counterparty; it is a regulator acting in pursuit of its public interest mandate. Accordingly, the application materials did set out Furtado's position, as known to the Commission, on the matters in issue. Points of disagreement were explicitly drawn to the attention

of the Court and Furtado had the opportunity to respond. At that time and again on this appeal, Furtado provides no substantive response to the fraud or other allegations made against him.

BDBC v. Aventura II Properties Inc., 2016 ONCA 300 at paras. 23-24; *USA v. Friedland*, 1996 CarswellOnt 5566 (Gen Div) at paras. 27-31, 36, 166-167.

Applicant's Factum at paras. 18, 21, 25-28, 34, 36 and footnotes 3-4; Collins Affidavit at paras. 50-55, 66-70, 73-75, 77-79, 82-83, 85, RC Tab 5 pp. 57-59, 63-65, 67-71.

B. Appellants Did Not Object To Transcript Admissibility In The Application

38. In their factum, the Appellants argue for the first time that the transcripts of the Investigation examinations of Furtado were inadmissible (**Transcript Objection**). The Appellants could have raised this objection before Justice Pattillo and did not. In fact, the Transcript Objection is contrary to the position taken by the Appellants before Justice Pattillo and before this Court on their unsuccessful motion for a stay. In those instances, the Appellants argued that the Commission ought to have provided complete copies of the Investigation transcripts rather than excerpts.

Reasons paras. 4, 19 RC Tab 1 pp. 6, 7-8; Stay NOM at paras. 9-10, RC Tab 25 pp. 186-187.

39. A failure to object to the admissibility of evidence at first instance will often be decisive on appeal. This Court should decline to hear the Transcript Objection given:

(a) no objection was made to the admissibility of the transcripts on the application (in fact, the Appellants took a contrary position about the transcripts at that time);

(b) there is no allegation that application counsel was negligent or incompetent, nor evidence that the Transcript Objection was not raised due to inadvertence; and

(c) further arguments and/or evidence would have been adduced by the Commission before the Court below, had the Transcript Objection been raised.

Marshall v. Watson Wyatt & Co., 2002 CanLII 13354 (ONCA) at paras. 14-15, 30.

Mamado v. Fridson, 2018 ONCA 806 at para. 4.

Kaiman v. Graham, 2009 ONCA 77 at paras. 18, 21, 22.

C. In Any Event, The Transcript Objection Is Without Merit

40. The Commission did not adduce inadmissible evidence before Justice Pattillo. Pursuant to the *Securities Act*: (i) compelled evidence gathered in investigations is for the **use** of the Commission; and (ii) the Commission may seek the appointment of a receiver via application to the Superior Court. The Commission is a regulator with a public interest mandate; its ability to seek the appointment of a receiver is one of many regulatory tools granted to it under the Act. Section 17 of the Act only confirms the Commission's gatekeeper role in relation to requests by others who seek to disclose compelled information. The Commission is not required to seek, from itself, a s. 17 order before using compelled evidence in a s. 129 receivership application to the Court. As discussed below, the Appellants' argument to the contrary relies on an absurd interpretation of the Act and should be rejected.

Securities Act ss. 1.1, 2.1, 16(2), 17, 129, Sch. B.

1. Sections 16 & 17 Of The Act Give The Commission Control Over Compelled Information

41. Provisions of the Act must be read purposively, as a whole, and in harmony with the Act's purposes and the intention of the legislature. Read properly, ss. 16 and 17 of the Act establish that the Commission: (a) has "exclusive use" of compelled information (s. 16(2)); and (b) plays a gatekeeper role in respect of requests for disclosure of such information by others (s. 17).

Wilder v. Ontario Securities Commission, 2001 CanLII 24072 (ONCA) at paras. 19-23; *Rooney v. ArcelorMittal S.A.*, 2016 ONCA 630 at paras. 10-14, 38, 50; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 (***Rizzo***) at para. 27.

42. The purposes of the Act include protecting investors from unfair, improper or fraudulent practices and fostering fair and efficient capital markets. The Commission's public interest

mandate is animated by those purposes and informed by the fundamental principles of the Act, which include the need for timely, open and efficient enforcement of the Act by the Commission.

> *Securities Act* ss. 1.1, 2.1, Sch. B. See also: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 (***Pezim***) at pp. 589, 592-593.

43. Subsection 16(1) constrains disclosure of certain information by a "person or company" except as permitted under ss. 16(1.1) or 17. The Commission is not a "person or company" under s. 16 and thus not subject to the confidentiality requirements therein. The phrase "person or company" appears throughout the Act, and "should be assigned the same meaning wherever [it] appear[s]" absent a clear indication otherwise. Other instances of the phrase in the Act illustrate that the Commission is not a "person or company": see, e.g. ss. 17(1), 8(1)-(2), 9(1), 9(4), and 80. Indeed, read as a whole, the Act sets out a framework whereby persons and companies on the one hand are regulated by the Commission on the other. If the legislature intended s. 16 of the Act to constrain the Commission's use of its regulatory tools, it would have said so expressly.

> *R v. Ali*, 2019 ONCA 1006 (***Ali***) at para. 68; *R. v. Jarvis*, 2019 SCC 10 at para. 110; *Securities Act* ss. 16, 17(1), 8(1)-(2), 9(1), 9(4), 80, Sch. B.

44. Instead, s. 16(2) confirms that the fruits of an investigation – including compelled information – is for the Commission's "exclusive **use**". A receivership application under s. 129 is a regulatory proceeding that only the Commission can bring and, accordingly, must be one of the uses the Commission may make of such information.

> *Securities Act* ss. 16(2), 129(1)-(2), Sch. B.

45. The foregoing is the logical interpretation of the confidentiality/disclosure regime set out in ss. 16 and 17, when read in harmony with the scheme and object of the Act and the intention of legislature. It is supported by:

(a) the language in s. 16(2) that only restricts disclosure of compelled information "to any *other* person or company or in any *other* proceeding" [emphasis added] – implying that:

1. like s. 16(1), s. 16(2) only restricts disclosure from one person or company to another person or company; and

2. s. 16(2) permits disclosure without s. 17(1) authorization in proceedings arising from an investigation order through which that information was obtained;

(b) the special public interest function the Commission serves under ss. 16 and 17 as the guardian of compelled information and gatekeeper for its disclosure;

(c) the underlying rationale for the s. 16 disclosure restrictions, which include protecting the investigative process by allowing the Commission to control information disclosure and providing statutory protections to compelled witnesses[3] and which would not be advanced if the Commission itself were bound by those restrictions when carrying out its public interest mandate;

(d) the illogical results that would flow from the Commission itself being bound by s. 16 disclosure restrictions; and

[3] *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)*, Toronto: Queen's Printer for Ontario, 2003 at p. 241. The statutory protections for witnesses are not intended to restrict the use of compelled evidence for regulatory purposes in accordance with the Act. As discussed below, witnesses accordingly have no reasonable expectation of privacy in relation to such uses.

(e) the purposes of the Act. There is no reason or public interest that supports differential treatment of compelled information in proceedings before the Commission versus proceedings brought by the Commission before the Court. Both are regulatory, public interest processes authorized by the Act in which disclosure of compelled information is expected, and compelled witnesses have no reasonable expectation of privacy.

2. The Appellants' Interpretation Is Illogical And Contrary To The Purposes Of The Act

46. Acceptance of the Appellants' arguments would lead to an absurd result, namely that the Commission would have to bring a s. 17 application before itself for permission to use the fruits of an investigation before commencing a s. 129 application.

