



Capital
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Citation: *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 35

Date: 2023-10-20

File No. 2022-8

**IN THE MATTER OF
GO-TO DEVELOPMENTS HOLDINGS INC., GO-TO SPADINA ADELAIDE SQUARE
INC., FURTADO HOLDINGS INC., and OSCAR FURTADO**

REASONS AND DECISION

**(Rules 22(2), 22(4) and 29(1) of the *Capital Markets Tribunal Rules of
Procedure and Forms*)**

Adjudicators: M. Cecilia Williams (chair of the panel)
Geoffrey D. Creighton
Dale R. Ponder

Hearing: June 2, 2023, by videoconference; final written submissions
received July 17, 2023

Appearances: Erin Hault For Staff of the Ontario Securities
Braden Stapleton Commission
Melissa MacKewn For Oscar Furtado
Dana Carson
Asli Deniz Eke

TABLE OF CONTENTS

1.	OVERVIEW	1
2.	BACKGROUND.....	2
3.	ADJOURNMENT MOTION	3
3.1	Law.....	3
3.2	Parties’ positions and our analysis	4
4.	CONFIDENTIALITY REQUESTS	9
4.1	Law.....	9
4.2	Parties’ positions and our analysis on the Confidential Documents Motion	11
4.3	Parties’ positions and our analysis on the Confidential Hearing Motion....	13
5.	CONCLUSIONS.....	14

REASONS AND DECISION

1. OVERVIEW

- [1] On June 22, 2023, we granted a motion by Oscar Furtado filed on May 11, 2023, to adjourn the merits hearing in this proceeding (the **Adjournment Motion**), scheduled to commence on August 21, 2023 (the **Merits Hearing**), with reasons to follow.
- [2] We granted the Adjournment Motion, but not for an indefinite period as requested by Furtado. Furtado persuaded us that his health issues constituted extraordinary circumstances requiring a delay to the start of the Merits Hearing. In our Order dated June 22, 2023,¹ we vacated the first eight hearing days and, after considering panel availability, ordered that the merits hearing commence on November 3, 2023.
- [3] Furtado requested that the motion hearing take place without the public present (the **Confidential Hearing Motion**) and that certain documents filed on this motion be treated as confidential (the **Confidential Documents Motion**).
- [4] We conclude that some small portions of the documents filed with respect to these motions concern Furtado's personal dignity and should remain confidential. The appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings can be achieved in these circumstances by redacting the portions of the documents that deal with specific symptoms, diagnosis and treatment. The public disclosure of these portions could reasonably be considered to result in an affront to Furtado's dignity. However, how health issues affect the respondent's ability to prepare for and participate in a proceeding is information that should be in the public domain if core to a decision rendered by the Tribunal.
- [5] We allowed the motion to be heard as a confidential hearing because we were persuaded that Furtado's health was central to the motions, and the issues to be determined in the motions could not be discussed without revealing personal

¹*Go-To Developments Holdings Inc (Re)* (2023), 46 OSCB 5469

information that Furtado indicated was highly sensitive and went to Furtado's personal dignity. The balancing of Furtado's privacy interests against the fundamental principle of public access to Tribunal proceedings could be achieved, we concluded at the time, through redactions of the hearing transcript to protect any such personal information.

- [6] However, upon review of the transcript very little content involved personal information that might put Furtado's dignity at risk. We conclude that the balancing of the private and public interests regarding the Confidential Hearing Motion could have been achieved with a more nuanced approach.
- [7] The transcript of the confidential hearing will be made public subject to redactions to the transcript of language that deals with specific symptoms, diagnosis and treatment that could reasonably be considered to result in an affront to his dignity.
- [8] These are our reasons for the Adjournment Motion, Confidential Documents Motion, and Confidential Hearing Motion. Other requests contained in Furtado's May 2023 motion have subsequently been dealt with.²

2. BACKGROUND

- [9] On May 11, 2023, Oscar Furtado brought a motion for an adjournment of the Staff's motion for a further and better witness summary (the **Witness Summary Motion**) scheduled to proceed on June 2, 2023, the Adjournment Motion, an order that the evidence-in-chief to be tendered at the Merits Hearing by Staff's witness and Furtado be filed by affidavit in advance of the Merits Hearing, the Confidential Documents Motion, and the Confidential Hearing Motion.
- [10] Furtado also requested that the final interlocutory attendance scheduled for July 20, 2023 be used to schedule new dates for the Witness Summary Motion and the Merits Hearing, if Furtado's health permits.
- [11] The parties agreed to argue the Adjournment Motion on June 2, 2023.

