



Capital
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Citation: *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 44
Date: 2023-11-24
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, 27, and 29 of the *Capital Markets Tribunal Rules of Procedure and
Forms*)**

Adjudicators: M. Cecilia Williams (chair of the panel)
Sandra Blake

Hearing: By videoconference, October 2, 2023

Appearances: Johanna Braden For Staff of the Ontario Securities
Michelle Vaillancourt Commission
Braden Stapleton
Melissa MacKewn For Oscar Furtado
Dana Carson
Asli Deniz Eke
Ian Aversa For the Receiver, KSV Restructuring
Inc.

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REASONS AND DECISION

1. OVERVIEW

- [1] At a hearing before the Tribunal on October 2, 2023, we heard a motion brought by Oscar Furtado for orders:
- a. adjourning the merits hearing set to commence on November 3, 2023, extending related filing dates, and extending the time to deliver and file a better witness summary;
 - b. requiring Staff to provide further disclosure; and
 - c. hearing part of the motion and filing part of the motion record confidentially.
- [2] On October 5, 2023, we dismissed the motion, reserving our decision on his request for confidentiality. These are our reasons.

2. BACKGROUND

- [3] This is Furtado's second motion for an adjournment. The merits hearing had been scheduled to start in August and continue in November 2023.
- [4] Furtado's first motion to adjourn, brought in May 2023, was for an indefinite period based on health reasons. The panel granted the adjournment, but not indefinitely. The merits hearing was rescheduled to commence on November 3, 2023.
- [5] At the final attendance prior to the start of the merits hearing, Furtado advised that he would be bringing this second motion to adjourn the merits hearing.

3. ISSUES

- [6] The issues we must address are the following:
- a. Should the Tribunal further adjourn the merits hearing on medical grounds?
 - b. Should the Tribunal adjourn the merits hearing due to late disclosure by Staff?
 - c. Is Staff required to provide further disclosure related to:

- i. law enforcement documents and conversations;
- ii. a September 2022 investigation order and future enforcement plans;
- iii. Staff's forensic accountant witness, Stephanie Collins' amended witness summary?

4. ADJOURNMENT MOTION

4.1 Law on Adjournments

[7] Rule 29(1) of the Tribunal's *Rules of Procedure and Forms* 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. The standard set out in rule 29 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.¹

4.2 Adjournment on medical grounds

[8] Furtado submits that his health has worsened since the first adjournment and he is continuing to experience health issues including significant problems with memory, concentration, and fatigue. He submits that he has had difficulty instructing his legal counsel.

[9] Furtado provided evidence from a dentist and osteopath who confirm that Furtado suffers from stress-related dental and physical ailments.

[10] Furtado also filed a list of medications he is currently taking, along with the product monograph listing the possible side effects from these medications.

[11] Furtado was granted the first adjournment, in part, to enable him to seek further treatment from a psychiatrist. He was assessed in late June 2023 by an unnamed psychiatrist, who is referred to as Dr. X, and was provided with a treatment plan. He had a number of follow-up visits in August 2023 with Dr. X and another scheduled in September 2023. However, while preparing for this motion Furtado learned that Dr. X is under supervision and review by the College

¹ *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40 (**Money Gate**) at para 54; *First Global Data Ltd (Re)*, 2022 ONCMT 23 (**First Global Data**) at para 7

of Physicians and Surgeons of Ontario. This fact, Furtado submits, has exacerbated his health issues.

