Court File No. CV-17-579357-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH AND JASON COUCH

Plaintiffs

- and -

BDO CANADA LLP

Defendant

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING FACTUM OF THE DEFENDANTS
(Plaintiffs' Motion for Certification returnable December 9, 2019)

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PART I - OVERVIEW

A. The Receivership is the Preferable Procedure

1. The preferable procedure to this proposed class proceeding is anything but hypothetical. A Receiver has been appointed by the Court to act as a fiduciary for the interests of all Stakeholders in the Crystal Wealth Funds, including the unitholders who comprise the proposed class.[1] Amongst other steps to maximize recoveries for Stakeholders, the Receiver is pursuing an action in negligence against BDO. While the Receiver's claims are simply allegations at this stage and are denied by BDO, they are practically identical to those advanced by the representative Plaintiffs in this Action. There is no question that a recovery by the Receiver, if any, against BDO will be for the benefit of *all* Stakeholders, including the proposed class. Nor is there any suggestion that the Receiver is failing to effectively execute its mandate. Indeed, the Receiver has already recovered substantial funds and has started making payments to unitholders.

2. The Plaintiffs are not even asserting that a class proceeding will be preferable to the Receiver's Action. Instead, they argue that the two matters should be combined and proceed "in tandem" without specifying how this combination could be achieved procedurally or justifying why Stakeholders, the Courts and BDO should be subjected to the burdens, delays and costs associated with determining two duplicative claims.

[1] Capitalized terms are defined below.

B. The Duty of Care Hurdle Burdens the Class and Stakeholders

3. The Receiver's Action offers all of the positive procedural features and protections that are afforded to class members in a class proceeding, including a level of participation that equals or exceeds that which is afforded to class members in a class action. However, it is not subject to the costs, delays and litigation risks associated with a number of threshold issues that will need to be determined in the proposed class proceeding.

4. As determined by the Supreme Court of Canada in *Livent*, the Receiver stands in the shoes of the Crystal Wealth Funds and the fund manager and is authorized to pursue causes of action on their behalves. It cannot reasonably be contested by BDO, nor does BDO contest, that it owes professional duties to the Funds and the fund manager. Further, it is beyond question that any amounts recovered through the Receiver's Action will flow to the Funds' beneficiaries, including the unitholders. Even the proposed representative Plaintiff, Mr. Anthony Whitehouse, expects that he will receive his "fair share" of any amount the Receiver recovers against BDO based on his proportion of units held.[2]

5. While BDO does not dispute that it owes a duty to its clients, it *does* contest that it owes a duty of care in negligence *simpliciter* directly to the unitholders for the purposes of their individual investment decisions. BDO asserts, on the basis of established Supreme Court precedents, including *Hercules Managements*, that the

[2] Transcript of the Cross-Examination of Anthony Whitehouse on October 31st, 2019, at line 17, p. 69 – line 9, p. 70 ["Whitehouse Cross"], Exhibit J to the Affidavit of Melissa Marie Feriozzo sworn November 13, 2019 ["Feriozzo Affidavit"], Defendant's Supplementary Record ["DSR"] Tab 1J, pp. 324-325.

negligence *simpliciter* claim at the heart of the proposed class proceeding fails to disclose a cause of action.

6. Even if BDO cannot establish that the negligence *simpliciter* claim fails to meet the cause of action requirement of section 5(1)(a) of the *Class Proceedings Act*, the issue will need to be determined through an evidence-based hearing, either in a common issues trial or a summary judgment motion. Such a determination will subject the class to the costs, delays and risks of an adverse outcome that they need not bear in the Receiver's Action.

7. This certification hearing itself is a burden that is not imposed on the Receiver in its proceeding against BDO. The Receiver's Action may proceed directly to discovery without the need to establish a duty of care *or* demonstrate that the criteria for certification are met.

C. Conflicts of Interest Present Another Reason Not to Certify this Action

8. In addition to the hurdles to certification in the form of a 5(1)(a) challenge over questions of duty and the clear preferability of the Receiver's Action, this case also faces significant challenges under subsection 5(1)(e) of the test for certification. The proposed class action is beset with conflicts of interest that arise from proposed class representatives and class counsel bringing duplicative actions in overlapping roles. For example, Anthony Whitehouse is not a suitable class representative because:

(a) Mr. Whitehouse is pursuing an individual action against certain defendants embroiled in the fraud that is alleged to have occurred in the

Crystal Wealth Media Fund (the “Media House Defendants”) but who have not been sued by the Receiver. Thus, the claim represents an individual source of recovery that is just for him in the event that the class action is unsuccessful.

(b) In his individual action, Mr. Whitehouse alleges that certain third parties misled BDO and even went so far as to forge documents to deceive the auditor. The fact that these allegations constitute admissions by the proposed representative Plaintiff is helpful to BDO but harmful to the class in the class action claim.

9. For its part, class counsel, Adair Goldblatt Bieber LLP (“AGB”) also has multiple conflicts of interest:

(a) Not only does AGB represent the proposed class, extraordinarily, it also represents the Receiver in the Receiver’s Action. AGB is acting on a contingency basis and therefore has a financial stake in both matters. There are numerous problems with this:

(i) The proposed class is not coextensive with the Stakeholders the Receiver is acting for in the Receiver’s Action; AGB is conflicted to the extent that the class action could impede creditors from recovering their claims in priority to unitholders.

(ii) As set out above, the class proceeding burdens any recovery against BDO with litigation risks, legal fees and other costs that

will not be encountered in the Receiver's Action. The Receiver, whose duty is to maximize recoveries for Stakeholders, is compromised when its counsel pursues an agenda that is antithetical to this mandate; and

(iii) As its submissions indicate, AGB is constrained in arguing that either the Receiver's Action or the class proceeding is the preferable procedure because it has a duty to advocate for *both*. This has left it in the untenable position of having to argue that both actions should proceed in tandem. This is not a logical position but it is the only position AGB can take without compromising the position of at least one of its clients.

(b) AGB also represents Mr. Whitehouse in his individual action against the Media House Defendants. This constitutes an individual source of recovery for Mr. Whitehouse in connection with the alleged fraud. If it is a meritorious proceeding it should have been i) pursued on behalf of the class and ii) pursued by the Receiver. AGB cannot justify this preference for the interests of one of its clients over those of the others.

(c) Further, the proposed representative Plaintiffs, Carrie and Jason Couch, gave evidence that they invested their entire life savings in Crystal Wealth Funds with the knowledge and encouragement of Gary Froats, who was their investment advisor. Mr Froats is also an individual client of AGB and has been proposed as an additional Plaintiff in the Media

> House Action. The Couches do not appear to have met the criteria to qualify as accredited investors and therefore may have a claim against Mr. Froats to the effect that they were inappropriately sold Crystal Wealth Funds. AGB's representation of both the investors and their investment advisor presents a further conflict which may compromise AGB's duty to recommend that appropriate cross or third-party claims are advanced.

10. Multiple actual and potential conflicts prejudice Mr. Whitehouse, the Couches, the class and Stakeholders generally. They also have the potential to cause delays and additional costs associated with changes of counsel mid-litigation. None of these complications arise in a scenario in which the Receiver simply pursues its court-approved function with independent counsel.

D. Certification Would Impose "Double Jeopardy" on BDO

11. If certified and allowed to proceed, in addition to burdening the class, the class proceeding will subject BDO to two practically identical claims and the risk of inconsistent outcomes, in addition to the costs and distraction associated with litigating the same matter twice. As this Court has observed, procedural fairness to "*all parties*" is an ancillary goal closely associated with access to justice.[3]

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[3] *Vaeth* v. *North American Palladium Ltd.,* 2016 ONSC 5015, ["*Vaeth*"] at para. 41, Defendant's Book of Authorities ["DBA"] Tab 29.

E. Certification Constitutes an Impermissible End Run Around the Receivership

12. The interests of parties beyond those in front of this Court and the integrity of the Receivership process are at stake. The Commercial List has already considered and rejected the notion that unitholders require their own independent representation within the Receiver's Action. The proposed class action amounts to a collateral attack on this determination.

13. Further, creditors who rank in priority to unitholders have not been included in the class. However, they are entitled to have their claims satisfied in priority to the claims of unitholders.

14. The Receiver has a duty and a corresponding, exclusive power to pursue remedies on behalf of all Stakeholders. Receivership is a well-entrenched, effective and Court-sanctioned process designed to achieve solutions that are fair to all Stakeholders while respecting the priority of creditors' claims. Allowing a class proceeding to usurp the role of the Receiver would be to distort well-established Canadian insolvency law and practice.

PART II - THE FACTS

15. The Plaintiffs' discussion of the facts makes a number of merits-based assertions that have not been proven and are contested by BDO, including the assertion that BDO was negligent. As the merits of the Plaintiffs' allegations are irrelevant to this motion, BDO provides the following summary for context and to dispute those facts that could have a bearing on this motion, including facts relating to the magnitude or complexity of the cases at issue. However, while BDO will refrain

from engaging in a distracting refutation of all factual assertions made by the Plaintiffs, it should not be taken to have conceded any facts it does not expressly address below.

A. Crystal Wealth and Facts Leading up to the Receivership

1. Crystal Wealth and the Fraud Perpetuated by Clayton Smith

16. Crystal Wealth Management Services Limited ("CWMS") was a Burlington, Ontario-based Investment Fund Manager, Portfolio Manager, and Commodity Trading Manager operated by its Founder, Chief Executive Officer, Chief Compliance Officer, controlling shareholder and sole officer and director, Clayton Smith. CWMS managed fourteen proprietary mutual fund trusts (the "Crystal Wealth Funds" or the "Funds" and together with CWMS, "Crystal Wealth").[4]

17. As is discussed further below, in April 2017, following a lengthy investigation by Crystal Wealth's regulator, the Ontario Securities Commission (the "OSC"), Crystal Wealth was put into receivership by application of the OSC (the "Receivership"). Following the Receivership, Mr. Smith reached a settlement, which was approved by the OSC in May 2018. As part of his settlement, Smith admitted to committing fraud in his role at Crystal Wealth, namely the direct misappropriation of approximately $11 million in assets held by the Media Fund and Mortgage Fund. He also admitted to having misled both BDO and the OSC.[5]

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[4] Affidavit of Nigel Meakin sworn August 22, 2019 ["Meakin Affidavit"] at paras. 10-12, Defendant's Motion Record ["DR"], Volume 1, Tab 1, pp. 5-6; Grant Thornton Limited's First Report dated June 22, 2017 at paras. 14-17, Exhibit C to Meakin Affidavit ["First Receiver Report"], DR Volume 1, Tab 1C, p. 49.

