

**IN THE MATTER OF
BDO CANADA LLP**

File No. 2018-59

**MOTION
OF BDO CANADA LLP**

(Regarding Staff's Disclosure pursuant to the October 29, 2018 Order of the
Commission)

Under Rule 27 of the *Ontario Securities Commission Rules of Procedure and Forms*

A. ORDERS SOUGHT

The moving party BDO Canada LLP ("**BDO**"), requests with notice, that the Ontario Securities Commission ("**OSC**") make the following orders pursuant to Rule 27 of the *OSC Rules of Procedure and Forms* (the "**Rules**"):

1. An Order requiring OSC Staff to reproduce the electronic disclosure provided to BDO on November 2, 2018 (the "**Disclosure**") in a manner that is reasonably accessible to BDO, including:
 - (a) An Order requiring OSC Staff to accurately indicate any applicable familial relationships between documents (as described herein);
 - (b) An Order requiring OSC Staff to reproduce e-mails contained in the Disclosure which have been provided as PDF documents in their native format, with attachments included where applicable;
 - (c) An Order requiring OSC Staff to provide documents with their respective date fields and MD5 hash values (as described herein) where applicable;

- (d) An Order requiring OSC Staff to reproduce the Disclosure in a format which allows for the use of chronological sorting and de-duplication technology (as described herein);
2. An Order requiring OSC Staff to provide to BDO a complete record of all documents and things in its possession or control relating to (i) the compliance reviews of Crystal Wealth Management System Limited ("**Crystal Wealth**") and its proprietary investment funds (the "**Funds**" and together with Crystal Wealth, the "**Crystal Wealth Entities**") commenced by OSC Staff in 2011 and 2014 respectively; (ii) the compliance reviews of Crystal Wealth commenced by Staff of the British Columbia Securities Commission (the "**BCSC**") in 2013 and 2015 respectively; and (iii) any and all other compliance reviews or investigations conducted by OSC or BCSC Staff of Crystal Wealth or its representatives (the above documents referred to herein as the "**Compliance Review Record**");
 3. An Order that the Compliance Review Record to be produced as noted above, shall include without limitation, the full record of communications between and among OSC and/or BCSC Staff and representatives of Crystal Wealth and its external advisors as well as any internal notes, analyses, findings and communications between and among OSC and/or BCSC Staff; and
 4. An Order that any and all redacted internal notes among the Compliance Review Record included as part of the Disclosure provided to BDO by OSC Staff on November 2, 2018 be reproduced to BDO in an unredacted format.

B. GROUNDS:

The grounds for the motion are:

1. OSC Staff provided BDO with its Statement of Allegations in this proceeding on October 12, 2018 (the "**SOA**");
2. The SOA alleges that BDO failed to conduct its audits of the 2014 and 2015 annual financial statements of the Crystal Wealth Media Strategy Fund (the "**Media Fund**") and Crystal Wealth Mortgage Strategy Fund (the "**Mortgage Fund**") in accordance with Canadian generally accepted auditing standards ("**GAAS**");
3. Prior to commencing this proceeding, OSC Staff conducted an expansive investigation into the Crystal Wealth Entities as well as Clayton Smith, Crystal Wealth's President, Chief Executive Officer and Chief Financial Officer during its period of operation, certain other members of Crystal Wealth's management and staff as well numerous third parties connected to the Crystal Wealth Entities with a total of at least two dozen distinct parties involved;
4. The OSC and BCSC had, during the period at issue, coextensive regulatory oversight over the Crystal Wealth Entities in regard to many of the same matters considered by BDO in the course of its audit work;
5. To BDO's knowledge, both OSC and BCSC Staff conducted at least four separate compliance reviews of the Crystal Wealth Entities between 2011 and 2017, including in regard to many of the same issues grounding OSC Staff's current allegations against BDO;

