Court of Appeal File No. C70114
Court File No.: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

- and –

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

Respondents
(Appellants in Appeal)

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

RESPONDING FACTUM OF THE APPELLANTS
(Fresh Evidence Motion)

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RESPONDING FACTUM OF THE APPELLANTS

PART I - OVERVIEW

1. This factum is filed in response to a Motion by the Ontario Securities Commission (the "**Commission**") to have new evidence (the "**Fresh Evidence**") admitted in connection with the Commission's response to an appeal of the Order of the Honourable Mr. Justice Pattillo of the Ontario Superior Court of Justice (Commercial List) issued December 10, 2021 (the "**Receivership Order**"), granted upon the Application (the "**Receivership Application**") of the Commission.[1]

2. The Commission contends that the Fresh Evidence: (i) establishes that Justice Pattillo's concerns were justified, and (ii) demonstrates the "commercial reality" of the Appellants' current situation. The Commission is incorrect on both counts. First, the Fresh Evidence does not establish that Justice Pattillo's concerns were justified. Rather, the Commission mischaracterizes the content of the Reports to baselessly impugn commercially reasonable proposed transactions that would have been to the investors' benefit, by falsely insinuating that these transactions were driven by improper motives and personal gain. Second, any significant challenges the Appellants may now face are directly attributable to the issuance of the Receivership Order. It would be a perverse result if the damage and distress that result from an improperly-appointed receiver could then be used to justify keeping that receiver in place.

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

3. Accordingly, the Appellants seek an Order dismissing the Commission's Motion. None of the Fresh Evidence meets any of the criteria required for its admission: it could have been obtained by due diligence and adduced at first instance; it is neither credible nor reliable; it is neither relevant to any decisive or potentially decisive issue on the Receivership Application nor would it have affected the result; and it would not be conclusive on any issue on this Appeal.

PART II - THE FACTS

A. Background

4. Go-To Developments Holdings Inc. ("**GTDH**") operates a property development business. GTDH conducts its business through an organizational structure that includes a number of affiliated limited partnerships (the "**LPs**"). GTDH is the sole shareholder in respect of each of the corporate general partners (the "**GPs**", and collectively with GTDH and the LPs, "**Go-To Developments**") in the structure. Each of the LPs owns, alone or with others, one or more of the Real Properties, all of which are located in Ontario.[2]

5. Oscar Furtado ("**Furtado**") is the founder and guiding mind behind Go-To Developments.[3]

B. Staff's Investigation

6. The Enforcement Branch ("**Staff**") of the Commission has been conducting an investigation of Go-To Developments since before March, 2019. In the course of its investigation of Go-To Developments, the Commission interviewed Furtado three times

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

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

for a total of more than 2.5 days: (i) September 24, 2020, (ii) November 5, 2020, and (iii) July 7, 2021.[4] Following the last interview, the Commission did not substantively communicate further with the Mr. Furtado or the Appellants until December 2021.

C. Notice of the Receivership Application

7. In the evening of Monday December 6, 2021, the Commission first notified the Appellants of an application (through their former counsel, Darryl Mann of Torkin Manes) for the appointment of receiver and manager, being the Receivership Application returnable on Thursday December 9, 2021, and provided Mr. Mann (acting on a limited retainer) with an electronic copy of the Commission's Application Record (the "**Application Record**").[5]

8. The Application Record was comprised of a number of documents, including the Collins Affidavit, which is 1,958 pages long and includes 113 exhibits.[6]

D. The Collins Affidavit

9. The Collins Affidavit discloses, incorporates and references evidence that was compelled by Staff under section 11 and 13 of the *Securities Act* (Ontario) (the "**Compelled Evidence**"), such that the unlawful evidence is inextricable from the Collins Affidavit itself. Exhibits to the Collins Affidavit include 28 excerpts totalling 206 pages of the transcripts of Mr. Furtado's compelled interview. In addition, in the body of her Affidavit,

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[4] Collins Affidavit, at para 65; Appellants' Compendium at Tab 4, page 84.

[5] Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

[6] Application Record; Appellants' Compendium at Tab 4, pages 40 to 2,077.

