



Capital
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Citation: *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 29
Date: 2023-09-07
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

(Rule 27(3) 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: In writing; final written submissions received July 13, 2023

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

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REASONS AND DECISION

1. OVERVIEW

- [1] On March 30, 2023, Staff of the Ontario Securities Commission brought a motion for a further and better witness summary from Oscar Furtado, requesting that the Tribunal order Furtado's witness summary to comply with the requirements of Rule 27(3) (the **Witness Summary Motion**).
- [2] Furtado served a witness list on November 23, 2022, as required by the *Capital Markets Tribunal Rules of Procedure and Forms* and as ordered by this panel. He identified himself as the only anticipated witness that he may be calling in this matter, and he provided a summary of his anticipated evidence (the **Initial Witness Summary**). The Initial Witness Summary listed topics that Furtado was expected to testify about but did not disclose the substance of his testimony about any of them.
- [3] On June 30, 2023, Furtado served a "fresh as amended" witness summary (**Amended Witness Summary**) in response to Staff's Witness Summary Motion. The Amended Witness Summary states that Furtado will testify generally in accordance with the transcripts of his compelled interviews by Staff. Staff's position is that the Amended Witness Summary is also deficient.
- [4] For the following reasons, we find that the Amended Witness Summary does not meet the requirements of Rule 27(3).

2. PRELIMINARY ISSUE

- [5] Staff initially requested that the Witness Summary Motion be conducted in writing. Furtado did not consent to Staff's request, and the Witness Summary Motion was subsequently scheduled to be heard on June 2, 2023.
- [6] Before the June 2, 2023 hearing date, Furtado requested that the motion be adjourned to address other issues in advance of the hearing on the merits. The parties agreed that other issues in this proceeding be dealt with on that date.
- [7] At the June 2, 2023 attendance, Furtado agreed the Witness Summary Motion could now be conducted in writing but stated he required time to provide responding submissions. Staff, however, submitted that the Witness Summary

Motion should go ahead as scheduled. Furtado also indicated that there was a possibility he might serve a further and better witness summary on Staff, and so make the Witness Summary Motion unnecessary. However, he added that he could not do so in the short term due to his health issues.

[8] On June 22, 2023, we ordered that the motion for a new witness summary be conducted in writing, pursuant to Rule 23(6). We also extended the timelines for the Respondents to file their materials.¹ Since whether a witness summary complies with Rule 27(3), is a purely legal question, we concluded there was good reason to conduct the hearing in writing.

[9] We now turn to the law regarding witness summaries.

3. LAW AND ANALYSIS

3.1 The law

[10] Rule 27 (3) of the Tribunal's Rules provides that a party to a proceeding shall serve on every other party a "summary of the evidence that each witness is expected to give that includes, unless previously disclosed: ... (b) the substance of the witness's evidence; and (c) the identification of any document or thing to which the witness is expected to refer."

[11] The Tribunal has previously identified some of the purposes served by requiring pre-hearing disclosure of anticipated oral evidence in the form of witness summaries. For example, witness summaries:

- a. allow the parties to understand the issues in the proceeding better;
- b. facilitate the narrowing of issues;
- c. allow parties to identify and resolve evidentiary issues that may arise at the hearing;
- d. facilitate settlement;
- e. permit more reliable estimates of the time required to conduct the hearing; and

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

f. as a result of all of the above, they minimize the time and resources required, and the cost of the hearing to the benefit of the Tribunal and the parties.²

[12] When the Tribunal is asked to assess the sufficiency of a witness summary at the pre-hearing stage, the summary must be assessed on its face.³ The Tribunal's review of the witness summary's sufficiency at this stage "necessarily affords the party delivering the witness summary more latitude than would be the case with a challenge during the merits hearing."⁴

[13] We now briefly describe the Witness Summary and the Amended Witness Summary before turning to the parties' positions and our analysis supporting our conclusion that the Amended Witness Summary is deficient.

3.2 The Initial Witness Summary and the Amended Witness Summary

[14] Furtado's Initial Witness Summary listed the topics about which Furtado would testify if he testifies. Staff submits that the Initial Witness Summary was deficient because it did not disclose the substance of his testimony about each of the topics. It said only that the witness would refer to documents that were included in Staff's disclosure, or would otherwise be provided or were publicly available. It did not disclose the specific documents or things Furtado would refer to in his evidence.