[5] Settlement Agreement between the OSC and Clayton Smith dated May 28, 2018 ["Smith Settlement"], Exhibit A to the Supplementary Affidavit of Marlie Patterson-Earle sworn June 15, 2018 ["Patterson-Earle Affidavit"], Plaintiffs' Motion Record ["PR"] Volume 20, Tab 6A, pp. 6600-6620.

18. While the fact that a fraud was committed by Mr. Smith is common ground between the parties, the Plaintiffs have exaggerated the extent of Smith's fraud. There is no evidence that Crystal Wealth was an inherently fraudulent structure or that the quantum of unitholder investments affected by Smith's fraud was even close to the $100 million the Plaintiffs assert. Mr. Smith's settlement agreement and the OSC's evidence in support of its receivership application, which is reproduced in the Plaintiffs' motion record, indicate that the amount of Crystal Wealth assets subject to fraud was in the range of $9-11 million (representing approximately 5% of the $193 million in assets under management as of April 2017), and was restricted to investments entered into by only two funds - the Media Fund and Mortgage Fund.[6] While the merits of the purported fraud are not relevant to certification, the potential magnitude of unitholders' losses may be relevant to proportionality considerations in assessing the desirability of the considerably more complex proceeding proposed by the Plaintiffs.[7]

2. *<u>The BDO Audit Period</u>*

19. During the period that encompassed the fiscal years 2007 to 2015 (the "BDO Audit Period"), BDO audited the annual financial statements of CWMS and, for differing lengths of time, the annual financial statements of the Crystal Wealth Funds.

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[6] Smith Settlement at para. 7, PR Volume 20, Tab 6A, p. 6602; Affidavit of Michael Ho sworn April 17, 2017 at para. 20 ["Ho Affidavit"],Tab B of Application Record of the OSC dated April 25, 2017, Exhibit B to the Affidavit of Marlie Patterson-Earle sworn June 14, 2018, PR Volume 5, Tab 4B, p. 1231.

[7] Proportionality may be relevant to the preferable procedure criterion on a certification motion: *Price v. H. Lundbeck A/S*, 2018 ONSC 4333 at para. 149, DBA Tab 23. The Law Commission of Ontario also recommended incorporating proportionality into the preferable procedure analysis: *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019) ["LCO Class Actions Report"] at pp. 49-50, DBA Tab 31. This report was cited authoritatively in *Winder v. Marriott International Inc.,* 2019 ONSC 5766 ["*Winder*"] at para. 75, DBA Tab 30. Note that in *Berg et al. v. Canadian Hockey League et al*., 2019 ONSC 210, the Divisional Court disagreed with the motion judge's application of the proportionality principle but did not criticize the relevance of the principle to the preferable procedure analysis.

20. As a result of Smith's failure to provide information and documents requested by BDO, Crystal Wealth did not file or deliver audited 2016 financial statements for any of the Crystal Wealth Funds by the applicable March 31, 2017 deadline.[8] Contrary to the Plaintiffs' submissions, however, and as reflected in the OSC's application record to appoint the Receiver, BDO's refusal to issue audit opinions in respect of the Funds' 2016 financial statements did not trigger the Receivership.

3. BDO's Retainers

21. BDO's audits of CWMS and the Funds were conducted pursuant to retainer agreements negotiated and signed by Clayton Smith in his capacity as the principal of CWMS. These agreements imposed certain explicit obligations on CWMS with respect to the disclosure of accurate and complete information to BDO.[9] During the BDO Audit Period, management representation letters were delivered to BDO affirming that CWMS had discharged its responsibility to make the requisite disclosures to BDO, including those relating to the existence of fraud and related party transactions. The retainer agreements also contained certain indemnities in favour of BDO and terms limiting BDO's liability.[10]

4. Fund Documents Restrain the Unitholders' Legal Capacity to Sue

22. BDO has delivered a Statement of Defence in this Action and also in the Receiver's Action. In its Statement of Defence in this Action, BDO asserts that

[8]Affidavit of Marcel Tillie sworn April 17, 2017 at paras. 58-61 ["Tillie Affidavit"],Tab A of Application Record of the OSC dated April 25, 2017, Exhibit B to the Affidavit of Marlie Patterson-Earle sworn June 14, 2018, PR Volume 2, Tab 4B, pp. 413-415.
[9] See, for example, Engagement Letter between BDO Canada LLP and Crystal Wealth Management System Ltd. dated December 31, 2016, pp. 2-3 ["2016 Engagement Letter"], Exhibit A to the Affidavit of Erin Tucker affirmed September 30, 2019 ["Tucker Affidavit"], Plaintiffs' Reply Record ["PRR"] Tab 1A.
[10] See, for example, 2016 Engagement Letter, p. 9, PRR Tab 1A.

individual unitholders do not have capacity to sue BDO directly. This is not only because unitholders are not owed a duty by BDO in connection with their individual investment decisions. It is also because constraints in the constating documents of the Funds[11] and principles of corporate law establish that only CWMS, and by extension the Receiver, have the right to bring an action against BDO.

23. The Declaration of Master Trust, which governed each of the Funds and was incorporated by reference within the Funds' Offering Memoranda, stipulates that CWMS is the trustee for the unitholders and stands possessed of, and holds sole legal title to, all of the property and assets of the Fund. The Declaration of Master Trust further provides that no unitholder "shall have or be deemed to have individual ownership of any property or asset of a Fund and the interest of a [u]nitholder shall consist only of the right to receive payment from the Trustee of his interest in a Fund…"[12]

24. As per the Declaration of Master Trust, the unitholders have no individual ownership rights over property held in any Fund. CWMS has sole legal title to the Fund assets, including the right to pursue an action against third-parties. This right is now being exercised by the Receiver on behalf of CWMS.

25. This is relevant because, if this case were certified, unitholders' capacity to sue is a threshold issue that would need be determined as a common issue. BDO would

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[11] See BDO Statement of Defence (Whitehouse Class Action) at paras. 26-28, Exhibit E to Feriozzo Affidavit ["Statement of Defence"], pp. 132-133; 2016 Engagement Letter, p. 10, PRR Tab 1A.
[12] Amended and Restated Master Declaration of Trust of Crystal Wealth Mutual Funds dated December 17, 2007, s. 2.6, Exhibit E to the Affidavit of Linc Rogers sworn August 29, 2019 ["Rogers Affidavit"], DR Volume 2, Tab 2E, p. 667.

also rely on the *Foss v Harbottle* principle of "reflective loss", which disallows shareholders from suing for a loss suffered by the company other than derivatively. This principle, which serves to prevent, among other things, a multiplicity of actions and duplicative recovery, has been extended by Canadian courts to entities other than corporations.[13] Accordingly, BDO would argue in a common issue trial that, to the extent there is any right of action against BDO, it is held and may be enforced by CWMS alone. The capacity of unitholders to bring claims is not challenged in the Receiver's Action because the Receiver is appropriately exercising its legal rights to pursue that action.

5. *Regulatory Oversight by the Provincial Securities Commissions*

26. Crystal Wealth was a registrant with provincial securities regulators in its provinces of operation as an Investment Fund Manager, Exempt Market Dealer, Portfolio Manager and Commodity Trading Manager.[14] As such, it operated in a heavily regulated environment, and was overseen by multiple securities regulators including both the OSC and the British Columbia Securities Commission ("BCSC").

27. Crystal Wealth operated in the "exempt" market. Exempt issuers are excepted from certain of the disclosure requirements imposed by provincial securities regulators. In exchange, such issuers are *not permitted* to issue their securities to the public at

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[13] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, ["*Hercules Managements"*] at para. 59, DBA Tab 14; See also *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276 at paras. 15-28, 48 DBA Tab 10, where the British Columbia Court of Appeal held that the rule from *Foss v Harbottle* applied to bar an action brought by the investors in a real estate investment trust where the "true substance of the claim" was damage to the trust. The true substance of the claim in this matter is damage to the Funds, rather than separate, independent, and personal losses suffered by individual unitholders.

[14] Grant Thornton Limited's First Report dated June 22, 2017 at para. 14, Exhibit C to Meakin Affidavit ["First Receiver Report"], DR Volume 1, Tab 1C, p. 49.

large – they are only permitted to issue pursuant to specific securities law exemptions, including an exemption permitting distribution to a defined class of "accredited investors".[15] As reflected in the definitions of accredited investor found in securities legislation,[16] the accredited investor qualification is restricted to only investors with a requisite net worth or sufficient level of investment sophistication.

28. While compliance with the accredited investor requirement is a matter of securities regulation and not within the ambit of BDO's audits of the financial statements, the restricted nature of permissible investors is relevant to the 5(1)(e) analysis on this motion. As is discussed below, it appears that the proposed representative Plaintiffs were not accredited investors when they purchased units of the Funds. In the case of the Couches, this gives rise to the prospect of cross-claims between the Couches and their investment advisor. Moreover, as is discussed further below, class counsel represents both the Couches and their investment advisor, giving rise to conflict concerns.