² *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 29

[12] On June 22, 2023 we issued an order, with reasons to follow, granting Furtado an adjournment of the Merits Hearing. We denied Furtado’s request for an adjournment of the Witness Summary Motion and subsequently dealt with it in writing, issuing our order and reasons on September 7, 2023.

[13] The parties agreed that certain evidence in chief of their respective witnesses in the Merits Hearing be provided by affidavit, negating the need for an order to that effect.

3. ADJOURNMENT MOTION

[14] Furtado requested that the Merits Hearing, scheduled to start in August 2023, be adjourned because of serious medical circumstances which make it impossible for him to meaningfully prepare for or participate in that hearing. Furtado sought to have the Merits Hearing delayed indefinitely and to use the final interlocutory attendance, scheduled for July 20, 2023, to reschedule the hearing, if Furtado’s health permitted.

[15] We concluded, as discussed below, that Furtado’s health in the circumstances constituted exceptional circumstances warranting a delay to the start of the Merits Hearing as currently scheduled. However, the balancing of the Tribunal’s objectives of ensuring fair, efficient, and expeditious proceedings does not, in our view, warrant an indefinite delay to an uncertain date to be set in the future.

[16] We consider the law relating to adjournments before turning to the parties’ positions and our analysis.

3.1 Law

[17] Rule 29(1) of the *Capital Markets Tribunal Rules of Procedure and Forms* (the **Rules**) provides that every merits hearing shall proceed on the scheduled date unless the party requesting an adjournment “satisfies the Panel that there are exceptional circumstances requiring an adjournment.”³

[18] The Tribunal has ruled that the standard set out in rule 29(1) is a “high bar” that reflects the important objective set out in rule 1, that Tribunal proceedings be conducted in a “just, expeditious and cost-effective manner”. The objective must

³ Rule 29(1)

be balanced against the parties' ability to participate meaningfully in the hearing and present their case.⁴

[19] The balancing of these objectives is necessarily fact-based.⁵

3.2 Parties' positions and our analysis

[20] Furtado submits that he is the sole responding witness in this proceeding, which involves very serious allegations, including fraud. He intends to defend the allegations against him. However, he is not currently medically fit to effectively prepare for and testify at the Merits Hearing as scheduled.

[21] Furtado provided affidavit evidence, including a letter from his primary care physician stating that Furtado is "not currently medically fit to begin preparation for the hearing commencing in August 2023". Included in the medical history was the fact that Furtado had been a transplant recipient in 2011, was immunocompromised as a result and that COVID was another source of stress that had contributed to a decline in his mental health.

[22] The physician concludes "[a]s a result of Mr. Furtado's physical and mental health issues and the medications he is taking, he is currently experiencing significant problems with memory, concentration, focus and fatigue." The physician further advised that Furtado is awaiting referral to a psychiatrist, within one to three months, and that his condition may improve after that referral.

[23] In addition, Furtado's primary care physician stated that he is concerned that undergoing the stress associated with attempting to prepare for and attend the Merits Hearing at this time would be detrimental to Furtado's health.

[24] Furtado submits that the Tribunal has considered the following factors to determine whether circumstances rise to the level of exceptional to warrant an adjournment:

- a. deliberate delay or an attempt to manipulate the process;⁶

⁴ *Debus (Re)*, 2020 ONSEC 20 at para 16 (**Debus**)

⁵ *Debus* at para 17

⁶ *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 at para 29 (**PFAM**); *Money Gate Mortgage Investment Corp (Re)*, 2019 ONSEC 40 at para 63 (**Money Gate**)