- [12] Despite mental health issues being his main ground for seeking an adjournment, Furtado has not filed any evidence from Dr. X who treated him for the preceding three months. Furtado advised that due to Dr. X's ongoing supervision and review by his regulator related to his knowledge, skill and judgment as a psychiatrist, he would not be relying on evidence from Dr. X in this proceeding.
- [13] Instead, Furtado chooses to rely on his own affidavit evidence, which we have already referred to above, and a new letter dated September 18, 2023, from his treating family physician, Dr. Shroff.
- [14] Dr. Shroff's letter states that Furtado's legal issues are affecting his mental health. The letter also provides scores from a psychiatric self-assessment, and says that Furtado's scores have increased, indicating that Furtado's condition or symptoms have worsened. Dr. Shroff refers to a letter from Dr. X and concurs with Dr. X that a timeframe of six months to recuperate is very reasonable.
- [15] We find the evidence from Dr. Shroff insufficient. Psychiatric self-assessments do not provide a diagnosis or treatment plan. The reference to concurring with Dr. X is vague. We have a recommendation from Dr. X., but we are missing the basis for the recommendation. How will a six-month adjournment assist? What is the start date for the period of recuperation? It's not clear that any of Furtado's medical issues will be resolved in six months.
- [16] Staff urges us to draw an adverse inference from the failure to provide the best evidence available, that being from Dr. X.
- [17] To refute Staff's request to draw an adverse inference, Furtado cites *Mascarenhas v. Winter*, which states "it does not always follow that because the party has access to further evidence, that an adverse inference should be drawn if that evidence is not tendered."² Furtado further quotes from *Parris v Laidley* the test for drawing an adverse inference:

Drawing adverse inferences from failure to produce evidence is discretionary. The inference should not be drawn unless it

² *Mascarenhas v Winter*, 2021 BCSC 474 at para 68

is warranted in all the circumstances. What is required is a case-specific inquiry into the circumstances including, but not only, whether there was a legitimate explanation for failing to call the witness, whether the witness was within the exclusive control of the party against whom the adverse inference is sought to be drawn, or equally available to both parties, and whether the witness has key evidence to provide or is the best person to provide the evidence in issue.³

- [18] Furtado submits that a legitimate explanation was provided for why the psychiatrist's letter hadn't been provided on this motion, and further submits that we have the evidence of Furtado himself, and the letter from Dr. Shroff.
- [19] Staff submits that applying the test set out in *Parris v Laidley*, the conclusion is that an adverse inference ought to be drawn against Furtado for failing to provide even the psychiatrist's name. Staff does not have access to the witness who would provide the best evidence of Furtado's medical condition.
- [20] We note that Dr. X is still licensed and practicing and conclude that as the treating psychiatrist for the past months, he would have the best evidence concerning Furtado's medical condition. While the case law supports the drawing of an adverse inference, we decline to do so. Instead, we consider the limited evidence before us.
- [21] Staff submits that none of the evidence provided by Furtado is sufficiently particularized to justify a second adjournment. To justify an adjournment, it is not sufficient to establish merely the existence of a medical condition or treatment. Rather, the evidence must detail the nature of the issue and explain why the party cannot attend. The decision-maker must be satisfied that a medical issue gives rise to a true inability to attend.⁴
- [22] We are not satisfied that Furtado's physical ailments give rise to a true inability to prepare for and attend this hearing. Some of those conditions are of long duration and pre-existed the alleged misconduct. Some are of an unknown

³ *Parris v Laidley*, 2012 ONCA 755 at para 2

⁴ *McIntyre v Connolly*, 2008 CanLII 12496 (ONSC) at para 4; *Law Society of Upper Canada v Kryvenko*, 2010 ONLSHP 108 at para 11

duration, for which we have no evidence. Further, we did not find it helpful to our analysis about whether Furtado was able to prepare for and attend a hearing to have a list of the potential side effects of medication that had been prescribed for him. Evidence of the side effects suffered by Furtado, and how those side effects impact his ability to prepare for and attend a hearing is required.