> *Ali* at para. 71 ("It is a well-established principle of statutory interpretation that the legislator does not intend to produce absurd results.") citing *Rizzo* at para. 27.

47. Under the Act, the Commission has both regulatory and adjudicative functions. Section 129 provides a regulatory tool for the Commission to seek the appointment of a receiver by the Court, either in the interests of stakeholders or for the due administration of securities laws. There is nothing in s. 129 that suggests that commencement of a receivership application by the Commission does or should require an exercise of the Commission's adjudicative function. To the contrary, there are reasons why this cannot be so:

(a) the power to seek a receiver is an essential regulatory tool and may be sought in circumstances of urgency. The addition of an adjudicative process at the Commission before the commencement of a Court application would only create unnecessary delay and unduly hinder use of that enforcement tool, contrary to the principle of efficient enforcement;

(b) while Furtado's objection relates to transcripts of his evidence from the Investigation, investigations often compel a broad scope of documents from a wide range of persons – e.g., testimony, banking and trading records, corporate documents, agreements, correspondence, etc. The suggestion that s. 17 authorization is required to use those materials in a s. 129 application, perhaps on notice to all of the parties who provided them, would also unduly undermine efficient enforcement; and

(c) subsection 129(3) of the Act empowers the Commission to seek the appointment of an interim receiver on an *ex parte* basis. Any party seeking *ex parte* relief has an obligation to make full and frank disclosure of material facts to the Court. It cannot be that the legislature intended to indirectly modify that well-established obligation by requiring that permission to comply with that obligation be granted via a separate, preliminary adjudicative process before the Commission. The Appellants' submission, at root, is that the Commission was wrong to have informed the Court of, among other things, Furtado's own position on the matters of concern in the Investigation.

48. The Appellants' argument that to "make a disclosure of [compelled] evidence… requires an Order from the Commission" is an incorrect overstatement. Compelled information is routinely disclosed without s. 17(1) orders and without prior notice or an opportunity to be heard by the compelled party. For example, such information may be disclosed in s. 127 regulatory proceedings before the Commission, including by the Commission itself in its decisions. The Appellants can point to no principled reason why the Act would permit use of compelled information by the Commission in a s. 127 proceeding without a s. 17(1) order, but require such an order for use of the same information by the Commission in a s. 129 application to the Court, because no such reason exists.

49. A compelled witness can have no greater expectation of privacy in relation to a s. 129 receivership application to the Court then they would have in a s. 127 proceeding before the Commission. Both types of proceedings: (1) are brought under the provisions of the Act, which is "regulatory in nature;" (2) are administrative/regulatory processes rather than criminal or quasi-criminal; (3) are expressly set out in the Act as available enforcement measures; (4) are aimed at advancing the effective enforcement of securities regulation and the purposes of the Act; and (5) are part of the "heavily regulated" securities industry and among the "rules of the game" that industry participants are deemed to know.

British Columbia Securities Commission v. Branch, [1995] 2 SCR 3 at paras. 53-58; *Pezim* at p. 589.

Black Re, 2007 CarswellOnt 9553 (***Black***) at para. 119; *Mega-C Power Corp., Re*, 2007 ONSEC 11 (***Mega-C***) at paras. 28-29.

50. The Appellants also argue that s. 17 is part of an oversight function in which the Commission is to be a neutral arbitrator in contrast to the "self-interested parties before it", and imply that it was not the Commission that brought the receivership application. Such arguments only reinforce that a s. 17(1) order is *not* required in a s. 129 application as:

(a) the applicant was – and can only be – the Commission itself. On such an application, the Commission is not a "self-interested" party but a regulator discharging its public interest mandate; and

(b) the fact that Staff is involved in advancing the application does not make the use of compelled information therein any less an act of the Commission. As the Act demonstrates, the Commission and Staff are conceptually distinct. As above, the Commission is able to disclose compelled information in its application for a receiver.

Appellants' Factum at paras. 58(d) and 60; *Securities Act* ss. 129(1), 3.6(1), 3(9), 19(3), 20.1(1), 20.1(1.1), 122(1)(a), 127.1(4)(3), 141(1), 143(1)(41), Sch. B.

51. Lastly, the Appellants erroneously imply that the Commission's use of the transcripts is contrary to 'relevant principles' from the jurisprudence. However:

(a) *Black* does not suggest that *the Commission's own use* of compelled evidence in regulatory proceedings undermines investigative processes and public confidence. *Black* concerned a request by private parties for permission to use compelled transcripts of others in criminal proceedings in the United States. In that context, the panel considered the potential harm to those witnesses if the transcripts were disclosed and whether that might dissuade others from cooperating with future investigations. The concern in *Black* does not arise where the Commission uses compelled evidence in regulatory proceedings pursuant to its mandate and powers under the Act. Indeed, as the panel in *Black* noted, compelled witnesses can expect that "compelled evidence will only be released where disclosure is in the public interest or for the purpose of a regulatory proceeding under the Act";

Appellants' Factum at para. 58(a); *Black* at paras. 119, 133-134.

(b) the Appellants' reliance on the implied undertaking rule is misplaced. A compelled witness must reasonably expect their evidence may be disclosed in a regulatory proceeding under the Act, as such disclosure falls squarely within the purposes for which the evidence was obtained. The implied undertaking rule is of no assistance;

Appellants' Factum at para. 58(b); see para. 49 above.

(c) *Mega-C* confirms that the Commission may disclose compelled information absent a s. 17(1) application. In that case, the Commission rejected an argument that it could not refer to compelled information in its public decision, holding that s. 16(2)

"presume[s] that [compelled] information … can be produced or disclosed in the course of a Commission proceeding".

Appellants' Factum at para. 58(c), *Mega-C* at paras. 28-29.

D. Conclusion

52. The appeal should be dismissed. Justice Pattillo properly exercised his discretion in declining to grant an adjournment and in granting the Receivership Order.

53. As they did before Justice Pattillo, the Appellants provide this Court with no substantive response to the serious concerns of fraud, self-dealing and providing false or misleading evidence during the Investigation. In the meantime, the Fresh Evidence submitted by the Commission identifies facts not known at the time of the application and the present state of the receivership, which include:

(a) Furtado's further misconduct after being served with the application materials;

(b) the precarious financial state of the Go-To entities; and

(c) a sales process proposed by the Receiver for the Go-To entities' properties was unopposed by any interested person, and the Sales Process Order was granted by the Commercial List on consent of Furtado.

54. The Appellants ask this Court to set aside the Receivership Order and order a rehearing, even though they did not avail themselves of the opportunity to respond before Justice Pattillo. This Court may make any order that is just. The Appellants provide no evidence or argument as to their alleged concerns with the substance of Justice Pattillo's conclusions. On the other hand, the Go-To entities are in financial jeopardy and there are numerous stakeholders – e.g. investors,

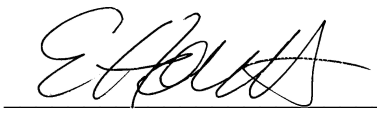
creditors, suppliers, purchasers of pre-sold units, etc. – whose interests are affected, none of whom have challenged the receivership. In the circumstances, the interests of justice support dismissing the appeal.

Courts of Justice Act ss. 134(1), Sch. B.