B. The Receivership Process and the Receiver's Action

1. Admissibility of the Meakin Evidence

29. The receivership process generally, and the specific mandate and activities of Grant Thornton as the Receiver to the Crystal Wealth Funds, are outlined in the Affidavit of Nigel Meakin.[17] Mr. Meakin is the Senior Managing Director of the

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[15] *Securities Act*, R.S.O. 1990, c. S.5, ss. 72, 73.3, DBA Tab 38; *Securities Act*, RSBC 1996, c 418, Part 10, s.76, DBA Tab 37; National Instrument 45-106 Prospectus and Registration Exemptions, BC Reg 227/2009, s. 2.6 DBA Tab 35; Canadian Securities Administrators, National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, s. 7.1, DBA Tab 34.
[16] See National Instrument 45-106 Prospectus and Registration Exemptions, BC Reg 227/2009, s. 1.1 DBA Tab 35; *Securities Act*, R.S.O. 1990, c. S.5, s. 73.3, DBA Tab 38.
[17] Meakin Affidavit, DR Volume 1, Tab 1.

turnaround and restructuring practice of FTI Consulting Canada Inc., a global leader in the restructuring and insolvency field, where he assists financially troubled companies by, amongst other things, managing insolvency administrations, including acting as a court-appointed receiver.[18] Mr. Meakin has worked for 29 years as a restructuring professional.[19]

30. The Plaintiffs did not cross-examine Mr. Meakin. They contend that Mr. Meakin's evidence is inadmissible because it is unnecessary. They submit that his affidavit provides information that may be presumed to be within the knowledge of this Court and relates to Ontario law.[20]

31. There is no general principle that a judge of a court of general jurisdiction is presumed to have the requisite level of knowledge regarding the procedures of specialized courts or tribunals. As held by the Court of Appeal for Ontario: "[t]here is no exact way to draw the line between what is within the normal experience of a judge or a jury and what is not."[21] To the extent that the Meakin evidence makes reference to domestic law in describing specialized Receivership procedures, this does not preclude its admissibility. Expert evidence that makes reference to domestic law can be admitted, so long as it does not opine on that law.[22]

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[18] Meakin Affidavit at para. 1, DR Volume 1, Tab 1, pp. 1-2.
[19] Meakin Affidavit at para. 1, DR Volume 1, Tab 1, pp. 1-2.
[20] Plaintiffs' Certification Factum dated November 15, 2019 ["Plaintiffs' Factum"] at paras. 70-72, 157-161.
[21] *R. v. F. (D.S.)*, [1999] O.J. No. 688 (Ont. C.A.) at para. 65, DBA Tab 24; *Meady v. Greyhound Canada Transportation Corp*. 2015 ONCA 6 at para. 41, DBA Tab 18.
[22] *New Brunswick v Rothmans Inc.*, 2009 NBQB 60 at para. 48, DBA Tab 20.

32. The admissibility of the Meakin evidence is best demonstrated by the admission and consideration of similar expert evidence in *Fischer*. In *Fischer,* the Plaintiff adduced expert evidence regarding the context and purpose of OSC proceedings.[23] There, as on this motion, the expert evidence provided the Court with important information and context regarding a specialized form of proceeding despite the fact that the Court likely had some level of familiarity with it.[24]

33. In any event, much of the Meakin evidence relates to the professional practices of receivers which cannot be discerned from legislation. For example, Meakin advises about the existence of a "Commercial List Users Committee" that has developed a "Model Receivership Order" ("MRO") which sets out the provisions, including the range of powers, that the court typically considers it appropriate to grant in a receiver's appointment order.[25] In the Commercial List court in Toronto, parties typically use the MRO as a template when drafting an order and provide a backline to the MRO. The MRO and practices that have developed around it are relevant to an understanding of the typical powers and duties of a receiver, some of which, as Meakin points out, are not set out in any statute.[26] The powers, duties and common practices of receivers and how they have been applied in the context of the Crystal Wealth Receivership are also clearly relevant to the preferable procedure analysis in this case. To the extent that this Court does not have actual (as opposed to presumed) familiarity with receivership

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[23] *Fischer v. IG Investment Management Ltd*., 2012 ONCA 47 ["*Fischer ONCA*"] at paras. 48-49, DBA Tab 11.
[24] See *Fischer ONCA* at paras. 51-57, DBA Tab 11 where the Court summarizes the OSC proceedings as a complementary analysis to the expert evidence provided on this issue.
[25] Meakin Affidavit at paras. 26-30, DR Volume 1, Tab 1, pp. 11-14.
[26] Meakin Affidavit at para. 26, DR Volume 1, Tab 1, pp. 11.

proceedings, Mr. Meakin's evidence meets the necessity test. Alternatively, this Court may determine the appropriate weight to be afforded to Mr. Meakin's evidence.

2. *Receivership Proceedings: Background*

34. Mr. Meakin explains that a court-appointed receiver is an independent officer of the court acting in a fiduciary capacity, whose duties and obligations must be performed honestly and in good faith. The receiver must exercise reasonable care, supervision and control of the debtor's property. A fundamental duty of the receiver is to protect and preserve the interests of and realize value for the benefit all parties who may have an economic interest in the debtor's assets, property and undertakings (the "Stakeholders"). Stakeholders in the Crystal Wealth Receivership are both creditors and unitholders (*ie.* debt holders and equity holders).[27]

35. During an insolvency proceeding, claims are satisfied in order of priority. Certain statutory priorities and claims secured by Court-ordered charges (such as receiver and fees and disbursements) typically have priority over ordinary secured claims, and ordinary secured claims have priority over unsecured claims. Only when all other debt claims have been satisfied or provided for are unitholder claims (*ie.* equity) addressed.[28]

36. Mr. Meakin has opined that, since its appointment, the Receiver has acted in a manner that is consistent with its duties to consider the interests of all Stakeholders. Moreover, the Receiver has acted in a manner that is reflective of its primary objective:

[27] Meakin Affidavit at paras. 8, 18, 20, 22, 23, 24, 25, DR Volume 1, Tab 1, pp. 4, 9, 10-11.
[28] Meakin Affidavit at para. 38, DR Volume 1, Tab 1, p. 17.

the protection and advancement of Stakeholder interests, including the interests of unitholders.[29]

37. The Receiver continues to make efforts to realize value for Stakeholders and has made effective use of its powers to (i) realize on assets, (ii) investigate potential causes of action against third parties, and (iii) initiate litigation proceedings when it considers it appropriate to do so.[30]

3. The Receiver's Action

38. The Receiver has commenced a claim against BDO seeking damages. It is common ground between the parties that the Receiver's Action and the proposed class action are for the same alleged investor losses as are claimed in this proposed class action and both assert negligence *simpliciter* as the primary cause of action.[31] However, the Plaintiffs assert that these two proceedings are brought by "different parties."[32] As discussed below, AGB LLP is also counsel of record in the Receiver's Action.

39. Like the proposed representative Plaintiffs, the Receiver's primary allegation is that BDO was negligent because it did not conduct its audits of the Funds in accordance with GAAS or ensure that Crystal Wealth's financial statements were prepared in accordance with the relevant accounting framework.[33]

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[29] Meakin Affidavit at paras. 7, 17, 51, 70, 77, DR Volume 1, Tab 1, pp. 4, 9, 22, 29, 33
[30] Meakin Affidavit at paras. 52, 44, 55, 56, DR Volume 1, Tab 1, pp. 20, 23-24.
[31] Plaintiffs' Factum at para. 119.
[32] Plaintiffs' Factum at paras. 66-67.
[33] Statement of Claim in the Receiver Action at paras. 1, 20, 24, 28-29, Exhibit F to Feriozzo Affidavit, DSR Tab 1F, pp. 140-142, 150-155.

40. While BDO is defending the Receiver's Action on the merits, as stated above, it does not question the Receiver's standing or capacity to bring its claim. The Receiver's Action is ready to proceed to document production and discovery.

4. Receiver's Efforts to Maximize Stakeholder Interests

41. Since its appointment, the Receiver has taken several significant steps to advance the interests of unitholders.

42. As of the date of the Receiver's Fourth Report, no distributions have been made to creditors of the Crystal Wealth Group. However, the Receiver has held back approximately $7.6 million from available proceeds, representing the face value of claims filed pursuant to the Creditor CPO, and $1.3 million for actual and future estimated receiver and counsel fees (the "Holdback").[34]

43. Notwithstanding priority, which as explained above, means that unitholders, as equity claimants, rank after creditors, and in light of the Holdback, the Receiver obtained authorization from the Court to make interim distributions to unitholders in advance of the resolution of creditor claims. To date, unitholders have received two interim distributions of $31.4 million and $25.3 million, representing 87% of the total $65 million realized by the Receiver.[35]

44. A receivership appointment order does not typically provide the receiver with the power to make distributions from the proceeds of the realization of the debtor's assets. However, the Receiver sought and obtained court approval to rely on a Third-

[34] Meakin Affidavit at para. 16, DR Volume 1, Tab 1, p. 8.
[35] Meakin Affidavit at paras. 14(e), 15, 38, 53, 75, DR Volume 1, Tab 1, pp. 7-8, 17, 23, 31.

Party Unitholder Listing for the purposes of interim distributions to unitholders. The consequence of this approval was that a claims procedure was not required to quantify and validate unitholder claims prior to distribution. Accordingly, unitholders recovered some of their investments early in the Receivership - well in advance of the final resolution of creditor claims.[36] It should be noted that, as discussed at paragraphs 50-52, notwithstanding the Holdback, the Receiver cannot confirm with certainty that any recoveries it makes in the BDO action will be entirely for the benefit of unitholders.[37] Accordingly, the Receiver acknowledges the possibility that creditors may have claims against any recovery it makes against BDO in the Receiver's Action in priority to the claims of the unitholders.