6. OSC Staff have produced partial records of these compliance reviews but have, without justification, (i) failed to produce a number of significant and highly relevant documents in their possession or control and (ii) provided a number of internal notes relating to these reviews in a redacted format;
7. On May 28, 2018, Mr. Smith entered into a Settlement Agreement with the OSC in which he admitted to, *inter alia*, perpetrating a fraud on Crystal Wealth's investors and actively deceiving both OSC Staff and BDO in the course of perpetrating that fraud;
8. Pursuant to the October 29, 2018 Order of the Commission (the "**October 29 Order**"), OSC Staff were required to provide BDO with all non-privileged documents and things in their possession or control by November 9, 2018;
9. In response to the October 29 Order, OSC Staff provided BDO with electronic disclosure on November 2, 2018, (the "**Disclosure**") via a USB key containing 61,489 documents collected from 100 unique sources;
10. OSC Staff have failed to meet the burden of providing reasonably accessible disclosure of all relevant documents and things in their possession or control as required by the *Rules* and applicable jurisprudence, including *R v. Stinchcombe*, [1991] 3 S.C.R. 326 and *Biovail Corporation et al.*, 2008 ONSEC 14;
11. Further particulars of these grounds have been set out below in two sections: (a) Technical Issues and (b) Incomplete Disclosure;

Technical Issues

12. The Disclosure consists of 61,489 documents from 100 unique source folders, making manual review and sorting of the Disclosure a practical impossibility, and wholly disproportionate in terms of cost;
13. In order to meaningfully review the Disclosure, BDO will have to utilize e-discovery techniques, including chronological sorting, filtering and de-duplicating methods;
14. BDO is unable to utilize these methods as a result of the technical issues noted below;

Format of Disclosure

15. The Disclosure contains approximately 6,810 e-mails or attachments that have been provided as PDF documents rather than in their native format, including several instances where e-mails which originally had attachments have been provided in PDF format without the attachments noted therein;
16. As such, these documents have been stripped of their metadata (i.e., information regarding their essential characteristics, including size and date) and therefore cannot be reliably searched, organized or understood;

Inaccurate or Missing Familial Relationships

17. In cases involving electronic documents, documents must be coded to reflect their familial relationship to one another where applicable;

18. Documents may appear in a database as “standalone” documents, or as a family (i.e., a “parent” and its “children” such as a “parent” e-mail and “child” attachments to the e-mail);
19. A proper understanding of the familial relationship between documents is essential for conducting a proper and meaningful review with reference to the subject matter or allegations pertaining to any litigation;
20. Based on BDO's review of the Disclosure to date, the familial relationship between documents provided by OSC Staff is inconsistently recorded and, in some cases, entirely inaccurate;
21. These inaccuracies are not limited to instances where the Disclosure consists of scanned paper documents or documents downloaded from secure sites, indicating that the deficiencies in the Disclosure are more pervasive than the inherent limitations in the documents which OSC Staff has received from third parties;
22. As a result, it is impossible to understand the context of documents, such as whether they were provided as attachments to an e-mail sent to a witness, for example;

Chronological Sorting

23. Chronological sorting is required to make sense of and allow for a meaningful, contextual review of a large dataset with reference to the subject matter or allegations in a given proceeding;

24. This process requires valid date fields and accurate family identifiers, which were not provided consistently or accurately within the index accompanying the Disclosure;
25. Accordingly, BDO is presently unable to chronologically sort the Disclosure and is thus prevented from conducting a comprehensible review of the Disclosure;

Duplication

26. De-duplication technology would be required to be applied to the Disclosure to filter its contents and make document review more efficient and proportionate;
27. The de-duplication process requires documents to contain MD5 hash values (i.e., unique document identifiers) and for accurate familial relationships to be indicated where applicable;
28. As over 7,000 documents within the Disclosure are missing MD5 hash values and the familial relationships between documents are not consistently and accurately provided, BDO has been unable to employ de-duplication technology to streamline its review;
29. A “near-duplicate” analysis was conducted of the database, which indicated that potential duplication across the dataset may be as high as 57.1% while potential duplication within certain document sources may be as high as 70.4%;
30. However, while relevant in providing an indication of the level of duplication, a “near-duplicate” analysis is not fully accurate, meaning it cannot be used by BDO

to confidently exclude any documents from its review given the possibility that any document identified as a near duplicate may not be a true duplicate;

