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**IN THE MATTER OF
BDO CANADA LLP**

REASONS AND DECISION ON A MOTION

Hearing: December 16, 2019

Decision: January 3, 2020

Panel: Timothy Moseley Vice-Chair and Chair of the Panel

Appearances: Doug McLeod For BDO Canada LLP
Melissa Feriozzo

Robert L. Gain For the moving party Staff of the
Anna Huculak Commission

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REASONS AND DECISION ON A MOTION

I. OVERVIEW

- [1] In this proceeding, Staff of the Ontario Securities Commission (**Staff of the Commission**) alleges that BDO Canada LLP (**BDO**), in conducting audits relating to Crystal Wealth Management Systems Limited (**Crystal Wealth**), breached certain provisions of the *Securities Act*¹ (the **Act**).
- [2] The merits hearing is set to begin on March 2, 2020. As part of pre-hearing disclosure, Staff and BDO have exchanged summaries of the anticipated evidence of witnesses that each party may call to testify at the merits hearing.
- [3] Staff contends that the witness summaries delivered by BDO fail to meet the standard imposed by the *Ontario Securities Commission Rules of Procedure and Forms* (**Rules**).² Staff brings this motion, seeking an order requiring BDO to deliver further and better witness summaries.
- [4] The motion was heard on December 16, 2019. By order dated December 18, 2019,³ I dismissed Staff's motion, with reasons to follow. These are my reasons.
- [5] As I explain below, I am unable to find at this time that BDO's witness summaries are inadequate. However, that does not preclude a finding, during the course of the merits hearing, that one or more of the witness summaries fails to comply with the Rules. Such a finding would, absent permission from a panel, prevent BDO from relying on witness testimony that was not properly disclosed in a timely way before the merits hearing.

II. BACKGROUND

A. Legal framework

- [6] Subsection 5(1) of the *Ontario Securities Commission Practice Guideline*⁴ (**Practice Guideline**) contemplates that in an enforcement proceeding, a panel will impose a timeline for various steps leading up to the merits hearing, including the exchange of witness summaries.
- [7] Rule 27(3) of the Rules requires that a witness summary include "the substance of the witness's evidence" and "the identification of any document or thing to which the witness is expected to refer."
- [8] Rule 27(8) of the Rules provides that a party that fails to comply with its disclosure obligations, including those set out in Rule 27(3), "shall not, without a Panel's permission, be permitted to rely on material or testimony that was not properly disclosed."
- [9] These sections of the Practice Guideline and of the Rules are the Commission's implementation of an authority expressly contemplated by s. 5.4 of the *Statutory Powers Procedure Act*.⁵ That section provides that if a tribunal's rules "deal with disclosure" (as the Rules do), "the tribunal may, at any stage of the proceeding

¹ RSO 1990, c S.5

² (2019) 42 OSCB 9714

³ (2020) 43 OSCB 28

⁴ (2019) 42 OSCB 9736

⁵ RSO 1990, c S.22

before all hearings are complete, make orders for... the exchange of witness statements...".

B. Timeline of relevant events in this proceeding

- [10] By order of the Commission dated June 13, 2019,⁶ BDO was required to serve its witness summaries on Staff by July 25, 2019.
- [11] On July 25, 2019, BDO served witness summaries on Staff. On July 29, 2019, Staff communicated its view to BDO's counsel that the witness summaries were deficient.
- [12] At an attendance before the Commission on August 19, 2019, scheduled to address various pre-hearing matters, Staff raised its concerns about BDO's witness summaries. The Commission did not have the summaries before it and was not asked to adjudicate with respect to them. However, on consent of both parties, the Commission ordered BDO to provide further witness summaries by October 11, 2019.⁷
- [13] On October 11, 2019, BDO delivered a single document entitled "Witness Summaries of BDO Canada LLP". That document contains the revised witness summaries that are the subject of this motion.