45. The Receiver has regularly communicated with Stakeholders to keep them apprised of it's realization efforts via twenty-five notices and four detailed reports. Further, the Receiver held a conference call "townhall" meeting for unitholders. The unitholders also have access to all the court materials posted on the Receiver's website.[38]

5. *Supplemental Representation is not Required*

46. The appointment of representative counsel to protect the interests of vulnerable Stakeholders is granted in certain receivership proceedings and certain proceedings under the *Companies' Creditors' Arrangement Act*, where the debtor rather than a court-officer remains in control of its business and assets. In the Crystal Wealth

[36] Meakin Affidavit at paras. 39, 65, 74, DR Volume 1, Tab 1, pp. 17, 28, 31.
[37] Receiver's Answers to Written Questions, Question 1, Exhibit D to Rogers Affidavit, DR Volume 2, Tab 2B, p. 645.
[38] Meakin Affidavit at para. 63, DR Volume 1, Tab 1, p. 27.

Receivership, unitholders do not require supplemental representation as the Receiver has taken control, and the protection of investor interests is demonstrably central to its mandate.[39]

47. Early in the Crystal Wealth Receivership proceedings, an attempt was made to appoint representative counsel for unitholders. This proposal was opposed by the Receiver, the OSC and certain investors and was ultimately denied by Justice Hainey on the basis that the Receiver adequately represented the interests of unitholders.[40] This matter is described in more detail at paragraphs 106-111 below in the context of the preferable procedure discussion where it is explained that the proposed class proceeding amounts to a collateral attack on the decision of Justice Hainey.

48. Mr. Meakin identifies certain procedural safeguards that help to ensure that the Receivership will function in the best interests of all Stakeholders, including unitholders. This includes the gatekeeper role of the Court in approving significant steps (such as the settlement of an action), the ongoing ability of Stakeholders to dispute the actions and decisions made by the Receiver, and avenues to appeal from decisions of the court approving the Receiver's actions.[41] To date, the activities of the Receiver have been considered and approved by the Court on five separate occasions.[42]

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[39] Meakin Affidavit at paras. 7, 44, 49, 50-51, DR Volume 1, Tab 1, pp. 4, 20, 22.
[40] Meakin Affidavit at paras. 45-47, 49, DR Volume 1, Tab 1, pp. 20-22.
[41] Meakin Affidavit at paras. 19, 76(d), DR Volume 1, Tab 1, pp. 9, 32.
[42] Meakin Affidavit at para. 58, DR Volume 1, Tab 1, p. 26.

49. Each of the proposed representative Plaintiffs expressed satisfaction with the work the Receiver is doing on cross-examination. None was critical of the Receiver's work. Ms. Couch indicated that the Receiver is doing "the best that he can".[43]

6. *Potential Adverse Effects on Creditor Stakeholder Rights of Priority*

50. As stated in the Receiver's Fourth Report, through the Holdback, the Receiver made provision for creditors that submitted proof of claims. Provided that this Holdback is sufficient to pay valid creditor claims in full, any additional realizations achieved by the Receiver, net of costs, will be available for distribution to unitholders.[44]

51. Under the Creditor CPO, claims packages were sent to all known creditors (*ie.* Stakeholders other than unitholders) and potential creditors that requested a claims package. The Creditor CPO set a claims bar date, pursuant to which any claims not filed by that date would be forever barred, extinguished released and discharged. However, leave to file a claim against the debtor company after the claims bar date can still be granted by the Court. If further valid claims are identified and accepted by the Court, the Holdback may be insufficient. If the Holdback is insufficient, the class proceeding could ultimately interfere with and subordinate the interests of creditors who, as indicated above, have priority to unitholders.[45]

52. The Receiver was examined as a non-party in this proceeding and answered written questions. The Receiver expressed uncertainty as to whether the Holdback will

[43] Transcript of the Cross-Examination of Carrie Couch held on October 29th, 2019 ["Carrie Couch Cross-Examination Transcript"] at lines 9-11, p. 47, Exhibit H to the Feriozzo Affidavit, DSR Tab 1H, p. 187.
[44] Meakin Affidavit at para. 57, DR Volume 1, Tab 1, p. 26.
[45] Meakin Affidavit at paras. 60-61, DR Volume 1, Tab 1, pp. 26-27.

be sufficient to satisfy all creditor claims.[46] Accordingly, the possibility remains that creditor claims will need to be accorded priority against recoveries (if any) the Receiver achieves against BDO. This means that the interests of creditor Stakeholders and unitholder Stakeholders are not aligned and a class action representing only the interests of unitholders has the potential to subvert the priority rights of creditors. This point is relevant to the preferable procedure analysis and also to considerations of conflicts of interest under the 5(1)(e) analysis.

PART III - ISSUES AND THE LAW

A. Section 5(1)(a) -The Pleadings do Not Disclose a Viable Cause of Action

53. In order to determine whether a claim in negligence discloses a viable cause of action, a court should assess whether it "is plain and obvious that no duty of care can be recognized" based on the facts as alleged.[47] The analysis of duty of care is governed by the *Anns/Cooper* framework, pursuant to the contemporary approach set out by the Supreme Court of Canada in its recent decision in *Livent*. The first question to be asked in applying the *Anns/Cooper* test is whether the relationship in question either falls within a recognized category or is analogous to one.[48]

54. The Plaintiffs' claim against BDO turns upon two distinct duties of care the Plaintiffs allege BDO owed to the members of the proposed class. These alleged duties fall within established categories, or alternatively, are clearly analogous to established

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[46] Receiver's Answers to Written Questions, Question 1, DR Volume 2, Tab 2B, p. 645.
[47] *Haskett v. Equifax Canada Inc*., [2003] O.J. No. 771 (Ont. C.A.) at para. 24, DBA Tab 13.
[48] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 ["*Livent*"] at paras. 25-28, Plaintiffs' Book of Authorities ["PBA"] Tab 11.

categories pursuant to the requirements of the *Anns/Cooper* test. It is settled law that there is no viable cause of action based on either alleged duty of care.

1. No Duty is Owed by BDO to Unitholders for Purpose of Making Investment Decisions

55. The first of the two duties alleged by the Plaintiffs is that BDO owed a duty to current and prospective investors in the funds in regard to their personal investment decisions.

56. The issue of whether an auditor, in performing a statutory audit, owes a duty of care to the investors in its corporate audit client has been addressed by the Supreme Court of Canada on at least two occasions. In both decisions, beginning with the 1997 decision in *Hercules Managements,* and more recently with the 2017 decision in *Livent* (which affirmed *Hercules Managements*),[49] the Supreme Court held that an auditor providing a statutory audit *does not owe a duty* to investors in relation to their personal investment decisions.[50] As initially set out in *Hercules Managements*, the Supreme Court rejected that there could be a duty to individual investors, on the basis of policy reasons of indeterminate liability:

> [32] … In modern commercial society, the fact that audit reports will be relied on by many different people (e.g., shareholders, creditors, potential takeover bidders, investors, etc.) for a wide variety of purposes will almost always be reasonably foreseeable to auditors themselves. Similarly, the very nature of audited financial statements -- produced, as they are, by professionals whose reputations (and, thereby, whose livelihoods) are at stake -- will very often mean that any of those people would act wholly reasonably in placing their reliance on such statements in conducting their affairs…
>
> [33] … I would agree that deterrence of negligent conduct is an important policy consideration with respect to auditors' liability. Nevertheless, I am of the view that, in the final analysis, it is outweighed by the socially undesirable

[49] *Hercules Managements,* DBA Tab 14; *Livent*, PBA Tab 11.
[50] *Hercules Managements* at paras. 27-28, 56, DBA Tab 14; *Livent* at paras. 21, 110-115, PBA Tab 11.

> consequences to which the imposition of indeterminate liability on auditors might lead.[51]

57. The Plaintiffs' alleged duty in this case fits squarely within the "duty to investors" category established in the Supreme Court jurisprudence. As in *Hercules Managements*, the work performed by BDO was a statutorily-mandated periodic audit of annual financial statements.[52] While the investors in *Hercules* were shareholders, and the investors in Crystal Wealth are unitholders, the claimants are in both cases alleging an identical duty. The duty in both cases is based on the claimants' status as investors in the defendant auditor's audit client.[53]

58. The Plaintiffs have not addressed *Hercules Managements* in their factum, and only one of the authorities they rely upon even concerns auditor liability. That case – the decision of this Court in *Excalibur* – was materially distinguishable on its facts.[54] Pursuant to the longstanding and recently re-affirmed law established in *Hercules Managements* and *Livent*, it is plain and obvious that the duty of care alleged to class members as investors cannot succeed.

2. No Duty is Owed by BDO to Unitholders via the Ontario Securities Commission

59. The second duty alleged by the Plaintiffs is derivative of the OSC's role as the regulator for Crystal Wealth. The Plaintiffs allege, circuitously, that (a) the OSC relied upon BDO in (b) permitting Crystal Wealth's continued registration, which (c) in turn

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[51] *Hercules Managements* at paras. 32-33, DBA Tab 14 [Emphasis Added].
[52] *Hercules Managements* at para. 56, DBA Tab 14.
[53] Amended Statement of Claim in the Whitehouse Class Action ["Amended Statement of Claim"] at paras. 1(a)(i), 81, 87, Exhibit C to Feriozzo Affidavit, DSR Tab 1C, pp. 62, 85-86, 88.
[54] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, PBA Tab 13. While the decision in *Excalibur* concerned an "Audit Report", the reasons from that decision reflect that the duty at issue was a novel one, and that the audit work at issue was *not* a periodic statutory audit but instead was prepared for the express purpose of soliciting an investment (para. 61). In any event, *Excalibur* precedes and has since been superseded by the Supreme Court's decision in *Livent*.

permitted further investments in Crystal Wealth to be offered, and that (d) BDO had a duty *to investors* as a result.[55]

