

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

FACTUM OF THE MOVING PARTY (RESPONDENT IN APPEAL)
(Fresh Evidence Motion)

March 10, 2022

ONTARIO SECURITIES COMMISSION
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8

Erin Hault (LSO No. 54002C)
Tel.: (416) 593-8290
Email: ehault@osc.gov.on.ca

Braden Stapleton (LSO No. 82537F)
Tel.: (416) 595-8903
Email: bstapleton@osc.gov.on.ca

Lawyers for the Ontario Securities Commission

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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 GTDHP*” 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:

<u>(unaudited; \$)</u>	<u>Cash</u>	<u>Accounts Payable</u>	<u>Difference</u>
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.

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 Hout
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.

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Proceeding Commenced at Toronto

**FACTUM OF THE MOVING PARTY
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20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Erin Hault (LSO No. 54002C)

Tel.: (416) 593-8290

Email: ehault@osc.gov.on.ca

Braden Stapleton (LSO No. 82537F)

Tel.: (416) 595-8903

Email: bstapleton@osc.gov.on.ca

Lawyers for the Ontario Securities Commission