C. Contents of the witness summaries

- [14] In introductory language, the witness summary document states that it "provides a brief overview of the anticipated evidence of witnesses that BDO... anticipates that it may call at the hearing of this matter." The document identifies nine individuals who may testify at the merits hearing.
- [15] For each potential witness, the summary of anticipated evidence states:
 - a. the witness's title at the relevant time; and
 - b. that "[b]roadly speaking", the witness will speak to her/his involvement, and/or the involvement of specified organizations (including BDO), in the subject audits.
- [16] Eight of BDO's nine witnesses were interviewed by Staff one or more times during Staff's investigation of this matter. For each of those eight individuals, the witness summary incorporates by reference the transcript(s) of Staff's interview(s) of that witness.
- [17] In addition, the witness summary document states that all witnesses "are 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."
- [18] None of the witness summaries, on its face, discloses the substance of the witness's anticipated evidence. While the examination transcripts that are incorporated by reference may include information of substance, those transcripts were not filed on this motion. I therefore had no opportunity to consider them in making my decision.

⁶ (2019) 42 OSCB 5449

⁷ (2019) 42 OSCB 6914

III. ISSUES

- [19] This motion presents one principal issue. Do BDO's witness summaries fail to comply with Rule 27(3), and if so, does that failure warrant an order at this stage of the proceeding requiring BDO to deliver further and better witness summaries?
- [20] Staff cites two deficiencies in the witness summaries.
- [21] First, all nine of the witness summaries use the words "including, but not limited to" when describing the anticipated evidence of that witness. Further, for the eight witnesses who were interviewed by Staff during the investigation, the witness summary states that the witness will testify in a manner that is "broadly consistent with" that witness's earlier testimony. With respect to the one witness who was not interviewed during Staff's investigation, the witness summary states that "broadly speaking", she will "speak to" the conduct of the relevant audits.
- [22] Second, Staff submits that the witness summaries do not properly identify the documents to which the witness is expected to refer.

IV. ANALYSIS

A. The purpose of witness summaries

- [23] I begin my analysis with a review of the purposes served by pre-hearing disclosure generally, and the exchange of witness summaries in particular.
- [24] Rule 1 of the Rules assists in determining those purposes, and in interpreting Rule 27(3) of the Rules. It provides that the objective of the Rules "is to ensure that Commission proceedings are conducted in a just, expeditious and cost-effective manner."
- [25] In *Hutchinson (Re)*,⁸ the Commission held that:
- [t]he requirement for mutual pre-hearing disclosure of anticipated oral evidence serves a number of purposes, all of which are consistent with the goals set out in Rule 1. For example, mutual pre-hearing disclosure:
- a. allows the parties to better understand the issues in the proceeding;
 - b. facilitates the narrowing of issues;
 - c. allows the parties to identify and resolve evidentiary issues that may arise at the hearing;
 - d. facilitates settlement;
 - e. permits more reliable estimates of the time required to conduct the hearing; and

⁸ 2019 ONSEC 9, (2019) 42 OSCB 1347 at para 22

f. as a result of all of the above, minimizes the time required, resources required, and cost of the hearing, to the benefit of the Commission and of the parties.

B. Assessing the sufficiency of witness summaries generally

- [26] Witness summaries are not typically provided to a panel, either before or during the merits hearing. A panel receives a witness summary only when there is a specific need to review it, *e.g.*, when a party complains about its adequacy.
- [27] A party may complain about the adequacy of a witness summary, and ask that the Commission assess its sufficiency, at either or both of two stages of a proceeding. The assessment may be made, as is the case here, before the merits hearing commences. Alternatively, the assessment may be made during the merits hearing.
- [28] The latter case, *i.e.*, a challenge to the adequacy of a witness summary during the merits hearing, typically arises when a witness is testifying and the challenging party submits that the substance of the witness's testimony was not properly disclosed. When the panel is asked to assess the witness summary's adequacy in those circumstances, the panel has two concrete elements to compare to each other – the witness summary and the witness's testimony.
- [29] In contrast, when as here a party challenges a witness summary before the witness begins to testify, the panel has nothing to which to compare the witness summary. At this stage of the proceeding, there is no certainty that the individual will be called as a witness at all, let alone what the extent of that witness's testimony will be if the individual does testify. The party on whose list the potential witness appears is free to decide not to call the witness, or to have the witness testify to only a portion of what is set out in the witness summary.
- [30] The summary must therefore be assessed on its face, an exercise that necessarily affords the party delivering the witness summary more latitude than would be the case with a challenge during the merits hearing.
- [31] Having said that, a witness summary that fails to disclose any "substance of" the witness's anticipated evidence, to use the words of Rule 27(3)(b), therefore does not comply with the rule. There would be no need to await the witness's testimony.