31. Accordingly, BDO is further impeded in its ability to conduct a meaningful and proportionate review of the Disclosure and at present would be forced to attempt to manually identify thousands of duplicative documents, a process which will be inordinately time-consuming and expensive;

Incomplete Disclosure

32. BDO's review of the Disclosure indicates that the Disclosure includes documents relating to four separate compliance reviews commenced by OSC or BCSC Staff between 2011 and 2017;

33. There are numerous direct areas of overlap between these compliance reviews and Staff's allegations, for example:

- (a) Both the SOA and the compliance review commenced by OSC Staff in 2014 address alleged conflicts of interest between representatives of Media House Capital (Canada) Corp. ("**MHC**"), a third party retained by the Media Fund to source administer the Media Fund loans, and Crystal Wealth, with the SOA alleging that BDO improperly relied on confirmations from MHC in conducting its audits of the Media Fund;

- (b) Both the SOA and certain of the compliance reviews conducted by OSC and BCSC Staff address alleged issues concerning the existence and valuation of the Mortgage Fund loans;

34. In regard to each of these reviews, OSC Staff have, without justification, excluded from the Disclosure certain categories of documents which are highly relevant to OSC Staff's allegations in this proceeding and redacted a number of internal notes relating to the review;
35. These reviews reflect the OSC and BCSC's core regulatory function in regard to capital markets participants and particularly their coextensive oversight of the Crystal Wealth Entities, both of which were known to BDO at the time of the events in question;
36. It is apparent that the fraud potentially perpetrated by Mr. Smith against BDO was being simultaneously perpetrated by Mr. Smith against OSC and BCSC Staff, including in regard to the core issues raised in OSC Staff's allegations against BDO;
37. In addition to being directly relevant to OSC Staff's allegations against BDO, the full Compliance Review Record, including but not limited to all internal correspondence and notes exchanged between and among OSC and/or BCSC Staff relating to their respective reviews, constitutes essential context for BDO in making full answer and defence to OSC Staff's allegations;
38. In particular, BDO cannot make full answer and defence to OSC Staff's allegations without understanding the basis upon which OSC and BCSC Staff concluded their reviews, including any decisions to conclude their reviews without further inquiries or conditions imposed upon Crystal Wealth;

OSC Staff Compliance Review Commenced in 2011

39. OSC Staff appear to have commenced their first compliance review of Crystal Wealth in or around 2011 (the “**2011-2012 Review**”);
40. The Disclosure provided to date in relation to this review consists only of two letters from Clayton Smith to OSC Staff dated September 14 and October 25, 2011, and two letters from Staff to Mr. Smith dated November 22 and December 21, 2012;
41. Reference is made in these documents to a Compliance Field View Report by OSC Staff dated August 11, 2011, (the “**2011 Compliance Field View Report**”) and an October 13, 2011, letter from OSC Staff to Mr. Smith, neither of which are included in the Disclosure;
42. Based on Mr. Smith’s September 14, 2011, letter to OSC Staff, the 2011 Compliance Field View Report addressed OSC Staff’s concerns relating to Crystal Wealth’s accounting and compliance measures, including specific accounting issues concerning the Mortgage Fund;
43. OSC Staff completed the 2011-2012 Review in or around December 2012, at which time they concluded that the issues identified in the Compliance Field View Report had been resolved by Crystal Wealth or adequately explained by Mr. Smith in his letters to OSC Staff;
44. The Disclosure excludes the full record of documents relating to the review, including but not limited to any internal correspondence or analyses between or among OSC Staff or any documents reflecting the basis behind (i) the issues it

identified in the 2011 Compliance Field View Report or (ii) OSC Staff's decision to conclude the review;

