Court File No.: 40267

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

BETWEEN:

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP AND 2506039 ONTARIO LIMITED

Applicants (Respondents)

- and –

ONTARIO SECURITIES COMMISSION

Respondent (Appellant)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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INDEX

1. Furtado[1] raised numerous grounds in support of his application for leave to appeal the decision of the Court of Appeal for Ontario to this Honourable Court, none of which have been directly responded to by the Commission in its two-page responding letter. Instead, it appears that the Commission's responding submission is aimed at attempting to minimize the importance of issues it would like to avoid being brought to light and considered by this Honourable Court.

2. In support of his application, Furtado argues that the Commission impermissibly circumvented the statutory scheme in the *Securities Act* in respect of receiverships by providing short notice to parties who did not have counsel, thereby avoiding the statutorily prescribed 10 day comeback provision which applies to *ex parte* receivership applications. In this case, as could be expected in any other case, the result was that prejudicial findings were made by the Ontario Superior Court of Justice (and subsequently relied upon by the Court of Appeal for Ontario) based on an entirely one-sided record. This issue is plainly of national and public importance. Its determination will govern the rules of fairness and procedure applicable to all future receivership proceedings commenced by the Commission and other securities regulators. The Commission has not advanced any arguments to the contrary.

3. Further, the Commission has not responded to the numerous issues of national and public importance that are engaged as a result of the Commission's conduct in respect of the Tribunal's decision in *Sharpe*.[2] In particular:

(i) The Commission has not addressed its Staff's failure to disclose the pending-*Sharpe* application to the Ontario Superior Court of Justice when the receivership application

[1] Unless otherwise defined herein, all capitalized terms have the same meaning as ascribed to them in Furtado's Memorandum of Argument dated June 27, 2022.

[2] *Sharpe (Re)*, 22 ONSEC 3 [***Sharpe***].

was brought in this case, despite the fact that the Commission's application record also contained compelled evidence. The Tribunal found, in *Sharpe*, that it was the Commission's duty to raise the issue of the lawfulness of publicly filing compelled evidence with the Court absent a prior order of the Tribunal when seeking to have a receiver appointed.[3] The Commission has ignored this finding and, instead, adopted the comments made by the Court of Appeal for Ontario on an issue it purportedly declined to address.

(ii) The Commission has also not provided any legal justification for its conduct in challenging the validity of its own Tribunal's decision in *Sharpe* before the Court of Appeal for Ontario in this proceeding, which is unrelated to *Sharpe*.

(iii) Rather than correcting the record with a view to ensuring that this Honourable Court renders its decision with accurate information, the Commission repeats and relies in its responding submissions on a known error of fact made by the Court of Appeal Ontario. The Commission states that "[n]ot only did the Applicants not argue inadmissibility below, **they took a contrary position that production of the complete transcripts was required** (as opposed to excerpts that were included) (emphasis added)." Furtado has had no change of position on this point. He sought *disclosure* of the Transcripts *to himself* to make full answer and defence to the Commission's application to appoint a receiver.[4] He categorically did not consent to the public filing and posting of such evidence by the Commission or the receiver, and the Commission is aware of that fact.

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[3] *Sharpe*, *supra* at paras. 67-68.

[4] Affidavit of Oscar Furtado sworn December 14, 2021 at para. 13, Application for Leave to Appeal Record Tab 6, p. 360.

4. Finally, the Commission takes the position, without advancing any argument or citing any authority, that the proposed appeal does not merit this Court's attention because section 17(6) of the *Securities Act* was amended effective April 29, 2022. The Commission's submission appears to be that the effect of the amendment is to allow for the public disclosure of compelled evidence and accordingly that, had the amendment been in effect when the Commission applied to the Ontario Superior Court of Justice for the appointment of a receiver in this proceeding, the Commission's unsupervised and unrestrained public filing of compelled evidence (which was in breach of the *Securities Act* at that time) would have been lawful.

5. The Commission has grossly over-simplified the matter and ignored the presumption of confidentiality applicable to compelled evidence pursuant to section 16 of the *Securities Act*, the scheme of Part VI of the *Securities Act* in respect of the disclosure of compelled evidence (including the Tribunal's oversight function), and the applicable jurisprudence which unequivocally establishes that those who provide compelled evidence enjoy rights of privacy that must be taken into account when public disclosure is being considered.[5] Further, the Commission's interpretation fails to take into account and offends the express prohibition under s. 17(7) of the *Securities Act* on disclosure of compelled testimony to law enforcement without the written consent of the person from whom such testimony was compelled.

6. In any event, while the amended s. 17(6) has not yet been considered by the courts or the Tribunal, there is no indication that the Legislature intended to eliminate the presumption of confidentiality of compelled evidence created by s. 16 of the *Securities Act* or to effectively put an end to the Tribunal's duty to protect the privacy interests and confidences of compelled witnesses,

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[5] *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 [***Deloitte***] at para. 29.

as recognized by this Court in *Deloitte & Touche LLP. v. Ontario (Securities Commission)*[6] and by the Tribunal in *Sharpe*.

7. The Commission's position also ignores the genesis of s. 17(6) (which was initially worded similarly to the current version). This provision was added to the *Securities Act* to permit enforcement Staff of the Commission to make disclosure of compelled evidence to respondents to enforcement proceedings without having to obtain a prior order of the adjudicative tribunal of the Commission under s. 17(1). In considering s. 17(6), the Ontario Divisional Court in *A Co. v. Naster* noted that it did not understand it to permit the disclosure of compelled evidence to the public at large.[7] When such evidence has been disclosed to the parties to a proceeding, its introduction into evidence in a public hearing occurs on notice and under the supervision of the Tribunal.

8. In short, the amendment to section 17(6) does not render nugatory the issues in respect of which leave to appeal is sought by Furtado. To the contrary, this Court's intervention is necessary to establish and affirm that the privacy rights of compelled witnesses must be respected and minimally impaired by administrative tribunals seeking to disclose such evidence publicly. This issue is one of national importance given that numerous administrative tribunals across the country have been granted the power to compel evidence.

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[6] *Deloitte*, *supra* at para. 29.
[7] *A Co. v. Naster* (2001), 143 O.A.C. 356, 2001 CarswellOnt 728 at paras. 7, 25-26, 30 (Ont. Div. Ct.).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September, 2022.

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TABLE OF AUTHORITIES

Authority	**Paragraph(s)**
Sharpe (Re), 22 ONSEC 3	3, 3(i)
Deloitte & Touche LLP v. Ontario (Securities Commission), 2003 SCC 61	5
A Co. v. Naster (2001), 143 O.A.C. 356, 2001 CarswellOnt 728	6

STATUES AND REGULATIONS RELIED UPON

Statute	**Paragraphs**
Securities Act, R.S.O. 1990, c.S.5, as amended / Loi sur les valeurs mobilières, L.R.O. 1990, chap. S.5	5, 6, 7