[15] Furtado's Amended Witness Summary states that he will testify generally in accordance with the transcripts of his compelled interviews. It states that he will refer only to documents in Staff's disclosure, or which have otherwise been provided to Staff through prior correspondence or are publicly available.

[16] Staff submits that it appears from the title of the Amended Witness Summary ("Fresh as Amended") and the fact that it does not refer to the initial Witness Summary, that the Amended Witness Summary is intended to replace the Initial Witness Summary. We agree. The focus of our analysis is therefore on whether

² *Hutchinson (Re)*, 2019 ONSEC 9 at para 22

³ *BDO Canada LLP (Re)*, 2020 ONSEC 2 at para 30 (**BDO**)

⁴ *BDO* at para 30

the Amended Witness Summary complies with Rule 27(3). We conclude it does not.

3.3 Parties' positions and our analysis

3.3.1 Does the Amended Witness Summary comply with Rule 27(3)(b)?

[17] Rule 27(3)(b) requires that a witness summary disclose the "substance" of the witness's evidence.

[18] Furtado submits that the Amended Witness Summary complies with Rule 27(3)(b) because it incorporates, by reference, Furtado's compelled interview transcripts. Relying on the Tribunal's decision in *BDO*, Furtado's submits that:

- a. a witness summary will fail to comply with the Rules only if it fails to disclose any substance of the witness's anticipated evidence;
- b. it can be assumed that compelled interview transcripts contain some substantive testimony even if such transcripts are not before the Tribunal; and
- c. therefore, a witness summary that incorporates by reference interview transcripts will disclose some substance of the anticipated testimony and will be compliant with the Rules.⁵

[19] Furtado submits that in *BDO*, the Tribunal found that the witness summaries of nine witnesses, which did not disclose any substance of the witnesses' anticipated testimony other than through the incorporation by reference of the interview transcripts for eight of the nine witnesses, sufficiently disclosed the substance of the witnesses' evidence and therefore complied with Rule 27(3).⁶

[20] In addition, Furtado submits that since he is to tender any in-chief evidence by affidavit in advance of the merits hearing, as agreed to by the parties, the Amended Witness Summary, together with the affidavit evidence, will clearly satisfy the purposes of mutual pre-hearing disclosure of anticipated oral evidence.

⁵ *BDO* at paras 31, 33, 34-35

⁶ *BDO* at para 40

- [21] Staff submits that the Amended Witness Summary provides no disclosure of intended topics for Furtado's evidence, other than a reference to the transcripts. In contrast, they submit that the Initial Witness Summary did identify categories in which Furtado may provide evidence, but without identifying the substance of the evidence. In *BDO*, the witness summaries, Staff submits, at least identified that each witness was to speak to their involvement, or that of a certain organization, in the audits in issue.⁷
- [22] Staff further submits that in *BDO* the Tribunal found that where a witness summary discloses no substance other than by reference to compelled interview transcripts, introductory language such as "including, but not limited to" and "broadly consistent with" raises reasonable concerns about the intended use of such phrases by the respondent⁸. The respondents in *BDO* conceded that the broad introductory language was "largely nominal". The panel in *BDO* accepted the witness summaries holding that the substance of those witness summaries was "confined to whatever substance may be found in the transcripts of their examinations."⁹
- [23] Furtado's Amended Witness Summary states that Furtado "will testify generally in accordance with the transcripts." Staff submits that this language raises the question of what use Furtado intends to make of the words "generally in accordance with", and whether he may attempt to testify beyond the scope of or contrary to the transcripts in reliance on this language. In addition, Staff submits that the concern is exacerbated by the covering letter from Furtado's counsel that accompanied the Amended Witness Summary, which states, "Should Mr. Furtado intend any corrections to the [Transcripts] in the course of reviewing his evidence and preparing for the merits hearing, we will advise staff expeditiously."
- [24] We conclude that the Amended Witness Summary does not comply with Rule 27(3)(b). While the Amended Witness Summary arguably provides less substance than the Initial Witness Summary (because it does not refer to

⁷ *BDO* at para 15

⁸ *BDO* at paras 36-37

⁹ *BDO* at paras 19-22, 34-35, 38, 41

categories or topics Furtado will testify about), Tribunal precedent supports a conclusion that incorporating by reference the transcripts of compelled interviews constitutes sufficient substance for the purposes of Rule 27(3)(b) at the pre-hearing challenge stage.