Ms. Collins directly references the substance of (and quotes from) Mr. Furtado's Compelled evidence no less than 22 times.[7]

E. The Hearing of the Receivership Application

10. The Receivership Application was returnable before Justice Pattillo at approximately 2:00 pm EST on Thursday December 9, 2021 (the "**Hearing**"), less than 72 hours after Mr. Mann's receipt of notice of the Hearing and access to the Application Record.[8]

F. The Appellants' Adjournment Request and Proposed Terms

11. At the outset of the Hearing, Mr. Mann advised Justice Pattillo that it was effectively impossible for Furtado or the other respondents to the Receivership Application to properly respond to the Receivership Application, in light of factors that included:[9]

    (a) the late service of the Application Record;

    (b) the massive size of the Collins Affidavit;

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

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

12. As such, Mr. Mann requested a short adjournment of the Receivership Application, on terms which included a continuation of the Commission's freeze directions and the

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[7] Affidavit of Oscar Furtado sworn December 14, 2021 at para. 39; Collins Affidavit at paras. 17, 19, 24, 28, 45, 50-54, 57, 65-70, 73-78, 85, Compendium of the Appellants at Tab 3, pages 67-71, 76, 78-79, 81, 84-90, 100.

[8] Notice of Application; Appellants' Compendium at Tab 4.

[9] Endorsement, at para. 3; Appellants' Compendium at Tab 3, page 35.

appointment of a monitor pending the hearing of the Receivership Application (the "**Proposed Terms**"):[10]

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

13. For the reasons set out in the Endorsement, on December 10, 2021, Justice Pattillo declined to grant the adjournment and issued the Receivership Order.[11]

14. As set out in the Endorsement, Justice Pattillo found that the respondents (Appellants on this appeal) had received sufficient notice of the Receivership Application to have filed responding material, and dismissed the adjournment request, including the Proposed Terms. Justice Pattillo also found that despite the length of time the Commission's investigation had been ongoing, having regard to the interests of the investors, it was necessary that the Receiver be appointed immediately.[12]

H. The Appeal

15. GTDH and the other Receivership Entities and respondents (collectively, the "**Appellants**") filed a Notice of Appeal dated December 14, 2021 (the "**Notice of Appeal**") in respect of the Receivership Order and shortly thereafter unsuccessfully brought a motion before this Court for a stay of the Receivership Order.[13]

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[10] Endorsement, at para. 4; Appellants' Compendium at Tab 3, page 35.

[11] Endorsement; Appellants' Compendium at Tab 3, pages 34 to 39.

[12] Endorsement, at paras. 6-7; Appellants' Compendium at Tab 3, page 35.

[13] Decision of Sossin J.A. dated December 29, 2021 in Court File No. M53047 (C70114).

I. The Motion & The Proposed Fresh Evidence

16. The Commission has brought a Motion for the admission of the Fresh Evidence, which includes the following:[14]

(a) First Report of the Receiver dated December 20, 2021 (the "**First Report**");

(b) Second Report of the Receiver dated February 3, 2022 (the "**Second Report**");

(c) Notice of Motion of the Receiver dated February 3, 2022;

(d) Notice of Motion of the Appellants (Respondents in the Application) dated February 8, 2022; and

(e) Order and Endorsement of Justice Conway dated February 9, 2022.

PART III - ISSUES ON MOTION

17. The sole issue on this Motion is whether the Fresh Evidence should be admitted. For the reasons described below, it is respectfully submitted that the Commission's motion to admit the Fresh Evidence ought to be dismissed.

PART IV - LAW & ARGUMENT

A. Test for Admission of Fresh Evidence

18. While the Court has the jurisdiction to allow parties to adduce fresh evidence on appeal,[15] such an order will not be granted unless specific conditions are met. Specifically, the Court

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[14] Factum of the Ontario Securities Commission dated March 10, 2022 ("**Commission's Factum**") at para 6.