OSC Staff Compliance Review Commenced in 2014

45. OSC Staff appears to have commenced a second compliance review of Crystal Wealth in or around September 2014 (the "**2014-2017 Review**");
46. The 2014-2017 Review appears to have focused on compliance and accounting issues concerning Crystal Wealth's various funds and was conducted by members of the OSC's accounting team;
47. After completing their initial review, OSC Staff provided Crystal Wealth with a Compliance Field View Report dated March 24, 2015, (the "**2015 Compliance Field View Report**") and a follow up letter dated July 23, 2015, which outlined several purported issues, including (i) specific issues regarding the valuation of the Mortgage Fund and (ii) conflicts of interest involving representatives of MHC;
48. On July 27, 2015, Mr. Smith executed Terms and Conditions proposed by OSC Staff in its July 23, 2015, letter pursuant to which Crystal Wealth agreed, among other things, to (i) retain the services of an independent consultant (the "**Consultant**") to rectify the purported issues noted in the 2015 Compliance Field View Report and submit monthly progress reports to OSC Staff and (ii) deliver year-to-date unaudited financial statements to Staff on a monthly basis;
49. On February 10, 2017, following numerous exchanges with the Consultant pursuant to the Terms and Conditions, OSC Staff notified Mr. Smith via e-mail that

they had completed their review and were satisfied that the Terms and Conditions could be removed from Crystal Wealth's registration;

50. The Disclosure does not include the full record of documents relating to the review;
51. In particular, the Disclosure does not include any documents reflecting the basis for the findings in the 2015 Compliance Field View Report; OSC Staff's subsequent letters to Crystal Wealth or its external advisors; OSC Staff's decision to conclude the review and lift the Terms and Conditions imposed on Crystal Wealth in February 2017; or internal notes taken by OSC Staff or internal correspondence or exchanges relating to the review;
52. In addition, many of the internal notes provided by OSC Staff in relation to the 2014-2017 Review are significantly redacted without justification;

BCSC Staff Compliance Review Commenced in 2013

53. In November 2013, BCSC Staff appear to have commenced a compliance review concerning the Mortgage Fund (the "**2013-2015 Review**");
54. The Disclosure provided in relation to the 2013-2015 Review to date consists only of a series of letters and e-mails exchanged between BCSC Staff and Mr. Smith between November 21, 2013, and September 30, 2015;
55. As reflected in the limited disclosure made to date, BCSC Staff appear to have identified issues concerning the preparation of the Mortgage Fund's financial

statements, including the basis behind certain significant loan losses recognized in the Mortgage Fund's 2012 and 2011 audited annual financial statements;

56. BCSC Staff appear to have concluded their review in or around September 2015 and declined to take further action against Crystal Wealth around this time;
57. The Disclosure does not include internal notes, correspondence, or analyses between and among BCSC or OSC Staff relating to the review, including any documents reflecting the basis behind the conclusions reached in BCSC Staff's various letters to Mr. Smith and decision to conclude the review;
58. The Disclosure contains documents demonstrating that OSC and BCSC Staff cooperated with one another in connection with their respective reviews and investigations of Crystal Wealth and that OSC Staff were aware of the 2013-2015 Review and kept apprised of its status by BCSC Staff;

BCSC Staff Compliance Review Commenced in 2015

59. The Disclosure is limited to a single February 12-13, 2015, e-mail exchange between a BCSC Staff member and Mr. Smith in which Mr. Smith was notified of the commencement of the review;
60. This correspondence does not indicate the basis behind or subject matter of the review, including the outcome of the review and whether it was separate and distinct from the 2013-2015 Review;

61. Rule 27 of the *Rules*.

C. EVIDENCE

The Moving Party intends to rely on the following evidence for the motion:

62. The Motion Record of BDO, including the Affidavit of Melissa Marie Feriozzo sworn February 15, 2019; and
63. Such further and other evidence as the lawyers may advise and the OSC may permit.

Dated this 19th day of February 2019.

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Nigel Campbell LSUC #23437H
Tel: 416-863-2429

Doug McLeod LSUC #58998Q
Tel: 416-863-2705
Fax: 416-863-2653

Lawyers for the Moving Party, BDO
Canada LLP