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

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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,

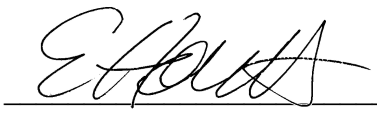
creditors, suppliers, purchasers of pre-sold units, etc. – whose interests are affected, none of whom have challenged the receivership. In the circumstances, the interests of justice support dismissing the appeal.

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

Erin Hoult (LSO No. 54002C)

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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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