[15] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(b), Schedule B.

may admit fresh evidence on appeal only where the evidence: (i) is credible; (ii) could not have been obtained by due diligence before the hearing below; and (iii) either:

(a) is relevant in that it bears on a decisive or potentially decisive issue, and could be expected to affect the result; or

(b) would likely be conclusive of an issue on appeal.[16]

B. Analysis of the Commission's Fresh Evidence

i. The Fresh Evidence is Irrelevant

19. Fresh evidence must be relevant in order to be admissible. Fresh evidence should not be admitted unless it is relevant in the sense that it bears on a decisive or potentially decisive issue or would be conclusive of an issue on an appeal.[17] The proposed Fresh Evidence should not be admissible on the Appeal of the Receivership Order, as it is: (a) not relevant to any decisive or potentially decisive issue on the Application and would not have affected the result; and (b) would not be conclusive of any issue on the Appeal.

(a) The Fresh Evidence is Irrelevant as it is Inadmissible

20. To the extent that the Fresh Evidence in the Receiver's First Report and Second Report (together, the "**Reports**") incorporates the Compelled Evidence, it is irrelevant, as it is inadmissible and thus could not have had any bearing on any decisive issue in the Application or conclusive issue on the Appeal. Disclosure of the Compelled Evidence was

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[16] *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3 ("***Chiang***"), at paras. 72-77, comparing the tests in *R. v. Palmer*, [1980] 1 SCR 759 ("***Palmer*"**), at p. 775 and *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ONCA) ("***Sengmueller***") at p. 5.

[17] *Palmer* at p. 775.

an abuse of process and should never have been before the Court in the first place, whether in the Collins Affidavit or in the derivative form such as the Reports.[18]

21. The Tribunal's recent decision in the *Sharpe* case is directly on point.[19] The *Sharpe* decision clearly and unequivocally establishes that Staff is prohibited under section 16 of the *Securities Act* from disclosing compelled evidence without first obtaining an order authorizing the disclosure under section 17.[20]

22. The Tribunal in *Sharpe* explicitly disposes of Staff's argument that the Commission need not resort to section 17 of the *Securities Act* when it chooses to apply to court for the appointment of a receiver.[21]

23. The Collins Affidavit is built almost entirely upon cherry-picked, out-of-context statements from the Compelled Evidence, such that the Compelled Evidence is inextricable from the Affidavit itself.

24. The Receiver's Reports included in the Fresh Evidence incorporate and reference the Collins Affidavit and the Compelled Evidence by Staff contained therein.[22] Insofar as the Reports include Compelled Evidence, they are the "fruit of the poison tree". It is respectfully submitted that such "derivative" disclosure would also be in breach of the *Securities Act* and thus an abuse of process, and should not be considered by any court.

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[18] Reasons for Decision, *Sharpe (Re)*, 2022 ONSEC 3, (2022-03-30) (File Nos. 2021-26 and 2021-15) ("***Sharpe***") at para 29.

[19] *Sharpe* at para 29.

[20] *Securities Act*, R.S.O. 1990, c. S.5, ss. 16-17.

[21] *Sharpe* at paras. 74-75.

[22] See for example, Section 2.0, paragraph 2 and Section 3.1, paragraph 4 of First Report.

(b) Abuse of Process

25. The Collins Affidavit and the balance of the Commission's Receivership Application materials unlawfully disclose the Compelled Evidence in violation of section 16 of the *Securities Act* and constitute an abuse of process.

26. The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.[23]

27. Abuse of process has been described by this Court as a "…discretionary principle that is not limited by any set number of categories." It is an intangible principle that has been used, for example, to bar proceedings that are inconsistent with the objectives of public policy.[24]

28. Notably, improper disclosure of confidential information in the course of an investigation by a regulatory body has been held to render the investigation an abuse of process.[25] The Court of Appeal of Alberta in *Clarke v Complaints Inquiry Committee* upheld the decision of an appeal panel appointed under the *Regulated Accounting Profession Act*[26] that found that an investigation undertaken by the Complaints Inquiry Committee ("**CIC**") (the prosecutorial branch of the Institute of Chartered Accountants of Alberta) was an abuse of process.[27] The Court of Appeal of Alberta acknowledged that the improper disclosure was

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[23] *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA) ("***Canam***") at para 55.
[24] *Canam* at para 31.
[25] *Clark v Complaints Inquiry Committee*, 2012 ABCA 152 ("***Clarke***").
[26] RSA 2000, c R-12 (the "***RAPA***").
[27] *Clark* at para 16.

not only a breach of the duty of confidence, but a specific contravention of the CIC's enabling legislation.[28] Similarly, Staff's public, unauthorized and improper disclosure of the Compelled Evidence was an abuse of the Commission's investigative process.