60. The OSC-based duty allegation is analogous, and in salient aspects virtually identical to, the duty that was alleged by the Plaintiffs in *Lavender*[56] – a duty that was recognized by the motion judge of first instance in that case.[57] However, the Court of Appeal for Ontario reversed the motions judge's decision in *Lavender* and rejected the existence of an OSC-based duty owed by an auditor to investors. While the Court of Appeal rendered its decision on multiple grounds, its primary finding was that there was a lack of proximity between the auditor and investors in connection with the auditor's preparation of a report *for the OSC*.[58] As stated by the Court of Appeal: "the interposition of the OSC and [the audit client] between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care".[59]

61. As a further ground for rejecting the alleged OSC-based duty of care in *Lavender*, the Court of Appeal identified the statutory scheme – being that of the Ontario *Securities Act* and related regulatory regime, identical to the scheme at issue in this case – as providing further context for the finding that there was no proximity between the auditor and the investor class members.[60] As is clearly reflected in a recent decision of the OSC in related OSC proceedings against BDO, the OSC-based

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[55] Amended Statement of Claim at paras. 61-63, Tab 1C, p. 77.
[56] *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, ["*Lavender ONCA*"] PBA Tab 20; *Lavender v Miller Bernstein,* 2017 ONSC 3958, ["*Lavender ONSC*"**]** DBA Tab 15.
[57] *Lavender ONSC* at paras. 16, 19-25, 33, DBA Tab 15.
[58] *Lavender ONCA* at para. 65, PBA Tab 20.
[59] *Lavender ONCA* at para. 66, PBA Tab 20.
[60] *Lavender ONCA* at para. 71, PBA Tab 20.

duty claim should fail in this case owing to the same lack of proximity that was recognized by the Court of Appeal in *Lavender*.[61]

3. *Conclusion on Duty of Care*

62. BDO submits that the settled law noted above warrants a finding that the Plaintiffs have failed to satisfy the 5(1)(a) test. In the alternative, however, BDO notes that even if the Plaintiffs were found to meet the minimum requirements of the 5(1)(a) test, the question of duty would, as in the *Lavender* case, need to proceed to a merits-based determination, meaning a summary judgment motion or common issues trial. Expert accounting evidence and complex issues relating to the extent that the OSC may be compelled to give evidence about its internal investigations and decision making can be expected. As in *Lavender*, *Livent* and *Hercules Managements*, many levels of appeal, potentially even to the Supreme Court of Canada, can also be anticipated, and the complexity and delay of determining this issue must factor into the preferable procedure analysis discussed below.

B. BDO Does Not Contest that the Section 5(1)(b) and (c) Tests are Met

63. BDO's challenge to certification is focussed on sections 5(1)(a)(d) and (e) of the CPA. BDO does not challenge certification on the basis that there is not an identifiable class. Nor does it contest that the Plaintiffs' allegations disclose common issues. However, BDO reserves its right to argue at a hearing on the merits that not all

[61] See also *BDO Canada LLP (R*e), 2019 ONSEC 21 (Ont. Sec. Com.), DBA Tab 5.

unitholders suffered loss and/or damage due to the nature and timing of their investments.

64. BDO also submits that whether or not individual unitholders have capacity to sue BDO directly is a threshold common issue that would need to be determined in a common issue trial if this case were certified. The basis in fact for this common issue is addressed at paragraphs 22-25 above.

C. Section 5(1)(d) -The Receiver's Action is the Preferable Procedure

1. Overview: A Combined Proceeding Cannot Further the Objectives of the CPA

65. In order to be the preferable procedure, a class proceeding must be a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claim. This analysis involves a practical "cost-benefit" approach that accounts for "the impact of a class proceeding on class members, the defendants, and the court", and should be viewed through the three principal objectives of class proceedings: judicial economy, access to justice and behaviour modification.[62]

66. In this case the Plaintiffs are not asserting that the proposed class proceeding is the preferable procedure. Instead they present the exceptional argument that the class proceeding should be certified and then combined, in an unspecified manner,[63] with the Receiver's Action. Embedded within this position are acknowledgements that

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[62] *AIC Limited v. Fischer*, 2013 SCC 69, ["*Fischer SCC*"] at paras. 16, 21, PBA Tab 1; *Hollick v. Toronto (City),* 2001 SCC 68, ["*Hollick*"] PBA Tab 17.

[63] The Plaintiffs do not clearly express a plan to combine the proceedings, and refer to this proposed combination vaguely and in different terms throughout their factum. For example, the Plaintiffs suggest at different points that the claims should be pursued "in tandem", "proceed together" or "be consolidated". see eg. Plaintiff's Factum at paras. 65, 69, 154-155.

i) the Receiver's Action will proceed *irrespective of* the determination of this Court and ii) there is overlap and redundancy between the two matters.

67. Further, notwithstanding their obligation to present this Court with a litigation plan that "sets out a workable method of advancing the proceeding on behalf of the class" the Plaintiffs have not advised as to which of the several distinct methods for combining proceedings, such as "joinder" or "consolidation" under Rule 6 of the *Rules of Civil Procedure* or joint case management, should be employed. They have not explained whether the Commercial List or a specialized class action judge should preside. The Plaintiffs' failure to specify precisely how they propose to combine the proposed class proceeding and the Receiver's Action indicates that they have not met their onus under *either* subsection 5(1)(d) or (e)(ii) of the CPA. Notably, this Court has already expressed skepticism as to whether consolidation of joinder of other proceedings with a class action will ever be appropriate.[64]

68. BDO responds that the Receiver's Action, on its own and not in combination with the proposed class action, is the preferable procedure when considered in light of all of the objectives of the CPA. There is simply no need for the class proceeding as an alternative to *or in combination with* the Receiver's Action.

69. Indeed, the Receiver's Action provides equal or better procedural safeguards for Stakeholders when compared with a class action, including oversight of the Court, rights to information, participation and objection, sharing of legal fees, and an efficient

[64] *Vaeth* at paras. 59-63, DBA Tab 29; *Obonsawin (c.o.b. Native Leasing Services) v. Canada*, [2002] O.J. No. 2502 (Ont. Sup Ct.) at paras. 23-24, DBA Tab 21.

claims administration process.[65] Further, the duplicative "tandem" process proposed by the Plaintiffs will actually *impede* access to justice and judicial economy by preventing the Receiver from carrying out its mandate to maximize recoveries for Stakeholders in a timely and cost-effective manner. A chart comparing the relative procedural benefits of the Receiver's Action and a class proceeding may be found at Schedule "C".

70. The Plaintiffs do not explain how complex, dispositive and appealable threshold issues, including whether BDO owes the duty alleged to unitholders and whether unitholders have capacity to pursue claims in their own right, may be resolved in the class action without putting the Receiver's Action on hold. If the Receiver's Action continues but its determination is shackled to the resolution of class action, that will inevitably be the case. This result would unfairly burden class members, BDO and the Court with costs and delays that could be avoided by simply allowing the Receiver's Action to proceed on its own, unimpeded by the need to resolve issues that are not challenged in the Receiver's Action.

71. While the Plaintiffs' argument for a combined proceeding is unique, courts have considered and accepted the proposition that claims that come with a high degree of litigation risk and prospects of appeals may be worth abandoning in favour of allowing a more streamlined procedure to advance. This arises in the context of carriage motions,[66] and also in scenarios where a defendant agrees to consent to certification

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[65] See paragraph 48 of this factum.
[66] *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (Ont. Sup. Ct.) at paras. 93-96, DBA Tab 26; *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (Ont. Sup. Ct.) at para. 17, DBA Tab 12.

provided that certain causes of action are discontinued.[67] The same practical considerations arise here. BDO is prepared to defend the Receiver's Action on its merits and does not contest that the Receiver stands in the shoes of parties to whom it owes a duty. As observed by this Court in *SNC-Lavalin*, a case involving a consent certification of statutory securities misrepresentation claims and the discontinuance of common law misrepresentation and oppression claims:

> [50] It is unclear, however, if the class members would be giving up much in the way of recoverable damages by forgoing their common law claims.
>
> [51] With respect to the oppression claim, the jurisprudence is undeveloped and there is uncertainty as to whether or not the court would certify an oppression claim in these circumstances. With respect to the common law negligent misrepresentation claim, the jurisprudence is divided on whether this claim is amenable to certification. Given the state of the relevant jurisprudence, there is little question that any decision certifying these claims would be appealed.
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> …
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> [53] Speaking metaphorically, I agree that in the circumstances of this case, a cause of action in the hand is worth far more than two appealable causes of action in the bush. Accordingly, I grant leave to discontinue.[68]

72. The same practical cost-benefit analysis should be performed here because this is fundamentally a case in which "a cause of action in the hand is worth far more than appealable causes of action in the bush".

2. *A Combined Proceeding Will Not Promote Access to Justice*

(a) Procedural Justice

73. The Plaintiffs rely on the Supreme Court of Canada's decision in *Fischer* to argue that certain "procedural and substantive aspects of access to justice are better

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[67] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund et al.* v. *SNC-Lavalin Group Inc. et al,* 2012 ONSC 5288 ["*SNC-Lavalin*"], DBA Tab 27.
[68] *SNC-Lavalin* at paras. 50-53, DBA Tab 27.

addressed by the class action".[69] With respect to the procedural aspects, the Plaintiffs allege, with reference *to Fischer*, that "investor participation in the process leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement in this case".[70] They argue that, while unitholders will benefit from distributions from the Receiver's Action, they have no right to participate "directly or meaningfully in the monetization efforts of the Receiver, including in connection with the Receiver's Action against BDO."[71]

74. This argument fails to account for profound differences between the regulatory proceeding that was argued to be the preferable procedure in *Fischer*, and the civil litigation proceeding being pursued by the Receiver on behalf of the Crystal Wealth Stakeholders. It also ignores the rights of participation that individual unitholders are afforded in the Receiver's Action and the relatively limited role individual class members play in any class proceeding.