- b. reasons and explanation provided for the adjournment, including the respondent's responsibility, if any;⁷
- c. seriousness of the consequences of the hearing for the respondent, including substantial financial sanctions and lengthy bans from participation in the capital markets;⁸
- d. circumstances of the parties and the way the parties have conducted themselves in the proceeding, including any previous adjournments that have been requested or granted and whether previous adjournments could be considered "neutral" in nature (i.e., through no fault of the respondent);⁹
- e. prejudice and costs to the Tribunal, Staff and other parties from rescheduling the hearing;¹⁰ and
- f. evidentiary basis for the adjournment request, which, in the case of a request for an adjournment for health reasons, includes proof of health condition and active course of treatment.¹¹

[25] Furtado submits that he has established a proper and compelling evidentiary foundation for his adjournment request, including the medical assessment of his primary care physician. His physician has advised that Furtado is actively pursuing a course of treatment. His serious health issues make it impossible for him to meaningfully prepare for or participate in the Merits Hearing currently.

[26] In addition, Furtado submits that none of the factors that often weigh against granting an adjournment are present in this case. This is his first request to adjourn the Merits Hearing. The reason for his request is solely for health reasons, which are beyond his control. Furtado is seeking the adjournment three months before the scheduled start of the Merits Hearing, because of ongoing and current medial assessments.

⁷ *Money Gate* at para 62

⁸ *PFAM* at para 29

⁹ *Debus* at paras 17-18; *Money Gate* at paras 55-56

¹⁰ *PFAM* at para 29

¹¹ *Debus* at paras 22-25

- [27] The Tribunal, Furtado submits, has previously granted adjournments to reasonably accommodate a respondent's health issues and those of counsel.¹² Furtado also submits that given the seriousness of the allegations against him, the principles of natural justice require that he be medically fit to prepare for and attend the Merits Hearing to defend against the allegations.
- [28] Staff submits that the exceptional circumstances threshold is a high bar and difficult to meet. In exercising its discretion to grant an adjournment, the Tribunal should consider all the circumstances, and be guided by the overarching public interests in i) having the proceeding heard expeditiously; and ii) natural justice, including the respondent's right to the opportunity to respond to the case against them.¹³
- [29] Staff also cites the same factors as Furtado and submits that, in weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date, and the length of the requested adjournment should also be considered.
- [30] Staff submits that the medical evidence Furtado adduced is not sufficiently detailed to justify an adjournment and that the medical issues he is facing are long standing, with no certainty of them improving, such that an adjournment may not make any difference to his preparation for and participation in the Merits Hearing. Staff submits that Furtado's medical information raises questions about the relevance of certain aspects of his medical history, the purpose of the medications he is on, when the medical issues started and whether they are worsening, the nature of the program that Furtado has indicated he is attempting to enrol in, what activities can Furtado do, and importantly, whether his issues can be accommodated.
- [31] Staff cites several cases where a defendant sought to be excused from an oral examination where the adjournment was denied, or accommodations were

¹² *Patrick Fraser Kenyon Pierrepont Lett, Re*, 2003 CarswellOnt 4332; *Juniper Fund Management Corporation (Re)* (2011), 34 OSCB 11550; *Juniper Fund Management Corporation (Re)* (2012), 35 OSCB 2076; *Juniper Fund Management Corporation (Re)* (2012), 35 OSCB 3630; *White (Re)* (2009), 32 OSCB 824; *Bradon Technologies Ltd. (Re)* (2015), 38 OSCB 1569; *Mega-C Power Corp (Re)*, 2010 ONSEC 19 at para 67

¹³ *Cheng (Re)* 2018 ONSEC 13 at para 6; *Turbo Logistics Canada Inc. v HSBC Bank Canada*, 2016 ONCA 222 at paras 18

accorded to the defendant to address the medical issues. In one instance, a plaintiff was excused from an oral examination for discovery on the basis of detailed observations and opinions from the plaintiff's psychiatrist that the plaintiff had a severe and chronic illness and there was "evidence of a real potential that the plaintiff could suffer psychological damage" from an oral examination.¹⁴

[32] Staff submits that the other factors to consider also collectively weigh against an adjournment, namely:

- a. Furtado has known the case he must meet for at least 1.5 years and therefore has had time to prepare;
- b. the circumstances underlying the adjournment request are long standing and therefore not unforeseen;
- c. at the third attendance in December 2022, Furtado sought Merits Hearing dates in 2024, he scheduled two preliminary motions which delayed the start of the hearing and were subsequently withdrawn, and his health issues were not mentioned at that time as factors in the scheduling of the Merits Hearing;
- d. the Adjournment Motion was filed three months in advance of the Merits Hearing but only a day before submissions were due on the Witness Statement Motion;
- e. Furtado is asking for an indefinite adjournment and to revisit scheduling in July; and
- f. an indefinite adjournment is not appropriate.