PART IV – ORDER SOUGHT

55. The Respondent requests that the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of March, 2022



Erin Hoult
Senior Litigation Counsel, Enforcement

Braden Stapleton
Litigation Counsel, Enforcement

Lawyers for the Ontario Securities Commission

Court of Appeal File No. C70114

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

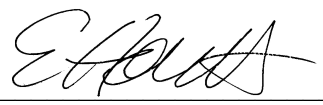
Respondents
(Appellants)

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990 c. s.5, as amended

CERTIFICATE

I certify that an order under subrule 61.09(2) (original record and exhibits) is not required. I estimate that 35 minutes will be needed for my oral argument of the appeal and the Respondent's motion to introduce fresh evidence, not including any reply.

March 14, 2022



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Schedule "A" – Cases and Authorities Cited

1. *Bank of Montreal v. Cadogan,* 2021 ONCA 405, 333 ACWS (3d) 508.
2. *BC (Superintendent of Brokers) v. Victoria Mortgage Corp.,* 1985 CarswellBC 1035, 32 ACWS (2d) 431.
3. *Black Re*, 2007 CarswellOnt 9553, 31 OSCB 10397.
4. *Bottan v. Vroom*, 2001 CarswellOnt 1172 (Div Ct), 104 ACWS (3d) 439.
5. *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3.
6. *Business Development Bank of Canada v. Aventura II Properties Inc.*, 2016 ONCA 300, 268 ACWS (3d) 424.
7. *Children's Aid Society of Ottawa v. C.S.,* 2005 CanLII 44174 (Div Ct).
8. *Kaiman v. Graham*, 2009 ONCA 77, 174 ACWS (3d) 1054.
9. *Khimji v. Dhanani*, 2004 CanLII 12037 (ONCA), 69 OR (3d) 790.
10. *LMC 477R Corp. v. Metropolitan Toronto Condominium Corporation No. 1046*, 2021 ONCA 677, 336 ACWS (3d) 275.
11. *Mamado v. Fridson*, 2018 ONCA 806, 297 ACWS (3d) 300.
12. *Marshall v. Watson Wyatt & Co.*, 2002 CanLII 13354 (ON CA), 57 OR (3d) 813.
13. *Mega-C Power Corp., Re*, 2007 ONSEC 11, 33 OSCB 8273.
14. *Murphy v. Cahill*, 2012 ABQB 754, 224 ACWS (3d) 645.
15. *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19.
16. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557.
17. *R v. Ali*, 2019 ONCA 1006, 383 CCC (3d) 184.
18. *R. v. Jarvis*, 2019 SCC 10.
19. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27.
20. *Romspen Investment Corp v. 1514904 Ontario Ltd.*, 2010 ONSC 832, 185 ACWS (3d) 902.
21. *Rooney v. ArcelorMittal S.A.,* 2016 ONCA 630, 133 OR (3d) 287.
22. *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, 106 OR (3d) 494.

23. *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752, 195 ACWS (3d) 90.

24. *United States of America v. Friedland*, 1996 CarswellOnt 5566 (Gen Div).

25. *Visic v. Elia Associates Professional Corporation*, 2020 ONCA 690, 324 ACWS (3d) 335, leave to appeal ref'd 2021 CanLII 22785 (SCC).

26. *Welton v. United Lands Corporation Limited*, 2020 ONCA 322, 320 ACWS (3d) 56.

27. *Wilder v. Ontario Securities Commission,* 2001 CanLII 24072 (ONCA), 53 OR (3d) 519.

Secondary Sources

28. *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)*, Toronto: Queen's Printer for Ontario, 2003.

Schedule "B" – Statutory Provisions

***Courts of Justice Act*, RSO 1990, c. C.43**

Powers on Appeal
134(1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
(b) order a new trial;
(c) make any other order or decision that is considered just.

…

Determination of fact
134(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
(c) direct a reference or the trial of an issue,
(d) to enable the court to determine the appeal.

Scope of decisions
134(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

New trial
134(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

Idem
134(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

***

***Rules of Civil Procedure*, RRO 1990, Reg. 194.**

Extension or Abridgment
General Powers of Court
3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

…

***Securities Act*., RSO 1990, c. S.5**

Purposes of the Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair, efficient and competitive capital markets and confidence in capital markets;

(b.1) to foster capital formation; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk.

Principles to Consider

2.1 In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:

1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
2. The primary means for achieving the purposes of this Act are,
    i. requirements for timely, accurate and efficient disclosure of information,
    ii. restrictions on fraudulent and unfair market practices and procedures, and
    iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.
4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.
6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.
7. Innovation in Ontario's capital markets should be facilitated.

Commission continued

3(1) The Ontario Securities Commission is continued as a corporation without share capital under the name Ontario Securities Commission in English and Commission des valeurs mobilières de l'Ontario in French.

…

Protection from liability

3(9) A member is not liable for an act, an omission, an obligation or a liability of the Commission or its employees. A member is not liable for any act that in good faith is done

or omitted in the performance or intended performance of his or her duties as a member of the Commission under this or any other Act.
…

Crown agency
3(12) The Commission is an agent of Her Majesty in right of Ontario, and its powers may be exercised only as an agent of Her Majesty.

Commission Staff
3.6(1) The Commission may employ such persons as it considers necessary to enable it effectively to perform its duties and exercise its powers under this or any other Act.

Officers
3.6(2) The Commission shall appoint from among its employees an Executive Director and a Secretary as officers of the Commission, and may appoint from among its employees such other officers as it considers necessary.

Status of members
3.6(3) The members of the Commission are not its employees, and the Chair and Vice-Chairs shall not hold any other office in the Commission or be employed by it in any other capacity.

…

Review of Director's decision
8(1) Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.

Same
8(2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
…

Appeal of Commission's decision
9 (1) A person or company directly affected by a final decision of the Commission, other than a decision under section 74, may appeal to the Divisional Court within thirty days after the later of the making of the final decision or the issuing of the reasons for the final decision.

Stay
9(2) Despite the fact that an appeal is taken under this section, the decision appealed from takes effect immediately, but the Commission or the Divisional Court may grant a stay until disposition of the appeal.

Certification of documents
9(3) The Secretary shall certify to the Divisional Court,

(a) the decision that has been reviewed by the Commission;
(b) the decision of the Commission, together with any statement of reasons therefor;
(c) the record of the proceedings before the Commission; and
(d) all written submissions to the Commission or other material that is relevant to the appeal.

Respondent on appeal
9(4) The Commission is the respondent to an appeal under this section.
…

Non-disclosure
16(1) Except in accordance with subsection (1.1) or section 17, no person or company shall disclose at any time,

(a) the nature or content of an order under section 11 or 12; or
(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

Exceptions
16(1.1) A disclosure by a person or company is permitted if,

(a) the disclosure is to the person's or company's counsel; or
(b) the disclosure is to the person's or company's insurer or insurance broker, and the person or company, or his, her or its counsel,
(i) gives written notice of the intended disclosure to a person appointed by the order under section 11 at least 10 days before the date of the intended disclosure,
(ii) includes in that written notice the name and head office address of the insurer or insurance broker and the name of the individual acting on behalf of the insurer or insurance broker to whom the disclosure is intended to be made, as applicable, and
(iii) on making the disclosure, advises the insurer or insurance broker that the insurer or insurance broker is bound by the confidentiality requirements in subsection (2) and obtains a written acknowledgement from the insurer or insurance broker of this advice.

Confidentiality
16(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and 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.

Disclosure by Commission
17(1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

(a) the nature or content of an order under section 11 or 12;
(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or
(c) all or part of a report provided under section 15.

Opportunity to object
17(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and
(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

Order without notice
17(2.1) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153.