29. There is no question that Staff's unlawful disclosure of the Compelled Evidence is contrary to public policy; that is why it is prohibited by the *Securities Act* in the first place. The prohibition on disclosure of compelled evidence serves a critical public policy function, by balancing the various privacy and other interests at issue. The Receiver's Reports that Staff now seeks to introduce as Fresh Evidence incorporate and reference that Compelled Evidence. It is respectfully submitted that any Compelled Evidence included in the Reports would be a further breach of the *Securities Act* and an abuse of process, and should not be admitted.

(c) The Fresh Evidence Does Not Support the Commission's Allegations

30. The Commission submits in its factum at paragraph 15 that the Fresh Evidence is relevant to the appeal in two ways: First, that the Fresh Evidence "shows further misconduct by Furtado", and second, that the Fresh Evidence "provides this Court with information about the current commercial reality: the Go-To Entities are in financial distress and Furtado himself is in favour of selling the properties."[29] However, the reality is that it does neither.

(d) Acceptance of Adelaide Offer was Not Misconduct

31. The Commission states at paragraph 17(b) of its Factum that "[o]n December 10th, while Justice Pattillo's decision was under reserve, Furtado entered the Adelaide LP and its

[28] *Clark* at para 18.

[29] Commission's Factum at para 15.

general partner into an agreement to sell the Adelaide LP's properties" as evidence of misconduct by Mr. Furtado. However, this statement does not indicate any misconduct whatsoever. Neither the terms nor timing of the proposed transaction can fairly be interpreted as demonstrating "misconduct" by Furtado. On the contrary, the terms of the transaction were exceptional and highly favourable to the investors.[30] In fact, nowhere in the Reports does the Receiver take issue with the merits of the transaction.[31]

32. The timing of the transaction also fails to demonstrate any misconduct on the part of Furtado. The transaction was the culmination of months of negotiations.[32] Until the issuance of the Receivership Order, Furtado had ongoing fiduciary duties including acting in the best interests of the Appellants as well as their creditors, shareholders and other stakeholders. Moreover, legal counsel was engaged and was fully aware that Justice Pattillo's decision in respect of the Receivership Application was under reserve when the transaction was entered into.[33]

(e) Acceptance of Termination Requests was Not Misconduct

33. The Fresh Evidence fails to establish any misconduct in the Appellants' acceptance of termination requests from investors while the Receivership Order was under reserve. The Commission correctly states at paragraph 17(a) of its factum that on December 9, 2021, seven purchasers of pre-sold condominium units terminated their agreements of purchase

[30] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[31] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[32] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.
[33] Furtado Affidavit at para 8, Tab 1 to the Responding Motion Record, page 6.

and sale for units in the Glendale Project.[34] However, acceptance of these terminations simply does not constitute "further misconduct" by Furtado.

34. These pre-sale purchasers were employees (or immediate family members of employees) of Go-To Developments.[35] The Receivership Order put each of the employees' jobs at risk, and accordingly, they were permitted to terminate their contracts.[36] These employees were in fact subsequently terminated by the Receiver, without severance, resulting in financial hardship.[37] The terminations were accepted solely to assist the employees and their families, and do not, on any reasonable interpretation, demonstrate "further misconduct" on the part of Furtado or the Appellants.[38]

35. Furtado would not have benefitted from the termination of the agreements, and legal counsel was engaged when the decision to permit the terminations was made.[39] The Commission has failed to establish how the Fresh Evidence will show that cancellation of these pre-sale agreements demonstrates "misconduct" on the part of Furtado.

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[34] Commission's Factum at para 17(a). Note that these were 7 investors were among a group of 25 investors described by Mr. Furtado as "friends and family". See Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[35] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[36] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[37] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[38] Furtado Affidavit at para 11, Tab 1 to the Responding Motion Record, page 6.

[39] Furtado Affidavit at paras 11-12, Tab 1 to the Responding Motion Record, pages 6-7.