[25] However, by stating that he will “testify generally in accordance with” the transcripts and raising the possibility of future challenges to the contents of the transcripts, Furtado has created sufficient ambiguity about the scope of his evidence that we conclude that the Amended Witness Summary does not disclose the intended substance of his evidence.

3.3.2 Does the Amended Witness Summary comply with Rule 27(3)(c)?

[26] Rule 27(3)(c) requires that a witness summary disclose the “identification of any document or thing to which the witness is expected to refer”.

[27] Staff submits that the Amended Witness Summary does not comply with Rule 27(3)(c) because it does not list any documents, rather it refers to documents only in broad categories. Further, Furtado has not limited himself to even those broad categories by indicating that he may identify other documents not captured in those broad categories.

[28] Furtado submits that the Amended Witness Summary is compliant with Rule 27(3)(c) and is consistent with routinely accepted practices of the Tribunal.

[29] Both parties rely on *BDO* to support their respective positions. In *BDO* the witness summaries at issue stated that the witnesses were “expected to refer to documents in the hearing brief of *BDO*, which is expected to include, among other documents, *BDO*’s Audit Working Papers and e-mail correspondence relating to the audits in question.”¹⁰

[30] The panel in *BDO* dismissed the reference to the hearing brief as illogical and of no assistance, given that the hearing brief did not exist at the time and was not due to be delivered until closer to the commencement of the merits hearing.¹¹

¹⁰ *BDO* at para 43

¹¹ *BDO* at para 44

- [31] The *BDO* panel went on to exclude the general introductory language “which is expected to include, among other documents” from its consideration of the witness summary as being of no value.¹² The *BDO* panel effectively read the witness summaries as referring to “BDO’s Audit Working Papers and e-mail correspondence relating to the audits in question”.¹³
- [32] The *BDO* panel declined to grant Staff’s request for “further and better” witness summaries because the requested order lacked any specifics and there was no basis for the panel to determine a more specific order. Given the broad nature of the allegations in *BDO*, the panel commented it had no basis to conclude that *BDO* would not rely on every document and every e-mail in presenting its case.¹⁴
- [33] Contrary to Furtado’s submissions, the circumstances before us differ from those in *BDO*. In *BDO*, the witness summaries disclosed that the witnesses would give evidence about “BDO’s Audit Working Papers and e-mail correspondence relating to the audits in question.” The Amended Witness Summary before us lacks anything close to that specificity. The reference to “documents that have been included in Staff’s disclosure, have otherwise been provided to Staff through prior correspondence, or are publicly available” does not identify any documents in a meaningful way that would facilitate the narrowing of issues, identification and resolution of evidentiary issues or facilitate settlement in this matter.
- [34] In addition, Furtado leaves open the possibility that he may identify additional documents outside the very broad category of documents he identified. He states that in such event, he will advise Staff in advance of the hearing and will include any such documents in his hearing brief. In our view the statement further undermines Furtado’s position that the Amended Witness Summary identifies the documents that he will refer to in his evidence.
- [35] We conclude that the broad and open-ended nature of the description of the documents that Furtado may refer to in his evidence, as described in the Amended Witness Summary, does not sufficiently identify the documents for the purposes of Rule 27(3)(c).

¹² *BDO* at para 45

¹³ *BDO* at para 46

¹⁴ *BDO* at para 51

[36] With respect to the substance of Furtado’s evidence and the identification of the documents he may refer to in evidence, Furtado states that both will be addressed in the affidavit of his in-chief evidence. We agree with Staff’s position that the affidavit is not a substitute for providing a proper witness summary. An affidavit that will be delivered mere weeks before the merits hearing does not achieve the purposes of proper pre-hearing disclosure of anticipated witness evidence as we set out in paragraph 16 above.

4. CONCLUSION

[37] For the reasons above, we conclude that the Amended Witness Summary does not comply with Rule 27(3). We order Furtado to deliver a further and better witness summary to all other parties by September 20, 2023.

Dated at Toronto this 7th day of September, 2023

“M. Cecilia Williams”

M. Cecilia Williams

“Geoffrey D. Creighton”

Geoffrey D. Creighton

“Dale R. Ponder”

Dale R. Ponder