Disclosure to police
17(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) or (2.1) authorizing the disclosure of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or
(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

Terms and conditions
17(4) An order under subsection (1) or (2.1) may be subject to terms and conditions imposed by the Commission.

Disclosure by court
17(5) A court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant

to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution.

Disclosure in investigation or proceeding
17(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or
(b) an examination of a witness, including an examination of a witness under section 13.

Disclosure to police
17(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or
(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

Provision of information to Commission
19(3) Every market participant shall, at the time and in the form specified by the Commission or by any member, employee or agent of the Commission, deliver to the Commission,

(a) Any of the books, records and other documents required to be kept by subsection (1); and
(b) Except where prohibited by law, any filings, reports or other communications made to any other regulatory agency whether within or outside of Ontario.

Continuous disclosure reviews
20.1 (1) The Commission or any member, employee or agent of the Commission may conduct a review of the disclosures that have been made or that ought to have been made by a reporting issuer or mutual fund in Ontario, on a basis to be determined at the discretion of the Commission or the Director.

Same, issuer other than reporting issuer or mutual fund in Ontario
(1.1) The Commission or any member, employee or agent of the Commission may conduct a review of an issuer other than a reporting issuer or mutual fund in Ontario for the purpose of determining whether disclosure requirements under Ontario securities law applicable to the issuer are being complied with, on a basis to be determined at the discretion of the Commission or the Director.
…

Relief against certain requirement
80 Upon the application of a reporting issuer or other interested person or company or upon the motion of the Commission, the Commission may, where in the opinion of the

Commission to do so would not be prejudicial to the public interest, make an order on such terms and conditions as the Commission may impose,

(a) Repealed: 1999, c. 9, s. 208 (2).
(b) exempting, in whole or in part, any reporting issuer from a requirement of this Part or the regulations relating to a requirement of this Part,
    (i) if such requirement conflicts with a requirement of the laws of the jurisdiction under which the reporting issuer is incorporated, organized or continued,
    (ii) if the reporting issuer ordinarily distributes financial information to holders of its securities in a form, or at times, different from those required by this Part, or
    (iii) if otherwise satisfied in the circumstances of the particular case that there is adequate justification for so doing.

Offences, general
122(1) Every person or company that,
(a) Makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading

…

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.
…

Costs
127.1(4) For the purposes of subsections (1), (2) and (3), the costs that the Commission may order the person or company to pay include, but are not limited to, all or any of the following:

1. Costs incurred in respect of services provided by persons appointed or engaged under section 5, 11 or 12.
2. Costs of matters preliminary to the hearing.
3. Costs for time spent by the Commission or the staff of the Commission.
4. Any fee paid to a witness.
5. Costs of legal services provided to the Commission.

Freeze direction
126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

(a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;
(b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or
(c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.

Duration
(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise.

Application
(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction.

Exclusions
(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states.

Certificate of pending litigation
(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation.

Review by court
(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.

Grounds for continuance or other order
(5.1) An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,

(a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or
(b) the regulation of capital markets in Ontario or another jurisdiction.

Notice
(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction.

Clarification or revocation
(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked.

Appointment of receiver, etc.
129(1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

Grounds
129(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or
(b) it is appropriate for the due administration of Ontario securities law.

Application without notice
129(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days.

Motion to continue order
129(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate.

Powers of receiver, etc
129(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

Directors' powers cease
129(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise

may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court.

Fees and expenses
129(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court.

Variation or discharge of order
129(8) An order made under this section may be varied or discharged by the court on motion.

Immunity of Commission and Officers
141(1) No action or other proceeding for damages shall be instituted against the Commission or any member thereof, or any employee or agent of the Commission for any act done in good faith in the performance or intended performance of any duty or in the exercise or the intended exercise of any power under Ontario securities law, or for any neglect or default in the performance or exercise in good faith of such duty or power.

Rules
143(1) The Commission may make rules in respect of the following matters:
…
41. Respecting the conduct of the Commission and its employees in relation to duties and responsibilities and discretionary powers under this Act, including,

i. the conduct of investigations and examinations carried out under Part VI (Investigations and Examinations), and

ii. the conduct of hearings.

Court of Appeal File No. **C70114**

ONTARIO SECURITIES COMMISSION Applicant (Respondent in Appeal)	- AND -	GO-TO DEVELOPMENTS HOLDINGS INC., *et al.* Respondents (Appellants)

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

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Lawyers for the Ontario Securities Commission

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)

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

RESPONDING FACTUM OF THE APPELLANTS
(Fresh Evidence Motion)

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RESPONDING FACTUM OF THE APPELLANTS

PART I - OVERVIEW

1. This factum is filed in response to a Motion by the Ontario Securities Commission (the "**Commission**") to have new evidence (the "**Fresh Evidence**") admitted in connection with the Commission's response to an appeal of the Order of the Honourable Mr. Justice Pattillo of the Ontario Superior Court of Justice (Commercial List) issued December 10, 2021 (the "**Receivership Order**"), granted upon the Application (the "**Receivership Application**") of the Commission.[1]

2. The Commission contends that the Fresh Evidence: (i) establishes that Justice Pattillo's concerns were justified, and (ii) demonstrates the "commercial reality" of the Appellants' current situation. The Commission is incorrect on both counts. First, the Fresh Evidence does not establish that Justice Pattillo's concerns were justified. Rather, the Commission mischaracterizes the content of the Reports to baselessly impugn commercially reasonable proposed transactions that would have been to the investors' benefit, by falsely insinuating that these transactions were driven by improper motives and personal gain. Second, any significant challenges the Appellants may now face are directly attributable to the issuance of the Receivership Order. It would be a perverse result if the damage and distress that result from an improperly-appointed receiver could then be used to justify keeping that receiver in place.

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[1] Receivership Order; Appeal Book and Compendium of the Appellants dated January 13, 2022 (the "**Appellants' Compendium**") at Tab 2, pages 8 to 33.

3. Accordingly, the Appellants seek an Order dismissing the Commission's Motion. None of the Fresh Evidence meets any of the criteria required for its admission: it could have been obtained by due diligence and adduced at first instance; it is neither credible nor reliable; it is neither relevant to any decisive or potentially decisive issue on the Receivership Application nor would it have affected the result; and it would not be conclusive on any issue on this Appeal.

PART II - THE FACTS

A. Background

4. Go-To Developments Holdings Inc. ("**GTDH**") operates a property development business. GTDH conducts its business through an organizational structure that includes a number of affiliated limited partnerships (the "**LPs**"). GTDH is the sole shareholder in respect of each of the corporate general partners (the "**GPs**", and collectively with GTDH and the LPs, "**Go-To Developments**") in the structure. Each of the LPs owns, alone or with others, one or more of the Real Properties, all of which are located in Ontario.[2]

5. Oscar Furtado ("**Furtado**") is the founder and guiding mind behind Go-To Developments.[3]

B. Staff's Investigation

6. The Enforcement Branch ("**Staff**") of the Commission has been conducting an investigation of Go-To Developments since before March, 2019. In the course of its investigation of Go-To Developments, the Commission interviewed Furtado three times

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[2] Affidavit of Stephanie Collins sworn December 6, 2021 (the "**Collins Affidavit**"), at paras. 4, 14-15; Appellants' Compendium at Tab 4, pages 64 to 67.