(f) The Fresh Evidence Fails to Shed Light on any Relevant Commercial Reality

36. The Commission states that the Fresh Evidence "provides this Court with information about the current commercial reality: the Go-To Entities are in financial distress and Furtado himself is in favour of selling the properties."[40]

37. At the time of the appointment of the Receiver, the Appellants were in the process of numerous advantageous refinancing and restructuring transactions, all of which were thwarted as a result of the Receivership Order.[41] Any financial hardship faced by the Appellants has been caused by the appointment of the Receiver. The only "commercial reality" that can be shown through the Fresh Evidence is the post-Receivership damage and distress caused by the Receivership Order.

38. In contrast to many other projects in the real estate development industry in Ontario, every single one of the Go-To projects weathered the COVID-19 pandemic, which is in and of itself a testament to the commercial soundness of the Appellants and their projects.[42]

39. Mr. Furtado is not in favour of selling the properties. In fact, Mr. Furtado has been actively challenging the appointment of the Receiver since the issuance of the Receivership Order. If successful, the receivership proceeding, including the sale process, will be void; that is what Mr. Furtado is in favour of.[43]

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[40] Commission's Factum at para 15.

[41] Furtado Affidavit at para 13, Tab 1 to the Responding Motion Record, page 7.

[42] Furtado Affidavit at para 14, Tab 1 to the Responding Motion Record, page 7.

[43] Furtado Affidavit at para 22, Tab 1 to the Responding Motion Record, page 10.

40. The Commission attempts to rely on a supposed lack of opposition by Mr. Furtado and the investors to suggest that investors are supportive of the Receiver's sale process. This is certainly not the "commercial reality".

41. Furtado and the Appellants have been unwavering in their challenge to the Receivership Order and proceedings, and commenced the within appeal and sought an emergency stay of the Receivership Order within days of its issuance. Any lack of opposition to the Sale Process Motion by Mr. Furtado or the Appellants was simply a recognition that *if* the Receiver was to remain in place, then the Appellants' business would be destroyed and a liquidation of its assets would be the right course of action. But this recognition has in no way diminished their view that the hearing of the Receivership Application and appointment of the Receiver were wholly improper, unfair and unjust.[44]

42. A number of investors have communicated to Furtado their disapproval of the appointment of the Receiver, their opposition to the Receiver's sale process, and their support for Furtado.[45]

43. Mr. Parmpal Parmar, an investor in one of the Go-To entities has made it clear that since the appointment of the Receiver, he has been unable to obtain any comfort or certainty with respect to the return of his investment.[46] Mr. Parmar indicated that his discussions with the Receiver consistently left him with the impression that any challenge to the Receiver's sale process would not be worth pursuing. Mr. Parmar's evidence is that prior to the

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[44] Furtado Affidavit at para 21, Tab 1 to the Responding Motion Record, page 9.

[45] Furtado Affidavit at para 15, Tab 1 to the Responding Motion Record, page 7; Exhibit 1B to the Responding Motion Record, page 208.

[46] Affidavit of Parmpal Parmar sworn April 4th, 2022 ("**Parmar Affidavit**") at para 4, Tab 2 to the Responding Motion Record, page 229.

appointment of the Receiver, he was able to at any time communicate directly with Furtado regarding his investment, and that they had built a relationship based on mutual trust and confidence.[47]

44. The Commission states that the Fresh Evidence "illustrates to this Court both the magnitude and the risk to stakeholders, which includes investors, given the financial precarity of the Go-To entities as well as the absence of any opposition to the Receivership by any interested party except Furtado."[48]

45. The Commission's statements that the Fresh Evidence therefore sheds light on the "commercial reality" that the Go-To entities are in financial jeopardy and that Furtado and other stakeholders are supportive of the Receiver's sale process are blatantly incorrect.

46. The "commercial reality" which the Commission claims is evident on review of the Fresh Evidence simply does not exist. Neither the "financial jeopardy" that the Commission attempts to establish nor the lack of opposition to the Receiver's sale process are (i) true; nor (ii) relevant to the issue on the Appeal: Whether the Appellants were unfairly deprived of their right to a meaningful opportunity to respond to the case against them.

(g) Fresh Evidence Would Not Have Affected the Result

47. In order to be admitted, fresh evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[49]

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[47] Parmar Affidavit at para 4, Tab 2 to the Responding Motion Record, page 229.