75. In *Fischer*, an OSC settlement that was approved *in camera* on the basis of a recommendation by OSC staff and which provided "little or no basis for investor participation"[72] was argued to be the preferable procedure.[73] The motion judge had observed that "how the OSC came to its calculation is not actually known".[74] The Supreme Court allowed a class action by the investors to proceed, finding:

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[69] Plaintiffs' Factum at para. 137.
[70] *Fischer SCC* at para. 55, PBA Tab 1.
[71] Plaintiffs' Factum at para. 144.
[72] *Fischer SCC* at para. 55, PBA Tab 1.
[73] *Fischer ONCA* at paras. 58-60, DBA Tab 11.
[74] *Fischer SCC* at para. 54, PBA Tab 1.

> In summary, the regulatory nature of and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation, support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address.[75]

76. The Supreme Court observed that the OSC's jurisdiction was mainly regulatory, meaning it was "neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent future harm to Ontario's capital markets."[76] It also observed that "compensation of investors is not the primary focus the OSC under its s. 127 jurisdiction."[77]

77. Unlike the OSC, the Receiver's primary function, which it exercises as a fiduciary and an officer of the Court, is to maximize recoveries for Stakeholders. The Receiver has repeatedly noted in its communications with unitholders that it views the protection and enhancement of their interests as its central objective and mandate.[78]

78. Further, the Receivership process will afford multiple opportunities for individual Stakeholders to receive information about the process, communicate with the Receiver, attend hearings, and object if they wish to do so.[79] The Receiver has delivered four detailed reports to the Court setting out its activities and has made its reports and other relevant material available on its website. The Receiver's website contains twenty-five notices to unitholders. Stakeholders have been given the

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[75] *Fischer SCC* at para. 54, PBA Tab 1.
[76] *Fischer SCC* at para. 54, PBA Tab 1.
[77] *Fischer SCC* at para. 54, PBA Tab 1.
[78] Notice to Investors in the Crystal Wealth Funds dated July 7, 2017, August 18, 2017, October 30, 2017, Exhibit R to Meakin Affidavit, DR Volume 2, Tab 1R, pp. 576-583.
[79] Notice to Investors dated September 28, 2018, Exhibit N to Meakin Affidavit, DR Volume 2, Tab 1N, pp. 525-528; Notice to Investors in the Crystal Wealth Funds dated July 7, 2017, August 18, 2017, October 30, 2017, Exhibit R to Meakin Affidavit, DR Volume 2, Tab 1R, pp. 576-583; Notice to Investors dated December 5, 2018, Exhibit S to Meakin Affidavit, DR Volume 2, Tab 1S, pp. 584-586; Grant Thornton Limited's Second Report dated November 24, 2017 at para. 490, Exhibit E to Meakin Affidavit, DR Volume 1, Tab 1E, p. 275.

opportunity to participate in a "town hall" teleconference. They are also entitled to submit written questions to the Receiver and the Receiver is obliged to respond to appropriate inquiries.[80]

79. Individual Stakeholders have the right to appear in Court and be heard on any aspect in respect of which the Receiver is seeking the Court's instructions. This would include a settlement approval with a defendant in an action initiated by the Receiver, or the approval of a Claims Procedure Order which will establish the process for resolution of individual unitholder claims. An individual Stakeholder may seek leave to appeal an order approving a step taken by the Receiver or appeal directly from a final order. An individual unitholder may also dispute the assessment of its claim by the Receiver and have the dispute adjudicated by the Court, subject to a right of appeal.[81]

80. The procedural rights afforded to individual Stakeholders in the Receivership are equivalent to, and in some instances superior to, the rights of individual class members in a class action. The Court of Appeal for Ontario recently commented on the limits on the participation rights of individual class members in a certified class action in *Bancroft-Snell*, a case which considered whether individual class members who object to a settlement can appeal from the approval order. The Court of Appeal held that they cannot and observed:

> The nature of a class proceeding and the goals of the CPA impact the procedural rights afforded to class members. Class actions permit the efficient resolution of disputes in a manner that is fair to all parties and promote[s]

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[80] *Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. Sup. Ct. [Commercial List]) var'd on other grounds [2002] O.J. No. 356 (Ont. C.A.).
[81] Meakin Affidavit at para. 19, DR Volume 1, Tab 1, p. 9; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b), DBA Tab 33; R.R.O. 1990, Reg. 194: *Rules of Civil Procedures,* Rule 61.01, 61.04., DBA Tab 36.

> access to justice, judicial economy and behaviour modification. In part, efficiency is achieved through the appointment of one or more class members as representative Plaintiffs, to conduct the litigation in the best interests of all class members.
>
> While class members have a *sui generis* status, they do not possess the same degree of autonomy as parties to the litigation and do not enjoy the rights or bear the responsibilities of parties. Class members have a right to notice of a certified class proceeding, the right to opt out of the class, and the right to object to settlement agreements. However, class members who do not choose to opt out of the class proceeding, are bound by the outcome. A settlement of a class proceeding that is approved by the court binds all class members.
>
> In contrast to class members who do not play an active role, the representative Plaintiff has carriage of the litigation on behalf of the class and, with the advice of class counsel, makes all litigation decisions on behalf of the class, including the decision to accept or reject a defendant's settlement offer. Significantly it is the representative Plaintiff who bears the litigation risk, including the risk of an adverse cost award.[82]

81. Notably, the limits imposed on individual class members' procedural rights are themselves stated by the Court of Appeal to be justified by the objectives of the CPA. In other words, unimpeded participation by class members would not be in the best interests of all class members because it would complicate class proceedings and make it difficult to achieve efficiency and final resolutions. It is also interesting to observe by way of comparison that individual Stakeholders would have appeal rights in connection with an order approving a settlement between a Receiver and a third party like BDO in a receivership proceeding.[83]

82. In light of the limits that class actions place on the procedural rights of individual class members, the most notable distinction between the procedural rights of individual Stakeholders in a Receivership and individual class members in a class proceeding is that the former is represented by an experienced professional who is appointed as an

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[82] *Bancroft-Snell* v. *Visa Canada Corporation*, 2019 ONCA 822, ["*Bancroft-Snell*"] at paras. 2-4, DBA Tab 3.

[83] Meakin Affidavit at para. 19, DR Volume 1, Tab 1, p. 9; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b), DBA Tab 33; R.R.O. 1990, Reg. 194: *Rules of Civil Procedures,* Rule 61.01, 61.04, DBA Tab 36.

officer of the Court and acts in a fiduciary capacity and the latter is represented by a class representative. Unlike the Receiver, the class representative has a personal stake in the proceeding. This is not necessarily an advantage for members of the class. While the class representative's personal interest may create a motivation to pursue the action, as is addressed below at paragraphs 130-135, conflicts can arise when a class representative's individual claims put him or her at odds with the class. Arguably the Receiver, a fiduciary who has a duty to maximize recoveries for stake holders but is not personally interested in the outcome of the case, is at least equally appropriate as an advocate for the Crystal Wealth Stakeholders.

83. Like a receiver, a class representative may be legally sophisticated and have experience that will benefit the class. However, this is not necessarily the case. None of the proposed representative Plaintiffs in this case has any particular experience or qualifications which would suggest they will be more skilled at representing the interests of Stakeholders in the case against BDO than the Receiver. In short, the procedural rights afforded to Stakeholders in the Receivership are as good or superior to those that would be provided by the class action.

(b) Substantive Justice

84. The Plaintiffs also point to the fact that contributory negligence and certain limitations of liability which govern the retainer terms between BDO and the Funds are asserted as defences by BDO in the Receiver's Action but not in the class proceeding. They assert that these defences may have an effect on the substantive recovery of unitholders and that such justifies the "tandem proceeding" they assert to be the preferable procedure. There are three problems with this argument.

85. First, the fact that BDO cannot assert contributory negligence and contractual defences in the class proceeding supports BDO's argument that it does not owe a duty to unitholders for the purposes of their individual investment decisions. As stated by the Supreme Court in *Hercules Managements* and recently affirmed by the Supreme Court in *Livent*, a claim against an auditor for a negligently performed statutory audit must proceed derivatively,[84] which in this case means through the Receiver. If parties who are not within privity of contract can sue the auditor and not be subject to contractual limitations of liability agreed to between the auditor and its client, then an auditor can never control its professional liability. One can expect that such a precedent would lead to an exponential increase in audit fees. This is precisely the "indeterminate liability" concern that prevented the imposition of a duty in *Hercules Managements* on policy grounds.

86. Second, an auditor should not be prevented from defending on the basis of contributory negligence against its client in appropriate circumstances and the auditor will generally seeks to preserve this right through contract. A class proceeding is not supposed to affect any party's substantive rights and the preferable procedure inquiry must also consider whether the procedure is fair and manageable, taking into account defences that may be raised.[85]

87. Third, even if this Court were to accept that certification could be justified on the basis that it will prevent BDO from asserting defences that can only be advanced in a

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[84] *Livent* at paras 18, 71, PBA Tab 11.
[85] *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.), aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.), ["*Chadha*"] at para. 18, opinion of Somers J, DBA Tab 8.

derivative proceeding, a further "cost-benefit" analysis is required. The risk that unitholders' recoveries could be reduced based on contractual or contributory negligence defences must be weighed against the risk that unitholders' claims will be dismissed because they cannot establish duty or capacity in the class proceeding. While the defences at issue could reduce damages, if unitholders fail to establish duty or capacity, their cases will be dismissed before they ever reach the damages stage.

88. If the Plaintiffs' retort to this is that they intend to pursue *both* matters in tandem so that the combined effect of the proceeding will alleviate both sets of vulnerabilities in unitholders' claims, this "cuts both ways." One may just as easily posit that the tandem proceeding will be beleaguered by the need to address all issues and subject to costly procedural disputes and delays. More fundamentally, this illustrates precisely why BDO should not be subjected to "double jeopardy" in the form of two competing proceedings with a risk of inconsistent outcomes. A point which is addressed at paragraphs 98-102 below.