[3] Endorsement of Justice Pattillo dated December 10, 2021 (the "**Endorsement**"), at para 8; Appellants' Compendium at Tab 3, page 35.

for a total of more than 2.5 days: (i) September 24, 2020, (ii) November 5, 2020, and (iii) July 7, 2021.[4] Following the last interview, the Commission did not substantively communicate further with the Mr. Furtado or the Appellants until December 2021.

C. Notice of the Receivership Application

7. In the evening of Monday December 6, 2021, the Commission first notified the Appellants of an application (through their former counsel, Darryl Mann of Torkin Manes) for the appointment of receiver and manager, being the Receivership Application returnable on Thursday December 9, 2021, and provided Mr. Mann (acting on a limited retainer) with an electronic copy of the Commission's Application Record (the "**Application Record**").[5]

8. The Application Record was comprised of a number of documents, including the Collins Affidavit, which is 1,958 pages long and includes 113 exhibits.[6]

D. The Collins Affidavit

9. The Collins Affidavit discloses, incorporates and references evidence that was compelled by Staff under section 11 and 13 of the *Securities Act* (Ontario) (the "**Compelled Evidence**"), such that the unlawful evidence is inextricable from the Collins Affidavit itself. Exhibits to the Collins Affidavit include 28 excerpts totalling 206 pages of the transcripts of Mr. Furtado's compelled interview. In addition, in the body of her Affidavit,

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[4] Collins Affidavit, at para 65; Appellants' Compendium at Tab 4, page 84.

[5] Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

[6] Application Record; Appellants' Compendium at Tab 4, pages 40 to 2,077.

Ms. Collins directly references the substance of (and quotes from) Mr. Furtado's Compelled evidence no less than 22 times.[7]

E. The Hearing of the Receivership Application

10. The Receivership Application was returnable before Justice Pattillo at approximately 2:00 pm EST on Thursday December 9, 2021 (the "**Hearing**"), less than 72 hours after Mr. Mann's receipt of notice of the Hearing and access to the Application Record.[8]

F. The Appellants' Adjournment Request and Proposed Terms

11. At the outset of the Hearing, Mr. Mann advised Justice Pattillo that it was effectively impossible for Furtado or the other respondents to the Receivership Application to properly respond to the Receivership Application, in light of factors that included:[9]

    (a) the late service of the Application Record;

    (b) the massive size of the Collins Affidavit;

    (c) the respondents' disagreement with the Commission's allegations; and

    (d) the respondents' need to engage independent counsel.

12. As such, Mr. Mann requested a short adjournment of the Receivership Application, on terms which included a continuation of the Commission's freeze directions and the

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[7] Affidavit of Oscar Furtado sworn December 14, 2021 at para. 39; Collins Affidavit at paras. 17, 19, 24, 28, 45, 50-54, 57, 65-70, 73-78, 85, Compendium of the Appellants at Tab 3, pages 67-71, 76, 78-79, 81, 84-90, 100.

[8] Notice of Application; Appellants' Compendium at Tab 4.

[9] Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

appointment of a monitor pending the hearing of the Receivership Application (the "**Proposed Terms**"):[10]

G. Denial of the Adjournment Request and Appointment of the Receiver

13. For the reasons set out in the Endorsement, on December 10, 2021, Justice Pattillo declined to grant the adjournment and issued the Receivership Order.[11]

14. As set out in the Endorsement, Justice Pattillo found that the respondents (Appellants on this appeal) had received sufficient notice of the Receivership Application to have filed responding material, and dismissed the adjournment request, including the Proposed Terms. Justice Pattillo also found that despite the length of time the Commission's investigation had been ongoing, having regard to the interests of the investors, it was necessary that the Receiver be appointed immediately.[12]

H. The Appeal

15. GTDH and the other Receivership Entities and respondents (collectively, the "**Appellants**") filed a Notice of Appeal dated December 14, 2021 (the "**Notice of Appeal**") in respect of the Receivership Order and shortly thereafter unsuccessfully brought a motion before this Court for a stay of the Receivership Order.[13]

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[10] Endorsement, at para. 4; Appellants' Compendium at Tab 3, page 35.

[11] Endorsement; Appellants' Compendium at Tab 3, pages 34 to 39.

[12] Endorsement, at paras. 6-7; Appellants' Compendium at Tab 3, page 35.

[13] Decision of Sossin J.A. dated December 29, 2021 in Court File No. M53047 (C70114).

I. The Motion & The Proposed Fresh Evidence

16. The Commission has brought a Motion for the admission of the Fresh Evidence, which includes the following:[14]

(a) First Report of the Receiver dated December 20, 2021 (the "**First Report**");

(b) Second Report of the Receiver dated February 3, 2022 (the "**Second Report**");

(c) Notice of Motion of the Receiver dated February 3, 2022;

(d) Notice of Motion of the Appellants (Respondents in the Application) dated February 8, 2022; and

(e) Order and Endorsement of Justice Conway dated February 9, 2022.

PART III - ISSUES ON MOTION

17. The sole issue on this Motion is whether the Fresh Evidence should be admitted. For the reasons described below, it is respectfully submitted that the Commission's motion to admit the Fresh Evidence ought to be dismissed.

PART IV - LAW & ARGUMENT

A. Test for Admission of Fresh Evidence

18. While the Court has the jurisdiction to allow parties to adduce fresh evidence on appeal,[15] such an order will not be granted unless specific conditions are met. Specifically, the Court

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[14] Factum of the Ontario Securities Commission dated March 10, 2022 ("**Commission's Factum**") at para 6.

[15] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(b), Schedule B.

may admit fresh evidence on appeal only where the evidence: (i) is credible; (ii) could not have been obtained by due diligence before the hearing below; and (iii) either:

(a) is relevant in that it bears on a decisive or potentially decisive issue, and could be expected to affect the result; or

(b) would likely be conclusive of an issue on appeal.[16]

B. Analysis of the Commission's Fresh Evidence

i. The Fresh Evidence is Irrelevant

19. Fresh evidence must be relevant in order to be admissible. Fresh evidence should not be admitted unless it is relevant in the sense that it bears on a decisive or potentially decisive issue or would be conclusive of an issue on an appeal.[17] The proposed Fresh Evidence should not be admissible on the Appeal of the Receivership Order, as it is: (a) not relevant to any decisive or potentially decisive issue on the Application and would not have affected the result; and (b) would not be conclusive of any issue on the Appeal.

(a) The Fresh Evidence is Irrelevant as it is Inadmissible

20. To the extent that the Fresh Evidence in the Receiver's First Report and Second Report (together, the "**Reports**") incorporates the Compelled Evidence, it is irrelevant, as it is inadmissible and thus could not have had any bearing on any decisive issue in the Application or conclusive issue on the Appeal. Disclosure of the Compelled Evidence was

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[16] *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3 ("***Chiang***"), at paras. 72-77, comparing the tests in *R. v. Palmer*, [1980] 1 SCR 759 ("***Palmer*"**), at p. 775 and *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ONCA) ("***Sengmueller***") at p. 5.

[17] *Palmer* at p. 775.

an abuse of process and should never have been before the Court in the first place, whether in the Collins Affidavit or in the derivative form such as the Reports.[18]

21. The Tribunal's recent decision in the *Sharpe* case is directly on point.[19] The *Sharpe* decision clearly and unequivocally establishes that Staff is prohibited under section 16 of the *Securities Act* from disclosing compelled evidence without first obtaining an order authorizing the disclosure under section 17.[20]

22. The Tribunal in *Sharpe* explicitly disposes of Staff's argument that the Commission need not resort to section 17 of the *Securities Act* when it chooses to apply to court for the appointment of a receiver.[21]

23. The Collins Affidavit is built almost entirely upon cherry-picked, out-of-context statements from the Compelled Evidence, such that the Compelled Evidence is inextricable from the Affidavit itself.