[48] Commission's Factum at para 20.

[49] *Palmer* at page 775.

48. It is respectfully submitted that, even if admitted and accepted by this Court, the Fresh Evidence cannot reasonably be expected to have had any impact on the decision that forms the subject of this Appeal.

49. None of the: (i) transaction in respect of the Adelaide LP's properties, (ii) the termination of pre-sale purchase agreements, (iii) the purported "commercial reality" including the "financial jeopardy" of the Go-To entities, nor (iv) the lack of opposition to the Receiver's sale process, could reasonably be expected to have impacted Justice Pattillo's decision to grant the Receivership Order.

50. As described and detailed herein, the Commission has failed to demonstrate how the Adelaide transaction or the termination of the pre-sale purchase agreements demonstrate misconduct of any kind on the part of Furtado. Moreover, even if it were accepted that the Go-To entities were in "financial jeopardy" at the time of the Receivership Application, this could not have reasonably affected Justice Pattillo's decision. Finally, any lack of formal opposition by Furtado, the Appellants or the investors over the conduct of the receivership including implementation of the sale process cannot fairly be interpreted as support for same.

ii. With due diligence the Fresh Evidence could have been adduced on the Application

51. Fresh evidence should not be admitted if, by due diligence, it could have been adduced at first instance.[50] As a general rule, this means that evidence should not be admitted in civil cases if it could have been adduced in the court below.[51]

52. In the Commission's Factum at paragraph 7, the Commission asserts that the Fresh Evidence will show that "[…] while Justice Pattillo's decision in the application was under reserve, Furtado caused the Adelaide LP and its general partner to enter into a conditional sales agreement for the Adelaide LP's properties".

53. This is one example of evidence that could have been adduced on the Application had the Commission exercised appropriate due diligence. Furtado spent months negotiating the proposed transaction in respect of the Adelaide property.[52] With minimal due diligence and inquiry, the Commission could easily have obtained the relevant information, including the surrounding circumstances of the potential sale, the details of the transaction, and how beneficial the transaction would have been to investors.

54. Instead, the Commission ceased communicating with the Appellants in July 2021, and the Appellants did not hear anything further from the Commission until service of the Application Record.[53]

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[50] *Lafontaine-Rish Medical Group Limited v Global TV News Inc.* [2008] OJ No 76 (Div Ct) at para. 34.

[51] *Nissar v Toronto Transit Commission*, 2013 ONCA 361 at para. 38.

[52] Furtado Affidavit at para 7, Tab 1 to the Responding Motion Record, page 5.

[53] Affidavit of Oscar Furtado sworn December 14, 2021 at paras. 12 and 18, Tab 4 to the Motion Record of the Appellants dated December 15, 2021, pages 48-50.

55. Similarly, Staff could have obtained information regarding the Appellants' financial condition at any time, given its power to compel evidence. Instead, for almost 6 months, the Commission made no attempts whatsoever to solicit further information or obtain any update on the status of the business or any proposed transactions.

56. The Commission's attempt to introduce the Reports to try to establish these points is simply a belated and misguided attempt to bolster its case with evidence that existed and was available at first instance, and which could have been obtained through reasonable due diligence. On this basis alone, it is respectfully submitted that the Fresh Evidence is inadmissible and the Commission's Motion should be dismissed.

iii. The Fresh Evidence is Not Sufficiently Credible

57. Fresh evidence should not be admitted unless it is credible in the sense that it is reasonably capable of belief. Each of the Reports makes clear that the Receiver relies on information obtained by third parties, without stating the source of same. The Reports also contain disclaimers that make explicitly clear the limitations on their reliability.

58. As such, it is respectfully submitted that the Reports fall short of the standard of credibility that should be imposed when determining admissibility on an originating application.

59. The reports of receivers and other court-appointed officers are often admitted as evidence in motions, where they are viewed as somewhat analogous to affidavits. However, this does not mean that such reports would be admissible in all court proceedings, particularly where an affidavit with similar content would not be admissible. Affidavits containing statements of information and belief on contentious issues may be admissible on motions, but they are

not admissible on originating applications, where a higher standard of credibility is applied under the *Rules*[54].