- [23] General statements that a proceeding may cause or contribute to stress do not assist. As the Supreme Court has stated “[s]tress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action...”. As noted by the Superior Court of Justice in the civil context: “[m]ost physicians, if asked, once told what being examined for discovery involves, would tell you that it is likely to cause their patient stress”.⁵
- [24] Furtado cites *Zhang* to support the requested adjournment, which states that the required review on a motion for an adjournment based on medical evidence “should not be confined to a search for flaws in whatever evidence has been delivered.”⁶
- [25] Staff submits that in *Zhang* and other cases⁷ that have considered adjournments or other accommodations on medical grounds, there is an underlying ailment. Here, it is the proceeding itself that appears to be the cause of most, if not all, of Furtado’s mental health issues.
- [26] We agree with Staff. We also distinguish *Zhang*, as in that case the Tribunal had available hospital records, specialist reports and detailed medical records. In this case, we are not combing the medical evidence in a search for flaws. We have no evidence to comb through. We have been provided some evidence of pre-existing physical ailments, a generic description of possible symptoms related to medications Furtado has been prescribed, Furtado’s own evidence unsupported by independent evidence, and a vague letter from Furtado’s treating family

⁵ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 59; *Botiuk v Campbell*, 2011 ONSC 1632 at para 31

⁶ *Zhang (Re)*, 2023 BCSECCOM 192

⁷ *Mohanadh v Thillainathan*, 2010 ONSC 2678 at paras 4-5, 8; *Ozerdinc Family Trust v Gowlings*, 2015 ONSC 2366 at para 6, 27, 31, 34; *Debus (Re)*, 2020 ONSEC 20 at paras 22, 25.

physician. The evidence is insufficient to reach the threshold of exceptional circumstances warranting a second adjournment based on medical grounds.

4.3 Adjournment on disclosure grounds

- [27] Furtado submits that Staff breached its duty to make reasonably prompt disclosure of new documents that arose from an investigation order made on September 20, 2022.
- [28] The new documents at issue were provided as the sixth tranche of disclosure in May 2023 and consisted of 2147 documents. The seventh and eighth tranches of disclosure in July and September 2023 contained a relatively small number of documents. In the covering letter to the May 2023 disclosure, Staff stated, “some documents relate to transactions within the material period in the Statement of Allegations, others are outside and are being disclosed out of an abundance of caution.” In September 2023 Staff informed Furtado that Staff intended to rely on 600 of the new documents from the sixth disclosure tranche in the merits hearing.
- [29] Furtado submits that he is unable to review and respond to this information in the short time left before the merits hearing. An adjournment – alongside a disclosure order – is an appropriate remedy where the prosecution fails to disclose in a timely manner.⁸
- [30] Staff points out that Furtado has now had disclosure of the documents for at least five months and that the documents are Furtado’s own financial and corporate documents. No concerns were raised at the first adjournment motion or at an attendance on July 20, 2023. In any event, Staff submits that disclosure is expected to be ongoing because the receivership related to this matter is ongoing.

⁸ *R v O’Connor*, [1995] 4 SCR 411 at para 83. See also *R v McMahon*, 2013 ABPC 75 at para 20 and *College of Nurses of Ontario v Member*, 2003 CarswellOnt 10596 at Appendix A

- [31] When considering disclosure, one must take a broad view of relevance and apply a low threshold for relevance but must also separate the wheat from the chaff.⁹ Disclosure must be adequate and need not be perfect.¹⁰
- [32] We find that Staff has discretion when making decisions about disclosure. While there may have been some delay in producing the records from the September 2022 investigation order, Furtado has had more than five months to review his own records. We do not find that there has been a delay in disclosure that amounts to exceptional circumstances warranting an adjournment.