24. The Receiver's Reports included in the Fresh Evidence incorporate and reference the Collins Affidavit and the Compelled Evidence by Staff contained therein.[22] Insofar as the Reports include Compelled Evidence, they are the "fruit of the poison tree". It is respectfully submitted that such "derivative" disclosure would also be in breach of the *Securities Act* and thus an abuse of process, and should not be considered by any court.

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[18] Reasons for Decision, *Sharpe (Re)*, 2022 ONSEC 3, (2022-03-30) (File Nos. 2021-26 and 2021-15) ("***Sharpe***") at para 29.

[19] *Sharpe* at para 29.

[20] *Securities Act*, R.S.O. 1990, c. S.5, ss. 16-17.

[21] *Sharpe* at paras. 74-75.

[22] See for example, Section 2.0, paragraph 2 and Section 3.1, paragraph 4 of First Report.

(b) Abuse of Process

25. The Collins Affidavit and the balance of the Commission's Receivership Application materials unlawfully disclose the Compelled Evidence in violation of section 16 of the *Securities Act* and constitute an abuse of process.

26. The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.[23]

27. Abuse of process has been described by this Court as a "…discretionary principle that is not limited by any set number of categories." It is an intangible principle that has been used, for example, to bar proceedings that are inconsistent with the objectives of public policy.[24]

28. Notably, improper disclosure of confidential information in the course of an investigation by a regulatory body has been held to render the investigation an abuse of process.[25] The Court of Appeal of Alberta in *Clarke v Complaints Inquiry Committee* upheld the decision of an appeal panel appointed under the *Regulated Accounting Profession Act*[26] that found that an investigation undertaken by the Complaints Inquiry Committee ("**CIC**") (the prosecutorial branch of the Institute of Chartered Accountants of Alberta) was an abuse of process.[27] The Court of Appeal of Alberta acknowledged that the improper disclosure was

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[23] *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA) ("***Canam***") at para 55.

[24] *Canam* at para 31.

[25] *Clark v Complaints Inquiry Committee*, 2012 ABCA 152 ("***Clarke***").

[26] RSA 2000, c R-12 (the "***RAPA***").

[27] *Clark* at para 16.

not only a breach of the duty of confidence, but a specific contravention of the CIC's enabling legislation.[28] Similarly, Staff's public, unauthorized and improper disclosure of the Compelled Evidence was an abuse of the Commission's investigative process.

29. There is no question that Staff's unlawful disclosure of the Compelled Evidence is contrary to public policy; that is why it is prohibited by the *Securities Act* in the first place. The prohibition on disclosure of compelled evidence serves a critical public policy function, by balancing the various privacy and other interests at issue. The Receiver's Reports that Staff now seeks to introduce as Fresh Evidence incorporate and reference that Compelled Evidence. It is respectfully submitted that any Compelled Evidence included in the Reports would be a further breach of the *Securities Act* and an abuse of process, and should not be admitted.

(c) The Fresh Evidence Does Not Support the Commission's Allegations

30. The Commission submits in its factum at paragraph 15 that the Fresh Evidence is relevant to the appeal in two ways: First, that the Fresh Evidence "shows further misconduct by Furtado", and second, that the Fresh Evidence "provides this Court with information about the current commercial reality: the Go-To Entities are in financial distress and Furtado himself is in favour of selling the properties."[29] However, the reality is that it does neither.

(d) Acceptance of Adelaide Offer was Not Misconduct

31. The Commission states at paragraph 17(b) of its Factum that "[o]n December 10th, while Justice Pattillo's decision was under reserve, Furtado entered the Adelaide LP and its

[28] *Clark* at para 18.

[29] Commission's Factum at para 15.

general partner into an agreement to sell the Adelaide LP's properties" as evidence of misconduct by Mr. Furtado. However, this statement does not indicate any misconduct whatsoever. Neither the terms nor timing of the proposed transaction can fairly be interpreted as demonstrating "misconduct" by Furtado. On the contrary, the terms of the transaction were exceptional and highly favourable to the investors.[30] In fact, nowhere in the Reports does the Receiver take issue with the merits of the transaction.[31]

32. The timing of the transaction also fails to demonstrate any misconduct on the part of Furtado. The transaction was the culmination of months of negotiations.[32] Until the issuance of the Receivership Order, Furtado had ongoing fiduciary duties including acting in the best interests of the Appellants as well as their creditors, shareholders and other stakeholders. Moreover, legal counsel was engaged and was fully aware that Justice Pattillo's decision in respect of the Receivership Application was under reserve when the transaction was entered into.[33]

(e) Acceptance of Termination Requests was Not Misconduct

33. The Fresh Evidence fails to establish any misconduct in the Appellants' acceptance of termination requests from investors while the Receivership Order was under reserve. The Commission correctly states at paragraph 17(a) of its factum that on December 9, 2021, seven purchasers of pre-sold condominium units terminated their agreements of purchase

[30] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[31] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[32] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[33] Furtado Affidavit at para 8, Tab 1 to the Responding Motion Record, page 6.

and sale for units in the Glendale Project.[34] However, acceptance of these terminations simply does not constitute "further misconduct" by Furtado.

34. These pre-sale purchasers were employees (or immediate family members of employees) of Go-To Developments.[35] The Receivership Order put each of the employees' jobs at risk, and accordingly, they were permitted to terminate their contracts.[36] These employees were in fact subsequently terminated by the Receiver, without severance, resulting in financial hardship.[37] The terminations were accepted solely to assist the employees and their families, and do not, on any reasonable interpretation, demonstrate "further misconduct" on the part of Furtado or the Appellants.[38]

35. Furtado would not have benefitted from the termination of the agreements, and legal counsel was engaged when the decision to permit the terminations was made.[39] The Commission has failed to establish how the Fresh Evidence will show that cancellation of these pre-sale agreements demonstrates "misconduct" on the part of Furtado.

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[34] Commission's Factum at para 17(a). Note that these were 7 investors were among a group of 25 investors described by Mr. Furtado as "friends and family". See Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[35] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[36] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[37] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[38] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[39] Furtado Affidavit at paras 11-12, Tab 1 to the Responding Motion Record, pages 6-7.

(f) The Fresh Evidence Fails to Shed Light on any Relevant Commercial Reality

36. The Commission states that the Fresh Evidence "provides this Court with information about the current commercial reality: the Go-To Entities are in financial distress and Furtado himself is in favour of selling the properties."[40]

37. At the time of the appointment of the Receiver, the Appellants were in the process of numerous advantageous refinancing and restructuring transactions, all of which were thwarted as a result of the Receivership Order.[41] Any financial hardship faced by the Appellants has been caused by the appointment of the Receiver. The only "commercial reality" that can be shown through the Fresh Evidence is the post-Receivership damage and distress caused by the Receivership Order.

38. In contrast to many other projects in the real estate development industry in Ontario, every single one of the Go-To projects weathered the COVID-19 pandemic, which is in and of itself a testament to the commercial soundness of the Appellants and their projects.[42]

39. Mr. Furtado is not in favour of selling the properties. In fact, Mr. Furtado has been actively challenging the appointment of the Receiver since the issuance of the Receivership Order. If successful, the receivership proceeding, including the sale process, will be void; that is what Mr. Furtado is in favour of.[43]

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[40] Commission's Factum at para 15.