3. *A Combined Proceeding Will Not Advance Behaviour Modification*

89. The objective of behaviour modification refers to the concern that "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one Plaintiff the expense of bringing suit would far exceed the likely recovery."[86] This concern is simply

[86] *Hollick* at para. 34, PBA Tab 17, citing to *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 29, PBA Tab 35.

not present in this case. The amounts of some individual claims are substantial[87] and BDO is already facing litigation from the Receiver.

90. The Plaintiffs make a comparative argument by asserting that a class proceeding will have a greater deterrent effect than the Receiver's Action because being held responsible to a class of unitholders would promote a broader concept of auditor's responsibility than simply being sued by the Receiver. Even if one accepts the proposition that a class action is somehow more "threatening" than the Receiver's Action, this consideration cannot justify subjecting the class, BDO or the Court to a duplicative and wasteful proceeding. Nor does it warrant distorting the law relating to auditor's duties.

91. In any event, the Plaintiffs' "punitive" concept of behaviour modification puts the cart before the horse. Certifying in order to "hold auditors to account"[88] suggests that wrongdoing may be presumed at the certification stage. However, certification is emphatically not about the merits of the case and negligence has not been proven. BDO is not avoiding the opportunity to justify its conduct and is prepared to defend a hearing on the merits. The Receiver's Action could be in discoveries if it were not for the delays created by this certification motion.

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[87] See, for example, the Couches had approximately $590,000 invested in the Funds: Affidavit of Carrie Couch sworn September 19, 2019 at para. 8, Exhibit 1 to the Carrie Couch Cross-Examination Transcript, Exhibit H1 to the Feriozzo Affidavit, DSR Tab H1, p. 193. Mr. Whitehouse had almost $1,000,000 invested in the Funds: Whitehouse Cross at lines 3-9, p. 307, DSR Tab 1J, p. 307.
[88] Plaintiffs' Factum at para. 153.

4. A Combined Proceeding Will Not Promote Judicial Economy

92. The Plaintiffs point to a number of cost-saving measures that they assert will be achieved by a class proceeding and/or "tandem" case. These are presented as access to justice arguments but are more appropriately considered under the rubric of judicial economy. Each of these purported savings is overstated, unsupported or vastly outweighed by the costs and delays that will accompany threshold determinations of duty and standing and the costs and procedural complexities associated with litigating essentially the same claim through two different procedural mechanisms.

93. The Plaintiffs argue that funding from the Class Proceedings Fund (the "CPF") will reduce the unitholder's exposure to disbursements "freeing up more immediate cash for distribution to investors from the Receivership."[89]

94. They also argue that indemnification from the CPF will insulate the representative Plaintiffs from an adverse cost award "again defraying the potential costs for the Receiver and permitting greater distributions to investors".[90]

95. While the Plaintiffs' extol the benefits of funding from the CPF, they do not mention the "*quid pro quo*" that accompanies funding from the CPF in the form of a ten percent levy on any award or settlement.[91] While it is true that the Receiver will need to fund its own disbursements out of its recoveries in the Receiver's Action, the Receiver's recoveries will not be reduced by *both* AGB's thirty percent contingency fee,

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[89] Plaintiffs' Factum at para. 139.
[90] Plaintiffs' Factum at para. 40.
[91] Carrie Couch Cross-Examination Transcript at line 25, p. 48 – line 1, p. 49, DSR Tab 1H, pp. 187-188.

which it stands to receive in both actions,[92] *and* the additional ten per cent levy for the CPF before a stakeholder sees a cent.

96. The Plaintiffs also appear to be confused about who will benefit from the adverse cost indemnity provided by the CPF. In a class action adverse costs are not imposed on the class but are the responsibility of individual representative Plaintiffs.[93] Representative plaintiffs are generally indemnified by their counsel. In light of the limited means of the proposed representative Plaintiffs in this case, it is safe to assume that the beneficiary of the CPF indemnity is AGB itself. It is hard to see how reducing AGB's own exposure to an adverse cost award will allow the Receiver to make larger distributions.

97. It is also unclear how the CPF funding, indemnity and levy will be applied in a tandem proceeding. The CPF plays an access to justice role and is intended to fund disbursements and indemnify against adverse costs for cases that could not proceed but for its assistance.[94] Assisting Receivers does not appear to be part of the CPF's mandate. The Receiver's Action is self-funded out of the Receiver's recoveries and does not need aid from the CPF to proceed. The question then becomes whether AGB intends to use CPF's funding to pay for disbursements applicable to both cases but only make recoveries in the class proceeding subject to the levy? If so, this would appear to be an abuse of the CPF. The Plaintiffs' failure to provide any details in their litigation plan as to how the tandem claims will proceed, what anticipated

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[92] Email from Aird & Berlis (Mark van Zandvoort) to Andrea Laing dated August 28, 2018, Exhibit C to the Rogers Affidavit, DR Volume 2, Tab 2C, p. 651.
[93] *Bancroft-Snell* at para. 4, DBA Tab 3.
[94] *McCracken v. Canadian National Railway,* 2012 ONCA 797 at para. 10, DBA Tab 16.

disbursements will be, or how CPF support will be allocated makes it impossible to evaluate whether the CPF's involvement will provide any overall benefit to unitholders.

5. Preferable Procedure Analysis Takes Impacts on Defendants and Courts Into Account

98. Courts have been clear that the preferable procedure analysis must consider the "impact that certification would have on the rights of the defendants as well as those of the Plaintiffs". The consideration of a defendant's rights in the preferable procedure analysis recognizes that the procedural mechanism of a class action must not affect the substantive rights of any party.[95] As this Court observed in *Vaeth*:

> Multiple proceedings against the same defendant over the same issue may compromise the ability of the defendant to defend itself over and over again, and while this circumstance may explain why the outcomes of virtually identical cases can be contradictory, it is not fair to the defendants.[96]

99. In emphasizing the value of the CPF's indemnity against adverse costs the Plaintiffs state that BDO's estimated defence costs in connection with the class action will be $5 million. They go on to say that BDO's costs to defend the Receiver's Action will be "the same or similar"[97] If BDO's costs will, as the Plaintiffs assert, be *doubled* if the matters proceed in tandem, it is manifestly apparent that the combined proceeding will impose an unacceptable burden on BDO.

100. It is also reasonable to infer from these assertions about BDO's costs that the imposition on the Courts' time for a tandem proceeding will also be unjustifiably high.

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[95] *Chadha* at paras. 18-19, opinion of Somers J, DBA Tab 8.
[96] *Vaeth* at paras. 37, 41, DBA Tab 29.
[97] Plaintiffs' Factum at para. 140.

Judicial resources are not unlimited and the effect of multiple proceedings on the administration of justice cannot be overlooked. As observed by this Court in *Vaeth*:

> Civil procedure encourages the avoidance of a multiplicity of proceedings. Multiple proceedings that litigate the same issue are obviously inefficient, a waste of scarce judicial resources and the cause of expense and delay in the administration of justice. And multiple proceedings that litigate the same issues entail the possibility of inconsistent results that may be embarrassing to the administration of justice and instill sentiments of unfairness. . . [98]

101. Allowing these cases to proceed simultaneously will unnecessarily create duplication in fact-finding and legal analysis on the part of the supervising judges, duplication in terms of evidentiary production and review on the part of the parties, and significant challenges in terms of administrative coordination. All of these factors would be resource-intensive for the courts and the parties, burdensome on witnesses or experts who would possibly have to give the same evidence twice, and would delay the timely progression of both the Receiver's Action and the class action. None of these inefficiencies are justified because the Receiver's Action provides a comprehensive process to protect and advance the interests of all Stakeholders in recovering the assets of the Crystal Wealth Funds.

102. The 2019 *Report on Class Actions* from the Law Commission of Ontario recommends that Courts should be encouraged to interpret section 5(1)(d) of the Act "to give considerable weight to alternative options". The LCO specifically recommends that the "cost-benefit analysis averted to in *Fischer* should be given a more generous reading". It goes on to state: "[a]lthough the LCO is not persuaded that legislative

[98] *Vaeth* at para. 37, DBA Tab 29.

amendment is warranted, we encourage judges to give more weight to alternative remedies." [99]

6. The Class Proceeding Is an Impermissible "End Run" Around the Receivership

103. Leaving aside that the preferable procedure test favours the Receiver's Action, this case also raises important questions about the extent to which class actions should ever be allowed to subvert Receivership Proceedings. Rulings of the Commercial List have already established the Receiver's right to pursue litigation on behalf of unitholders and the doctrine of collateral attack prohibits the challenge to the Receiver's representation that is implicit in the proposed class proceeding.

104. Notably, the Commercial List has already granted the Receiver the power to:

> Initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Crystal Wealth Group, the Property or GTL, and to settle or compromise any such proceedings [emphasis added]. [100]

105. Further, the Commercial List has already considered the question of whether unitholders require their own counsel to represent their interests and determined that unitholders are adequately represented by the Receiver.

106. In the Crystal Wealth Receivership, the law firm of Crawley Meredith Brush ("CMB") brought a motion seeking to be appointed as representative counsel to unitholders of the Crystal Wealth Group (referred to as "investors" in Justice Hainey's endorsement in respect of the motion). The Receiver, the OSC and certain investors

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[99] LCO Class Actions Report at pp. 49-50, DBA Tab 31. Cited authoritatively in *Winder* at para. 75, DBA Tab 30.

[100] Appointment Order of the Honourable Mr. Justice Newbould dated April 26, 2017 at para. 6 (i), Exhibit K of Meakin Affidavit, DR Volume 2, Tab 1K, p. 456.

opposed the appointment of CMB on, amongst other grounds, the basis that it would be duplicative of the Receiver's role, would result in confusion for investors and in unnecessary professional fees that would be incurred by all investors.[21]

107. The responding factum that the Receiver filed on CMB's motion asserted:

> The Receiver, as a court-appointed officer, has as its primary objective the interests and needs of the Investors and has and will continue to advance them in an objective, impartial manner, and in a way that recognizes the unique interest of the Investors in each different and unique fund.[101]

108. The Receiver also emphasized the advantage of the Receiver being "one focused point of contact for all Investors", and pointed out that the appointment or representative counsel could "only serve to create mixed messages and create confusion among Investors as to the status and role of the Receiver."[102] The Receiver made these submissions before retaining AGB.