[33] Regarding Staff's submission that Furtado's two motions that were withdrawn delayed the start of the hearing, we do not consider this a factor against Furtado. Furtado is entitled to defend himself against Staff's allegations, including bringing preliminary motions. In our view, there was nothing about those earlier motions that were delay tactics or manipulative of the process.

¹⁴ *Mohanadh v Thillainathan*, 2010 ONSC 2678 at paras 4-5, 8

[34] We conclude that the factors in this instance support a determination that the circumstances are exceptional warranting an adjournment to the start of the Merits Hearing. In particular:

- a. Furtado's medical evidence establishes that he is under the care of his primary care physician for serious physical and mental health concerns and is awaiting referral to a psychiatrist, which is anticipated to be in the next three months;
- b. those mental health concerns and the medication he is taking have caused issues with Furtado's memory, concentration, focus, and fatigue, all of which his doctor concludes makes him currently not medically fit to prepare for the Merits Hearing;
- c. this is Furtado's first adjournment request, and the Adjournment Motion was brought three months before the start of the Merits Hearing, giving ample time for the motion to be considered, Furtado's course of treatment to proceed and for the parties to adjust, should the panel determine as we did, that an adjournment was appropriate;
- d. the potential consequences of the Merits Hearing are very serious, and the principles of natural justice dictate that Furtado be given a fair opportunity to prepare for and participate in the Merits Hearing, although not a delay for an indefinite period; and
- e. there is no prejudice to Staff or the Tribunal at this point in the proceeding from a delay to the start of the Merits Hearing, particularly given our conclusion that the adjournment will not be for an indefinite period.

[35] While we are satisfied that there are extraordinary circumstances warranting a delay to the start of the Merits Hearing as scheduled, we are not satisfied that an indefinite delay as requested is appropriate.

[36] We took the following into consideration:

- a. the Merits Hearing was scheduled to start in August 2023 with eight hearing days that month and then continue in November 2023 for a further four days;

- b. Furtado anticipates that his specialist referral will occur within three months;
- c. by agreeing to deliver the in-chief evidence by affidavit, the parties have likely reduced the number of hearing days required;

[37] We therefore ordered that the initial eight hearing dates, starting in August be vacated and that the Merits Hearing will start instead on November 2, 2023 and continue for the three further days scheduled that month. We provided the parties with a deadline by which to file their submissions about the scheduling of what further, if any, dates were necessary for the hearing. Subsequently, we scheduled six additional dates in November and amended the start date to November 3 due to panel availability.

4. CONFIDENTIALITY REQUESTS

[38] Furtado seeks an order to redact certain personal information from documents in the adjudicative record of this matter on the basis that they contain his personal health information. Those documents are:

- a. Furtado's affidavit sworn May 10, 2023;
- b. Furtado's reply affidavit sworn May 24, 2023; and
- c. Exhibits F, G, H, I, and J to the affidavit of Michelle Spain affirmed May 17, 2023.

[39] Furtado also requested that the motion hearing proceed as a confidential hearing, without the public present.

4.1 Law

[40] Rule 22(2) provides that the Tribunal may order that a hearing or part of a hearing be held without the public present if it appears that avoiding disclosure of intimate financial or personal matters or other matters during the hearing outweighs adherence to the principle that hearings should be open to the public.

[41] Further, rule 22(4) provides that a panel may order that an adjudicative record be kept confidential if it determines that avoiding disclosure of intimate financial or personal matters or other matters outweighs adherence to the principle that adjudicative records should be open to the public. The test for determining

whether portions of the adjudicative record should remain confidential is the same as for determining if a hearing should be held in confidence.

[42] The Tribunal's *Practice Guideline* states that personal information relevant to the resolution of the matter is generally not treated as confidential.