C. BDO's original witness summaries

- [32] As noted above, the Commission has never been asked to adjudicate regarding the original witness summaries delivered by BDO on July 25, 2019. However, those summaries were before me on this motion. I observe that for all nine of BDO's potential witnesses, the relevant summary merely specified the individual's title and identified, at a high level, the topic(s) about which the individual was expected to testify (*e.g.*, the relevant audits, and the individual's role in connection with the audits). There was no reference to the interviews of the eight witnesses who had been interviewed by Staff.
- [33] None of the original summaries disclosed any substance. It is therefore apparent on their face that they all failed to comply with Rule 27(3). Nothing flows from that fact on this motion. I make the observation only to illustrate how witness summaries might be found to be deficient at this stage of a proceeding.

D. Assessment of BDO's revised witness summaries

1. Contents of BDO's revised witness summaries

- [34] The contents of BDO's revised witness summaries, which are the subject of this motion, are described in paragraphs [14] to [18] above. Briefly stated, none of the summaries discloses any substance of the witness's anticipated testimony, other than through the incorporation by reference of the interview transcripts for eight of the nine witnesses.
- [35] As noted earlier, however, those transcripts were not before me. It is reasonable to assume that each transcript contains some substantive testimony. However, it is impossible to test that assumption without seeing the transcripts.

2. Staff's concern about language such as "including, but not limited to" and "broadly consistent with"

- [36] The first of Staff's two objections about the witness summaries is that they include language such as "including, but not limited to" and "broadly consistent with". Staff expresses the concern that at the merits hearing, a BDO witness will testify beyond the scope of her/his investigation-stage testimony, and that if Staff were to object at that time, BDO would respond by seeking to rely on the words quoted in the previous sentence.
- [37] Staff's concern is reasonable. While it would be premature for me at this time to make the determination contemplated by Rule 27(8), *i.e.*, whether BDO should be permitted to rely at the merits hearing on evidence that was not properly disclosed, it is fair to ask BDO what use it intends to make of those words. Do those words provide any meaningful disclosure to Staff? Do they accomplish any of the purposes set out in paragraph [25] above (*e.g.*, narrowing issues and facilitating settlement)?
- [38] That question was answered during the hearing of this motion. In oral submissions, counsel for BDO conceded that there is no real value in the words, and that they are "largely nominal".⁹ As a result, for the eight witnesses who were interviewed by Staff during the investigation, the substance of their witness statement is confined to whatever substance may be found in the transcripts of their examinations.
- [39] For the one potential witness that Staff did not examine during its investigation, I would have found her witness summary to be devoid of substance, and therefore deficient on its face, had BDO's counsel not supplemented that summary somewhat in his oral submissions. He stated that she:
- a. was the most junior person on the audit team;
 - b. is unlikely to be called as a witness; and
 - c. if called, would likely testify only as necessary to explain a document or e-mail, introduced by Staff during its case in chief, and of which she was the primary author.

⁹ Motion Hearing Transcript, BDO Canada LLP (Re), December 16, 2019, at 35 lines 11-21

- [40] While I continue to have concerns about the sufficiency of this witness summary, those concerns do not rise to the level necessary for me to conclude at this stage of the proceeding that the witness summary fails to comply with the Rules.
- [41] The limits of the “substance” in all nine witness summaries are therefore now clearly established. In my view, BDO’s counsel’s concession regarding the words complained of effectively resolves Staff’s legitimate concern about the use of those words. If at the merits hearing BDO seeks to rely on those words to overcome a Staff objection to the scope of a BDO witness’s testimony, Staff no doubt will refer back to the transcript of this motion hearing and/or to these reasons. It will of course be for the panel at the merits hearing to decide upon the merits of any such objection at the time.