5. DISCLOSURE MOTION

5.1 Law enforcement documents and conversations

- [33] In the eighth tranche of disclosure provided to Furtado in September 2023 are documents obtained from and/or sent to the Financial Transactions and Reports Analysis Centre of Canada (**FINTRAC**).
- [34] Furtado submits that the FINTRAC documents include reference to the Commission having authorized the “dissemination” of the FINTRAC documents to the RCMP. Furtado further submits that it is unlikely that there are no additional communications or documents exchanged between Staff and FINTRAC and/or the RCMP. Even if there are not, Staff should be required to confirm this. Furtado submits that these law enforcement documents are relevant, given Staff’s election to disclose the FINTRAC documents even though Staff are not relying upon them at the merits hearing. Furtado further submits that this information is necessary because if he chooses to testify he needs to know if any evidence he might give could result in him incriminating himself in possible, future criminal proceedings.
- [35] In response, Staff submits that it is not the Commission that is sharing its information with law enforcement. Rather, the Commission is just not forbidding FINTRAC from sharing information. The RCMP won’t disclose this information to Furtado and the Commission has no obligation to make such disclosure.

⁹ *Biovail Corporation (Re)*, 2008 ONSEC 14 at para 15

¹⁰ *Agueci (Re)*, 2012 ONSEC 44 at para 44

Investigative privilege is important and, in any event, is not relevant to this proceeding.

- [36] We agree with Staff. Knowing whether FINTRAC shared information with the RCMP is not going to help in this proceeding. Any information that Staff may give cannot help with whether Furtado would incriminate himself, as it depends upon what evidence Furtado plans to give.

5.2 Evidence from the September investigation order and future enforcement plans

- [37] Furtado submits that as part of its ongoing disclosure obligations, Staff should be required to confirm whether a separate and potentially overlapping proceeding may be commenced in connection with a new investigation order that was obtained in September 2022. Furtado requests the status of that investigation. This is because Furtado should not be required to defend the allegations against him in this proceeding, only to have Staff potentially commence a separate but overlapping proceeding against him based on the evidence collected pursuant to the new investigation order. Nor would such an approach be fair to this Tribunal. Staff of the Commission is not entitled to litigate enforcement proceedings by instalment.

- [38] Furtado further submits that he requires the information sought to be disclosed by Staff so that he may make informed tactical defence decisions (for example, whether he will testify, considering his Charter rights; whether he will seek to have the proceedings joined; and/or whether he will seek a stay of proceedings). These are complex legal issues requiring sufficient information to make informed decisions.

- [39] Staff submits there are instances where it may be important to keep an investigation quiet. There has been new conduct since the Statement of Allegations resulting in an additional investigation order and a review of Furtado's assets. Some documents disclosed related to the transactions during the material period, while some are outside the period.

- [40] Staff further submits that an investigation is not a proceeding. There is currently only one proceeding from the statement of allegations in this matter and it does not get hung up if further investigations uncover further wrongdoing. The

conduct is differentiated in time. This is not a situation of double jeopardy. If in the future Furtado faces another proceeding he can bring whatever motion he wants about the appropriateness of that proceeding in that proceeding. The test remains relevance. The status of the other investigation and where it may be going is not relevant to this proceeding.

[41] We rely on *Cormark Securities Inc. (Re)*¹¹ to conclude that Furtado is not entitled to receive all the evidence arising from the September 2022 investigation order. In *Cormark*, the Tribunal rejected a request from respondents to order disclosure of all materials obtained under a s 11 order. Information obtained in an investigation is not automatically relevant to the allegations. The disclosure standard remains one of relevance.

[42] Similarly, we conclude that there is no obligation on Staff to inform Furtado of future enforcement plans. The Statement of Allegations frames this proceeding. It has not been amended. Furtado knows the case he must meet and any concerns he has raised in this motion are speculative.

5.3 Update to Collins witness summary

[43] Stephanie Collins is a Senior Forensic Accountant at the Commission. An amended witness summary was filed on September 19, 2023. Furtado submits that the amended Collins witness summary significantly expands the timeframe of Collins' existing financial analysis and adds new analysis of a further account held by Furtado. However, it does not include any information about Collins' findings and the anticipated use of such evidence in relation to the allegations Staff seek to prove. Furtado therefore requests that the witness summary be amended so that Furtado can assess what, if any, additional evidence, he wishes to present in his defence of this matter.