[43] Court and tribunal proceedings are presumptively open to the public and court openness is protected by the constitutional guarantee of freedom of expression. The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility to protect other public interests that may arise.¹⁵

[44] Given the fundamental nature of the open justice principle, a high threshold must be met for a confidentiality order. The Tribunal has adopted the requirements for confidentiality orders established by the Supreme Court of Canada in *Sherman Estate*, which are:

- a. court openness poses a serious risk to an important public interest:
- b. the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- c. as a matter of proportionality, the benefit of the order outweighs its negative effects.¹⁶

[45] Protection of privacy may be an "important public interest", where the information at issue reveals core aspects of a person's life, disclosure of which would result in an affront to their dignity.¹⁷

[46] To overcome the presumption of openness, the onus is on Furtado to establish that there is a serious risk that without a confidentiality order, he will suffer "an affront to his dignity" by virtue of the disclosure of his intimate personal matters during the hearing.¹⁸

¹⁵ *Sherman Estate v Donovan*, 2021 SCC 25 at para 30 (***Sherman Estate***)

¹⁶ *Sherman Estate* at para 38; *Odorico (Re)*, 2023 ONCMT 10 at para 36 (***Odorico***)

¹⁷ *Sherman Estate* at paras 32-35; *Odorico* at paras 37-38

¹⁸ *Odorico* at para 37, referring to *Sherman Estate*

[47] We now turn to the parties' positions and our analysis.

4.2 Parties' positions and our analysis on the Confidential Documents Motion

[48] Furtado submits that the portions of the adjudicative record he seeks to have redacted contain his personal health information and, as such, a confidentiality order is warranted. He submits that the Tribunal routinely makes sealing orders in respect of portions of the adjudicative record (and reasons for decision) containing intimate personal health information to protect the personal dignity and privacy interests of individuals. Furtado further submits that in granting the relief requested in the Adjournment Motion, it would be sufficient for the Tribunal to simply state it was satisfied that the "exceptional circumstances" test is met by the medical evidence filed.

[49] Staff submits that there's no exhaustive list of the type of information the disclosure of which will result in an affront to dignity, but information about stigmatized medical conditions is one example the Supreme Court has noted.¹⁹ The Tribunal must still consider the necessity of the restrictions sought and whether imposition of them outweighs the harm to the open court principle.²⁰

[50] Staff further submits that relevant personal information of respondents generally is not treated as confidential. Furtado's adjournment request is based on his asserted health issues. Details of those issues and their effects are relevant to his adjournment request, and ought to be public.

[51] We conclude that where a respondent is seeking relief based on asserted health issues, there needs to be sufficient details about those issues and their effects for the basis of the Tribunal's decision on the relief sought to be clear to the public. We agree that there are portions of the documents in question that go to issues of Furtado's dignity. However, they are more limited than Furtado proposes.

[52] The fact that the Furtado has certain health issues and how those issues impact his ability to participate in and prepare for the Merits Hearing are at the heart of

¹⁹ *Sherman Estate* at paras 32-35, 63, 71-75, 77, 85; *Odorico* at paras 37-38

²⁰ *Odorico* at paras 4-6

the Adjournment Motion. The appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings is achieved, in our view, by redacting from the documents in question language that deals with specific symptoms, diagnosis and treatment, the public disclosure of which could reasonably be considered to result in an affront to his dignity.

- [53] However, how physical and mental health issues affect the respondent's ability to prepare for and participate in a proceeding is information that should be in the public domain if core to a decision rendered by the Tribunal.
- [54] We disagree with Furtado's submission that in granting the requested relief in the Adjournment Motion, it would be sufficient for the Tribunal to simply state it was satisfied that the exceptional circumstances test is met by the medical evidence filed. If large portions of the medical evidence were to be redacted and if the reasons for decision only referred to that redacted medical evidence, what the Tribunal considers "exceptional circumstances" would be unknown to the public and to future panels considering these issues.
- [55] We also do not find that information about being immunocompromised because of being an organ transplant recipient, that COVID created additional stress for individuals who are immunocompromised, or that being a respondent in a regulatory proceeding causes stress rises to the level of personal information that goes to the dignity of an individual requiring confidential treatment. Being an organ transplant recipient is not a "stigmatized medical condition". Staff submits that it has been well documented and publicly discussed during the COVID pandemic that COVID created additional health issues for immunocompromised persons. The Supreme Court of Canada has commented on the fact that being the subject of a regulatory proceeding can cause stress.²¹
- [56] For the reasons set out above, we order that the adjudicative records referred to above be redacted as noted in Appendix "A" to our accompanying order and that only the redacted versions of these documents shall be made available to the public.

