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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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.

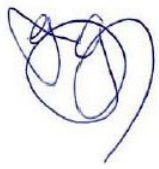
Reference: Endorsement, at paras. 6, 8-18, 22-24, 26, 31; Compendium of the Appellants, at Tab 3, pages 35-38.

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)