60. Rule 39.01(4) and (5) provide as follows:

> Contents — Motions
>
> (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).
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> Contents — Applications
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> (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

61. The Reports are rife with statements of information and belief on issues that are contentious. While the Reports are not affidavits, it is respectfully submitted that this Court ought to import a similar standard as that prescribed in Rule 39 when determining whether they are sufficiently credible for admission on an originating application.

62. The Appellants have consistently and categorically disputed all of the Commission's allegations regarding any wrongdoing by them, both before the Court of Appeal (*i.e.*, through an urgent motion for a stay of the Receivership and the Appeal itself) and before the Commission (*e.g.*, through the Appellants' response to the Commission's materials on this Motion). The Commission's allegations of wrongdoing are unquestionably

[54] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194., ss. 39.01(4)-(5).

contentious, whether those allegations are contained in the Commission's own materials or the Receiver's Reports.[55]

63. The Reports also fail the credibility test because they are incomplete, insofar as they fail to disclose all information relevant to the issues in respect of which the Commission seeks their admission. For example, the description of the proposed transaction in respect of the Adelaide LP's properties very notably excludes any mention of the proposed purchase price, the impact it would have had on creditors, investors and other stakeholders, or any criticism of the economics of the transaction itself. In fact, the proposed purchase price in the Adelaide Offer was significantly above market value, represented a 57% increase over the acquisition cost, and would have been more than sufficient to pay all creditors and other investors in full.[56]

PART V - ORDER SOUGHT

64. For the foregoing reasons, the Appellants seek an Order dismissing the Commission's Motion for admission of the Fresh Evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of April, 2022.

Gregory Azeff & Monica Faheim

MILLER THOMSON LLP
Lawyers for Appellants

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[55] Responding Affidavit of Oscar Furtado sworn April 2nd, 2022 ("**Furtado Affidavit**") at paras. 3, 7, 10-11, 13, and 20-22, Tab 1 to the Responding Motion Record of the Appellants dated April 4, 2022 (the "**Responding Motion Record**").

[56] Furtado Affidavit at para. 7, Tab 1 to the Responding Motion Record, page 5.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3.
2. *R. v. Palmer*, [1980] 1 SCR 759.
3. *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ONCA).
4. *Sharpe (Re)*, 2022 ONSEC 3, (2022-03-30) (File Nos. 2021-26 and 2021-15).
5. *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA)
6. *Clark v Complaints Inquiry Committee*, 2012 ABCA 152.
7. *Lafontaine-Rish Medical Group Limited v Global TV News Inc.* [2008] OJ No 76 (Div Ct).
8. *Nissar v Toronto Transit Commission*, 2013 ONCA 361.

SCHEDULE "B"
RELEVANT STATUTES

***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(b)**

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

Rules of Civil Procedure **R.R.O. 1990, Reg. 194, ss. 39.01(4)-(5).**

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit
Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

Evidence by Cross-Examination on Affidavit
On a Motion or Application

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

Evidence by Examination of a Witness
Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

Evidence by Examination for Discovery
Adverse Party's Examination

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.

Party's Examination

(2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.

***Securities Act*, R.S.O. 1990, c. S.5, ss. 16-17.**

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

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

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

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

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

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

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

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

(iii) on making the disclosure, advises the insurer or insurance broker that the insurer or insurance broker is bound by the confidentiality requirements in subsection (2) and obtains a written acknowledgement from the insurer or insurance broker of this advice. 2019, c. 15, Sched. 34, s. 1 (2).

Confidentiality
(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with subsection (1.1) or section 17. 2002, c. 18, Sched. H, s. 7; 2019, c. 15, Sched. 34, s. 1 (3).

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

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

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

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

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

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

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

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

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

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

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

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

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

Disclosure by court
(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding
(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210; 2016, c. 5, Sched. 26, s. 1.

Disclosure to police
(7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

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

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

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

ONTARIO SECURITIES COMMISSION	and	**GO-TO DEVELOPMENTS HOLDINGS INC. *et al***
Applicant (Respondent in Appeal)		Respondents (Appellants in Appeal)

Court of Appeal File No.: C70114

Court File No: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
TORONTO

RESPONDING FACTUM OF THE APPELLANTS
(Fresh Evidence Motion)

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