[41] Furtado Affidavit at para 13, Tab 1 to the Responding Motion Record, page 7.

[42] Furtado Affidavit at para 14, Tab 1 to the Responding Motion Record, page 7.

[43] Furtado Affidavit at para 22, Tab 1 to the Responding Motion Record, page 10.

40. The Commission attempts to rely on a supposed lack of opposition by Mr. Furtado and the investors to suggest that investors are supportive of the Receiver's sale process. This is certainly not the "commercial reality".

41. Furtado and the Appellants have been unwavering in their challenge to the Receivership Order and proceedings, and commenced the within appeal and sought an emergency stay of the Receivership Order within days of its issuance. Any lack of opposition to the Sale Process Motion by Mr. Furtado or the Appellants was simply a recognition that *if* the Receiver was to remain in place, then the Appellants' business would be destroyed and a liquidation of its assets would be the right course of action. But this recognition has in no way diminished their view that the hearing of the Receivership Application and appointment of the Receiver were wholly improper, unfair and unjust.[44]

42. A number of investors have communicated to Furtado their disapproval of the appointment of the Receiver, their opposition to the Receiver's sale process, and their support for Furtado.[45]

43. Mr. Parmpal Parmar, an investor in one of the Go-To entities has made it clear that since the appointment of the Receiver, he has been unable to obtain any comfort or certainty with respect to the return of his investment.[46] Mr. Parmar indicated that his discussions with the Receiver consistently left him with the impression that any challenge to the Receiver's sale process would not be worth pursuing. Mr. Parmar's evidence is that prior to the

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[44] Furtado Affidavit at para 21, Tab 1 to the Responding Motion Record, page 9.

[45] Furtado Affidavit at para 15, Tab 1 to the Responding Motion Record, page 7; Exhibit 1B to the Responding Motion Record, page 208.

[46] Affidavit of Parmpal Parmar sworn April 4th, 2022 ("**Parmar Affidavit**") at para 4, Tab 2 to the Responding Motion Record, page 229.

appointment of the Receiver, he was able to at any time communicate directly with Furtado regarding his investment, and that they had built a relationship based on mutual trust and confidence.[47]

44. The Commission states that the Fresh Evidence "illustrates to this Court both the magnitude and the risk to stakeholders, which includes investors, given the financial precarity of the Go-To entities as well as the absence of any opposition to the Receivership by any interested party except Furtado."[48]

45. The Commission's statements that the Fresh Evidence therefore sheds light on the "commercial reality" that the Go-To entities are in financial jeopardy and that Furtado and other stakeholders are supportive of the Receiver's sale process are blatantly incorrect.

46. The "commercial reality" which the Commission claims is evident on review of the Fresh Evidence simply does not exist. Neither the "financial jeopardy" that the Commission attempts to establish nor the lack of opposition to the Receiver's sale process are (i) true; nor (ii) relevant to the issue on the Appeal: Whether the Appellants were unfairly deprived of their right to a meaningful opportunity to respond to the case against them.

(g) Fresh Evidence Would Not Have Affected the Result

47. In order to be admitted, fresh evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[49]

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[47] Parmar Affidavit at para 4, Tab 2 to the Responding Motion Record, page 229.

[48] Commission's Factum at para 20.

[49] *Palmer* at page 775.

48. It is respectfully submitted that, even if admitted and accepted by this Court, the Fresh Evidence cannot reasonably be expected to have had any impact on the decision that forms the subject of this Appeal.

49. None of the: (i) transaction in respect of the Adelaide LP's properties, (ii) the termination of pre-sale purchase agreements, (iii) the purported "commercial reality" including the "financial jeopardy" of the Go-To entities, nor (iv) the lack of opposition to the Receiver's sale process, could reasonably be expected to have impacted Justice Pattillo's decision to grant the Receivership Order.

50. As described and detailed herein, the Commission has failed to demonstrate how the Adelaide transaction or the termination of the pre-sale purchase agreements demonstrate misconduct of any kind on the part of Furtado. Moreover, even if it were accepted that the Go-To entities were in "financial jeopardy" at the time of the Receivership Application, this could not have reasonably affected Justice Pattillo's decision. Finally, any lack of formal opposition by Furtado, the Appellants or the investors over the conduct of the receivership including implementation of the sale process cannot fairly be interpreted as support for same.

ii. With due diligence the Fresh Evidence could have been adduced on the Application

51. Fresh evidence should not be admitted if, by due diligence, it could have been adduced at first instance.[50] As a general rule, this means that evidence should not be admitted in civil cases if it could have been adduced in the court below.[51]

52. In the Commission's Factum at paragraph 7, the Commission asserts that the Fresh Evidence will show that "[…] while Justice Pattillo's decision in the application was under reserve, Furtado caused the Adelaide LP and its general partner to enter into a conditional sales agreement for the Adelaide LP's properties".

53. This is one example of evidence that could have been adduced on the Application had the Commission exercised appropriate due diligence. Furtado spent months negotiating the proposed transaction in respect of the Adelaide property.[52] With minimal due diligence and inquiry, the Commission could easily have obtained the relevant information, including the surrounding circumstances of the potential sale, the details of the transaction, and how beneficial the transaction would have been to investors.

54. Instead, the Commission ceased communicating with the Appellants in July 2021, and the Appellants did not hear anything further from the Commission until service of the Application Record.[53]

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[50] *Lafontaine-Rish Medical Group Limited v Global TV News Inc.* [2008] OJ No 76 (Div Ct) at para. 34.

[51] *Nissar v Toronto Transit Commission*, 2013 ONCA 361 at para. 38.

[52] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.

[53] Affidavit of Oscar Furtado sworn December 14, 2021 at paras. 12 and 18, Tab 4 to the Motion Record of the Appellants dated December 15, 2021, pages 48-50.

55. Similarly, Staff could have obtained information regarding the Appellants' financial condition at any time, given its power to compel evidence. Instead, for almost 6 months, the Commission made no attempts whatsoever to solicit further information or obtain any update on the status of the business or any proposed transactions.

56. The Commission's attempt to introduce the Reports to try to establish these points is simply a belated and misguided attempt to bolster its case with evidence that existed and was available at first instance, and which could have been obtained through reasonable due diligence. On this basis alone, it is respectfully submitted that the Fresh Evidence is inadmissible and the Commission's Motion should be dismissed.

iii. The Fresh Evidence is Not Sufficiently Credible

57. Fresh evidence should not be admitted unless it is credible in the sense that it is reasonably capable of belief. Each of the Reports makes clear that the Receiver relies on information obtained by third parties, without stating the source of same. The Reports also contain disclaimers that make explicitly clear the limitations on their reliability.

58. As such, it is respectfully submitted that the Reports fall short of the standard of credibility that should be imposed when determining admissibility on an originating application.

59. The reports of receivers and other court-appointed officers are often admitted as evidence in motions, where they are viewed as somewhat analogous to affidavits. However, this does not mean that such reports would be admissible in all court proceedings, particularly where an affidavit with similar content would not be admissible. Affidavits containing statements of information and belief on contentious issues may be admissible on motions, but they are

not admissible on originating applications, where a higher standard of credibility is applied under the *Rules*[54].

60. Rule 39.01(4) and (5) provide as follows:

> Contents — Motions
>
> (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).
>
> Contents — Applications
>
> (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

61. The Reports are rife with statements of information and belief on issues that are contentious. While the Reports are not affidavits, it is respectfully submitted that this Court ought to import a similar standard as that prescribed in Rule 39 when determining whether they are sufficiently credible for admission on an originating application.