[44] Staff submits that while the amended witness summary has been updated to the time the receiver was put in place, Staff cannot change the scope of the proceeding through disclosure. In any event, a review of the amendments do not reveal anything "earth shattering". The flow of funds to investors has been updated but no changes have been made to the substance of the evidence which

¹¹ *Cormark Securities Inc (Re)*, 2023 ONCMT 23 at paras 31, 35

is already outlined in the witness summary. Staff submits that if Furtado is concerned that the disclosure is outside the material time, such an argument can be made at the merits hearing.

[45] We find the amended witness summary meets the requirements of rule 27(3)(b), which is to provide the substance of the witness's evidence. The witness is providing a chart showing the source and use of funds from various accounts. As an accountant, this summary of the flow of funds is the witness's findings. The witness cannot make legal conclusions about the flow of funds.

6. CONFIDENTIALITY REQUEST

[46] Furtado sought to have part of the hearing conducted in camera to protect his personal medical information and to treat that same information as confidential in the written record.

[47] Staff did not oppose having the issue dealing with Furtado's adjournment request on medical grounds being held in a non-public hearing, but that the transcript of the submissions be made public subject to submissions to redact portions of it.

[48] 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.

[49] 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.

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

[51] 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.¹²

[52] Applying rules 22(2) and 22(4), and considering the case law, we proceeded in the same manner as an earlier adjournment motion in this hearing.¹³ We agreed to hear the portion of the hearing dealing with an adjournment request on medical grounds in a non-public hearing and that the parties propose redactions to transcript.

[53] Regarding redactions to the materials filed confidentially in relation to this motion and to the transcript of the confidential portion of the hearing, we rely on the conclusions reached by the Tribunal in *Go-To Developments Holdings Inc (Re)*.¹⁴ Where the health of a party is central to the issues in a proceeding before the Tribunal, as it is to the adjournment portion of this 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.¹⁵

[54] Consistent with the earlier *Go-To Developments Holdings Inc.* decision, as well as recent decisions issued by the Tribunal in *Odorico (Re)*¹⁶ and *Ali (Re)*¹⁷, 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.¹⁸

[55] Furtado also proposes that we redact certain materials attached as Exhibits to their Motion Record that do not deal with Furtado's health. These materials include s 11 orders from Staff's investigation and indices, lists, and documents from Staff's disclosure to Furtado. Neither party made submissions about

¹² *Sherman Estate v Donovan*, 2021 SCC 25 at para 30 (***Sherman Estate***)

¹³ *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 35 (***Go-To Developments Adjournment Motion #1***)

¹⁴ *Go-To Developments Adjournment Motion #1*

¹⁵ *Go-To Developments Adjournment Motion #1* at para 51

¹⁶ 2023 ONCMT 10

¹⁷ 2023 ONCMT 30

¹⁸ *Sherman Estate* at para 30

redacting these materials. We conclude that they should be redacted. Redacting the s 11 orders is consistent with the fact that such orders are confidential until a hearing is begun. Staff's disclosure to a respondent is intended to allow the respondent to make full answer and defence to Staff's allegations. Not all the material in Staff's disclosure becomes part of either Staff's or a respondent's case in a merits hearing. Redacting those materials does not, in our view, infringe on the open court principle.

7. CONCLUSION

[56] For the reasons above, we conclude that:

- a. the motion to adjourn the merits hearing is dismissed;
- b. the motion requiring Staff to provide further disclosure is dismissed, and the documents filed in connection that the disclosure motion shall be redacted as indicated in Schedule A to the order; and
- c. the documents filed in connection with the adjournment motion and the transcript of the confidential portion of the hearing shall be redacted as indicated in Schedule A to the order.

Dated at Toronto this 24th day of November, 2023

"M. Cecilia Williams"

M. Cecilia Williams

"Sandra Blake"

Sandra Blake