²¹ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 59

[57] The relevant documents will need to be redacted, as indicated in Appendix "A" to the order, and refiled with the Registrar.

4.3 Parties' positions and our analysis on the Confidential Hearing Motion

[58] Furtado submitted that his health makes him medically unable to prepare for and participate in the Merits Hearing, and that given the nature of the information about his health and how much of that information had to be raised for purposes of the Adjournment Motion, it would be impractical to proceed in an open hearing. Furtado further submitted that as his health is fundamental to the Adjournment Motion, proceeding in open court and speaking only in general terms about "health issues" would disrupt the parties' ability to speak in detail about the issues and would, therefore, be inefficient and ineffective.

[59] The panel proposed that as much of the hearing as possible be conducted in public due to the strong presumption to open justice. We suggested there be a brief confidential session where the parties outlined the details of Furtado's health issues. The hearing would then proceed in public, and the parties would make their submissions regarding the Adjournment Motion with references generally to either "health issues" or "personal issues".

[60] Staff submitted that the hearing should be conducted entirely in public because the information in question does not rise to the level warranting a confidentiality order. The public has a right to know all the information before the Tribunal, unless it is shown that there is a serious risk to another important public interest.

[61] Staff further submits that medical details are routinely disclosed where a party seeks relief on that basis. Access to the details best allows the public to understand, and question, the decision made. General factual summaries (referring to "medical or health issues") may render a decision inscrutable. The relevant details may be of heightened importance where a decision affects others, like investors and witnesses, who have an interest in the progress of proceedings.

[62] Staff submitted there was nothing in the medical information filed in support of the Adjournment Motion that rose to the level of an affront to Furtado's dignity.

- [63] Furtado proposed, as an alternative to the panel's proposed approach, that the hearing proceed in confidence subject to the transcript being made available to the public with appropriate redactions, if any.
- [64] We concluded, based on the information before us at the time, that the hearing would proceed in confidence subject to a further order making the transcripts public with appropriate redactions, if any. Without knowing the details of the personal information that Furtado believed necessary to present to support his Adjournment Motion, we concluded that there was a potential serious risk to his personal dignity and that the benefit of proceeding in confidence outweighed the negative effect on the presumption of open justice. The hearing therefore continued as a confidential hearing.
- [65] With the benefit of having heard Furtado's personal information and of reviewing the transcript of the hearing and the parties' submissions on appropriate redactions, we conclude that our decision at the hearing to proceed confidentially did not strike the right balance between the presumption of open justice and the protection of personal privacy. The risk to Furtado's dignity could have been reasonably protected by proceeding in a manner that allowed more of the hearing to proceed in public while dealing in a confidential setting with the detailed information that went to his dignity..
- [66] Where the health of a party is central to the issues in a proceeding before the Tribunal, as it is to the Adjournment Motion, there needs to be sufficient information available to the public so it can understand the issues and the basis for the panel's decision. Consistent with our decision regarding the Confidential Documents Motion, the appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings is achieved, in our view, by redacting from the documents in question language that deals with specific symptoms, diagnosis and treatment, the public disclosure of which could reasonably be considered to result in an affront to his dignity.
- [67] For the reasons set out above, we order that the transcript be redacted as noted in Appendix A to our accompanying order.

5. CONCLUSIONS

- [68] For the reasons above we conclude that:

- a. the documents at issue in the Confidential Documents Motion, including the transcript of the hearing on June 2, 2023, be redacted as indicated in Schedule A to the order; and
- b. the Merits Hearing be adjourned to November 3, 2023.

Dated at Toronto this 20th day of October, 2023

"M. Cecilia Williams"

M. Cecilia Williams

"Geoffrey D. Creighton"

Geoffrey D. Creighton

"Dale R. Ponder"

Dale R. Ponder