62. The Appellants have consistently and categorically disputed all of the Commission's allegations regarding any wrongdoing by them, both before the Court of Appeal (*i.e.*, through an urgent motion for a stay of the Receivership and the Appeal itself) and before the Commission (*e.g.*, through the Appellants' response to the Commission's materials on this Motion). The Commission's allegations of wrongdoing are unquestionably

[54] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194., ss. 39.01(4)-(5).

contentious, whether those allegations are contained in the Commission's own materials or the Receiver's Reports.[55]

63. The Reports also fail the credibility test because they are incomplete, insofar as they fail to disclose all information relevant to the issues in respect of which the Commission seeks their admission. For example, the description of the proposed transaction in respect of the Adelaide LP's properties very notably excludes any mention of the proposed purchase price, the impact it would have had on creditors, investors and other stakeholders, or any criticism of the economics of the transaction itself. In fact, the proposed purchase price in the Adelaide Offer was significantly above market value, represented a 57% increase over the acquisition cost, and would have been more than sufficient to pay all creditors and other investors in full.[56]

PART V - ORDER SOUGHT

64. For the foregoing reasons, the Appellants seek an Order dismissing the Commission's Motion for admission of the Fresh Evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of April, 2022.

Gregory Azeff & Monica Faheim

MILLER THOMSON LLP
Lawyers for Appellants

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[55] Responding Affidavit of Oscar Furtado sworn April 2nd, 2022 ("**Furtado Affidavit**") at paras. 3, 7, 10-11, 13, and 20-22, Tab 1 to the Responding Motion Record of the Appellants dated April 4, 2022 (the "**Responding Motion Record**").

[56] Furtado Affidavit at para. 7, Tab 1 to the Responding Motion Record, page 5.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3.
2. *R. v. Palmer*, [1980] 1 SCR 759.
3. *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ONCA).
4. *Sharpe (Re)*, 2022 ONSEC 3, (2022-03-30) (File Nos. 2021-26 and 2021-15).
5. *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA)
6. *Clark v Complaints Inquiry Committee*, 2012 ABCA 152.
7. *Lafontaine-Rish Medical Group Limited v Global TV News Inc.* [2008] OJ No 76 (Div Ct).
8. *Nissar v Toronto Transit Commission*, 2013 ONCA 361.

SCHEDULE "B"
RELEVANT STATUTES

***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(b)**

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

Rules of Civil Procedure **R.R.O. 1990, Reg. 194, ss. 39.01(4)-(5).**

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit
Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

Evidence by Cross-Examination on Affidavit
On a Motion or Application

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

Evidence by Examination of a Witness
Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

Evidence by Examination for Discovery
Adverse Party's Examination

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.

Party's Examination

(2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.

***Securities Act*, R.S.O. 1990, c. S.5, ss. 16-17.**

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

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

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358; 2019, c. 15, Sched. 34, s. 1 (1).

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

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

(b) the disclosure is to the person's or company's insurer or insurance broker, and the person or company, or his, her or its counsel,

(i) gives written notice of the intended disclosure to a person appointed by the order under section 11 at least 10 days before the date of the intended disclosure,

(ii) includes in that written notice the name and head office address of the insurer or insurance broker and the name of the individual acting on behalf of the insurer or insurance broker to whom the disclosure is intended to be made, as applicable, and

(iii) on making the disclosure, advises the insurer or insurance broker that the insurer or insurance broker is bound by the confidentiality requirements in subsection (2) and obtains a written acknowledgement from the insurer or insurance broker of this advice. 2019, c. 15, Sched. 34, s. 1 (2).

Confidentiality
(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and 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. 2002, c. 18, Sched. H, s. 7; 2019, c. 15, Sched. 34, s. 1 (3).

Disclosure by Commission
17 (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

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

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

(c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

Opportunity to object
(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained. 1994, c. 11, s. 358.

Order without notice
(2.1) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153. 2013, c. 2, Sched. 13, s. 1 (1).

Disclosure to police
(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) or (2.1) authorizing the disclosure of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(a) a member of a municipal, provincial, federal or other police service; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (2).

Terms and conditions
(4) An order under subsection (1) or (2.1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (3).

Disclosure by court
(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding
(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210; 2016, c. 5, Sched. 26, s. 1.

Disclosure to police
(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(a) a member of a municipal, provincial, federal or other police service; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

ONTARIO SECURITIES COMMISSION	and	**GO-TO DEVELOPMENTS HOLDINGS INC. *et al***	Court of Appeal File No.: C70114
			Court File No: CV-21-00673521-00CL
Applicant (Respondent in Appeal)		Respondents (Appellants in Appeal)	

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
TORONTO

RESPONDING FACTUM OF THE APPELLANTS
(Fresh Evidence Motion)

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THE GLOBE AND MAIL

Former Bridging Finance CEO seeks to quash OSC investigation

DAVID MILSTEAD > INSTITUTIONAL INVESTMENT REPORTER

PUBLISHED JULY 10, 2021

FOR SUBSCRIBERS

David Sharpe, the former CEO of Bridging Finance Inc., is seeking to shut down the Ontario Securities Commission investigation of the company, arguing the OSC improperly disclosed the transcript of his interview with the regulator.

Mr. Sharpe has filed an application seeking an order to quash an investigation by OSC enforcement staff and bar the regulator from using evidence it obtained from the interview. He also wants the transcript removed from the website of Bridging Finance's receiver.

The application argues the OSC compelled him to sit for an interview over three sessions, ending on April 29, and the summons referenced the confidentiality provisions of Ontario's Securities Act, which say no one can disclose the name of any person examined or any testimony given. Mr. Sharpe said he expected privacy and confidentiality with respect to his testimony as a result.

However, he said, the OSC filed various documents in court on April 30 that included excerpts of the transcript or featured it in its entirety, then posted it publicly on the website of Bridging Finance's court-appointed receiver, PricewaterhouseCoopers. The Globe and Mail published an article on May 3 that quoted some of his testimony. Mr. Sharpe said the article is "highly prejudicial."

The confidentiality provisions of the Securities Act include an exemption allowing disclosure if the OSC "considers that it would be in the public interest." However, Mr. Sharpe claims OSC staff did not obtain an order from the regulator's commissioners authorizing it

to disclose the interview transcript. He said he was given no warning nor opportunity to oppose the disclosure.

Bridging Finance's largest borrower to file for creditor protection, owes $208-million to the private lender

Bridging Finance's missing man: Who is Sean McCoshen, the dealmaker tied up in the private lender's fall?

The OSC has not launched a regulatory case against Mr. Sharpe, but it has alleged in court filings related to the receivership that Bridging Finance misappropriated $35-million from an investment fund it manages to complete an acquisition for its own benefit; that Mr. Sharpe received $19.5-million in his personal chequing account from a client to whom Bridging had lent more than $100-million; and that Bridging lent $32-million to a client two weeks before the same client bought a 50-per-cent stake in Bridging.

Those transactions constitute "serious misconduct and breaches of Ontario securities law," the OSC alleged, adding that Bridging and "certain members of its senior management have failed to deal fairly, honestly and in good faith with the investors" in its funds.

In an early May interview with The Globe, Mr. Sharpe admitted his company needed to beef up its investor disclosures, but he said he was mystified by the move to put his company under the control of a receiver. The undisclosed payments are actually loans, he said. "We are stunned by this."