3. Staff’s concern about BDO’s alleged failure to identify documents to which BDO witnesses will refer in their testimony

- [42] The second of Staff’s two objections is that the witness summaries fail to comply with the requirement in Rule 27(3)(c) that they “identify any document” to which the witnesses are expected to refer.
- [43] BDO responds by pointing to the introductory language in the witness summary document, which states that any individual on the witness list who is called as a witness is “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.”
- [44] That introductory language refers to BDO’s “hearing brief”. However, no such brief exists at this time. Each party will be required to prepare, and deliver to the other party, a hearing brief consisting of all the documents to which reference is expected to be made during the hearing. By order of the Commission dated August 19, 2019,¹⁰ the deadline for the exchange of hearing briefs is January 31, 2020. The deadline for the delivery of proper witness summaries was October 11, 2019. It is illogical and of no assistance to refer, in the witness summary document, to a set of documents (*i.e.*, the hearing brief) that does not yet exist. The reference should be disregarded.
- [45] As for the words “which is expected to include, among other documents”, the analysis in paragraphs [36] to [38] above applies. As BDO’s counsel correctly conceded, these words are of no value.
- [46] Accordingly, the BDO witness summaries can effectively be read to contemplate that the witnesses may refer to “BDO’s Audit Working Papers and e-mail correspondence relating to the audits in question.”
- [47] Staff submits that this description is overly broad. Staff contends that since the working papers comprise approximately 7,000 printed pages, and related correspondence consists of approximately 30,000 e-mails, the description fails to accomplish any of the purposes of pre-hearing disclosure. The witness summaries are therefore deficient in Staff’s submission, and BDO should be required to deliver witness summaries that are more precise about documents to which its witnesses are expected to refer.

¹⁰ (2019) 42 OSCB 6914

- [48] Staff requests an order requiring “further and better” witness summaries. Staff’s request does not explicitly contemplate that the order would be any more precise than that.
- [49] I cannot accede to Staff’s request. If I were to take it literally, the order would lack any specifics as to what subset of the audit working papers, or related e-mail correspondence, ought to be excluded. Better, in what way? Nothing would be achieved at this stage of the proceeding by an order that fails to answer that question.
- [50] If, on the other hand, I were to add some specifics, on what basis could I fashion those specifics? In the absence of a suggestion from Staff, to which BDO would have had an opportunity to respond at the motion hearing, I would have to proceed with extreme caution.
- [51] Even if I were comfortable with the idea of narrowing the list myself or directing that BDO do so in some specified way, I am ill-equipped to do that. Staff’s central allegation in this proceeding is that BDO falsely represented that it conducted its audits in accordance with Canadian generally accepted auditing standards (**GAAS**).¹¹ That is a very broad allegation (an observation I do not make critically). I have no basis to conclude that BDO would not choose to rely on every document and e-mail in presenting its case.
- [52] Staff does allege three “principal ways” in which BDO failed to comply with GAAS.¹² Those particulars may assist somewhat in defining the issues, but they do not clearly narrow the breadth of Staff’s central allegation (again, I mean no criticism in making that observation). One of the three “principal ways” is that BDO failed “to undertake its work with sufficient professional skepticism”. That allegation itself is broad. If I wished to narrow the relevant documents, how could I? I have no information about the specific documents contained within the audit working papers. I have not seen the transcripts of the examinations of the eight BDO witnesses. And I have not seen the expert reports that the parties have exchanged.
- [53] In my view, there is no valid option available at this stage by which I could require BDO to narrow the documents to which its witnesses may refer.
- [54] Even though I dismissed Staff’s motion, I do observe here, as I did during the motion hearing, that there may be costs consequences for BDO if:
- a. the merits hearing panel finds that BDO failed to comply with Ontario securities law;
 - b. Staff requests that the Commission make a costs order against BDO pursuant to s. 127.1 of the Act; and
 - c. Staff persuades the sanctions and costs hearing panel that BDO’s choice not to narrow the list of documents ought to result in a higher costs award (*e.g.*, because BDO’s choice unnecessarily lengthened the hearing).

¹¹ Amended Statement of Allegations dated September 16, 2019 at paras 3-4

¹² Amended Statement of Allegations dated September 16, 2019 at paras 4-7

V. CONCLUSION

- [55] For the reasons set out above, I cannot find at this time that any of BDO's witness summaries is deficient.
- [56] BDO's witness summary document describes itself as "a brief overview" of the evidence that BDO's witnesses will give. Time will tell whether the overview is too brief, in that it fails to provide the substance of testimony that BDO's witnesses attempt to give.
- [57] It must be clearly understood that nothing about my dismissal of Staff's motion, or these reasons, diminishes in any way the disclosure obligations that BDO had and continues to have under the Rules.

Dated at Toronto this 3rd day of January, 2020.

"Timothy Moseley"

Timothy Moseley