109. Justice Hainey rejected the need for representative counsel in the Crystal Wealth Receivership and made the following observations about the role and conduct of the Receiver:

> The Receiver's role is to protect and advance the interests of the Investors. Since its appointment, I am satisfied that the Receiver has maintained regular communications with the Investors while investigating and evaluating the Crystal Wealth funds to determine the appropriate approach to maximize Investors' returns.
>
> The Receiver, as a court-appointed officer, has as its primary objective the interests and needs of the Investors. I am satisfied, based upon the Receiver's actions to date, that it has and will continue to advance the interests of the Investors in an objective and impartial manner with a view to recognizing the

[101] Grant Thornton Limited's Responding Factum filed on Crawley Mackewn Brush LLP's motion at para. 4 ["Receiver's Factum on CMB Motion"], Exhibit Q of Meakin Affidavit, DR Volume 2, Tab 1Q, p. 560.
[102] Receiver's Factum on CMB Motion at para. 27, DR Volume 2, Tab 1Q, p. 568.

> unique interests of the Investors in each of Crystal Wealth's different and unique funds.[103]

110. Justice Hainey concluded:

> The Investors' interests are being protected and advanced by the Receiver which is why the appointment was made by Newbould J. in the first instance;
>
> Although the Investors may be vulnerable, their vulnerability will be protected by the Receiver, who has been appointed by the Court for the sole purpose of acting in their best interest;
>
> The appointment of representative counsel will add unnecessary expense to the receivership which will adversely affect Investors; and
>
> There is no good reason to appoint representative counsel to effectively replicate the Receiver's role.[104]

111. This decision illustrates that both Justice Newbould, who made the original Appointment Order, and Justice Hainey, who ruled on the motion for representative counsel, viewed the protection of investor (or unitholder) interests as central to the Receiver's mandate. The Court's concern that the Receiver's efforts not be duplicated by other professionals, as duplication would have the effect of increasing the overall professional costs associated with the Crystal Wealth Receivership and erode Stakeholder recovery, are the same concerns that should inform the "cost benefit" analysis of this Court when applying the preferable procedure test.

112. A proceeding in which a litigant does not expressly seek to overturn the prior judgment, but nevertheless still argues that the prior decision was incorrect, constitutes an implicit attack on the correctness of the factual basis of the decision. Such an implicit attack cannot be permitted because a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings

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[103] The Honourable Mr. Justice Hainey's Decision dated July 5, 2017 at paras. 4-5 ["Hainey J Decision"], Exhibit P of Meakin Affidavit, DR Volume 2, Tab 1P, p. 548.
[104] Hainey J Decision at para. 8, DR Volume 2, Tab 1P, p. 548.

except those provided by law for the express purpose of attacking it.[105] The prohibition against collateral attack grows out of the general jurisdiction of the court to prevent the abuse of its process.[106]

113. *McDonald v. Brookfield Asset Management Inc.*[107] and *Nash v. CIBC Trust Corp.*[108] are cases in which class proceedings were brought by investors of companies under receivership proceedings against third parties with involvement in those companies. Both were dismissed, in part, on the basis that they were found to be "collateral attacks" on orders made in the receivership proceeding.

114. In *Nash*, the defendant, a mortgagee in trust for the investor Plaintiffs, successfully brought a motion for summary judgment dismissing the representative plaintiffs' certified class action. The plaintiffs' claims for breach of trust, negligence and breach of contract each centered on the fact that the defendants obtained an order appointing a receiver over the assets of the two companies which were the proprietors of the mortgages in which the plaintiffs had invested (the "Receivership Order").[109]

115. In dismissing the plaintiffs' action, the Court agreed that the action constituted a collateral attack against the Receivership Order because the plaintiffs did not challenge the receivership proceedings or appeal the order within an appropriate time

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[105] *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 ["***Toronto (City)***"] at para. 34, DBA Tab 28.
[106] *Toronto (City)* at para. 35, DBA Tab 28.
[107] *McDonald v. Brookfield Asset Management Inc.,* 2015 ABQB 281, aff'd 2016 ABCA 375 ["*McDonald*"] at paras. 30-33, DBA Tab 17.
[108] *Nash v. CIBC Trust Corp* (1996), 7 C.P.C. (4th) 263 (Ont. Gen. Div.) ["*Nash*"], DBA Tab 19.
[109] *Nash* at paras. 15 to 17, DBA Tab 19.

period despite their ability to do so.[110] The Court quoted the Supreme Court of Canada in describing the doctrine of collateral attack:

> It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stand and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well-settled in the authorities that such an order may not be attacked collaterally — *and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment*.[111]

116. In *McDonald*, the Court of Queen's Bench of Alberta considered whether to dismiss an action involving a putative class action brought on behalf of a company's shareholders against certain of its institutional creditors for oppression, breach of good faith and negligent misrepresentation. The shareholders' claims centered on allegations that the defendants caused (i) a "death spiral" to the company's shares as well as (ii) a contrived interest default and receivership which resulted in an order allowing one of the defendant creditor's to acquire the company's assets for a bargain price through the receivership.

117. Following *Nash*, the Court dismissed the action, partly on the basis that it constituted a collateral attack on the Order; to this end, the Court noted that the Order was not appealed or challenged by the shareholders in the receiver's action.[112]

118. BDO asserts that certification should be denied in this case because it is a collateral attack on both the Receiver's appointment Order and the decision of Justice Hainey refusing independent counsel for unitholders. The representative Plaintiffs have all accepted distributions from the Receiver. All received notice and were aware

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[110] *Nash* at paras. 37 to 40, DBA Tab 19.
[111] *Nash* at para. 38, citing *Wilson v R* (1983) 2 SCR 594 at pp. 502-503, DBA Tab 19.
[112] *McDonald* at paras. 30 to 32, DBA Tab 17.

of the Receivership and none has taken issue with the Receiver's work.[113] It was open to them to support the retention of representative counsel or to seek leave to appeal from the decision of Justice Hainey if they thought their interests were not being adequately represented. In fact, Mr. Whitehouse was represented at the hearing before Justice Hainey by his counsel, Mr. Bieber, and opposed the appointment of representative counsel.[114]

D. Section 5(1)(e) -The Proposed Representative Plaintiffs and their Counsel are Conflicted and Unsuitable

119. Section 5(1)(e) of the CPA provides that there must be a representative Plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
>
> (iii) does not have, on the common issues for the class an interest in conflict with the interests of other class members.

120. More broadly, this Court has observed that two forms of conflict relating to class counsel will bear on the 5(1)(e) analysis:

> (a) Conflicts arising from class counsel's direct financial interest in the proceeding, which are inherent to class actions but may nevertheless pose prohibitive issues in some circumstances; and
>
> (b) conflicts arising from class counsel's divided loyalties outside the class proceeding.[115]

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[113] Carrie Couch Cross-Examination Transcript at lines 5-11, p. 47, DSR Tab 1H, p. 187; Transcript of the Cross-Examination of Jason Couch held on October 29th, 2019 at line 18, p. 35 – line 6, p. 36 ["Jason Couch Cross-Examination Transcript"], Exhibit I to Feriozzo Affidavit, DSR Tab 1I, p. 226; Whitehouse Cross at lines 1-23, p. 68, , DSR Tab 1J, pp. 323.

[114] See the list of counsel in Hainey J Decision, DR Volume 2, Tab 1P, p. 547. See also list of counsel in Receiver's Factum on CMB Motion, DR Volume 2, Tap 1Q, p. 555. Mr. Whitehouse was represented by Simon Bieber and Michael Finley, who, at the time, worked at Wardle Daley Bernstein Bieber LLP. Mr. Bieber subsequently joined AGB

[115] *Persaud v. Talon International Inc.*, 2018 ONSC 5377 ["*Persaud*"] at paras. 177-180, DBA Tab 22.

121. The proposed class representatives cannot fairly and adequately represent the class due to a series of conflicts arising from the fact that they and their counsel are pursuing duplicative actions in overlapping roles.

1. Conflicts of Interest Relating to the Receiver's Action

122. Ontario courts have identified scenarios in which class counsel also represent other parties in competing or overlapping claims against the defendant as inconsistent with their duty to represent the class. For instance, in *Vaeth v North American Palladium Ltd*., this Court prohibited counsel from representing both the proposed class and individual Plaintiffs in a separate action because:

> (a) There is an inherent conflict when the source of recovery for both proceedings is the same. This gives rise to the possibility that amounts paid towards settlement of one action (assuming one was settled first) would deplete the resources available to satisfy a settlement in the second action;[116]
>
> (b) The prospect that counsel would receive conflicting instructions from both sets of clients about the prosecution of their respective claims.[117]

123. Similarly, in *Persaud*, this Court prohibited class counsel from representing the proposed class and individual Plaintiffs in separate proceedings against the same defendant. AGB's status as counsel of record in both this proposed class action and the Receiver's Action gives rise to the same concerns.

124. First, the proposed class, which is comprised of unitholders, is not coextensive with the Stakeholders for whom the Receiver acts as a fiduciary in the Receiver's Action.[118] As such, AGB would be conflicted to the extent that the class action may

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[116] *Vaeth* at paras. 71-72, DBA Tab 29.
[117] *Vaeth* at para. 75, DBA Tab 29.
[118] Receiver's Answers to Written Questions, DR Volume 2, Tab 2B, p. 645.

impede creditors from recovering their claims in accordance with preference or conflict with the Receiver's objective to fairly represent the interests of all Stakeholders in the course of its mandate. Notably, the Receiver was examined as a non-party in the class action and confirmed:

> (a) The claims of creditors determined to be valid and ranking ahead of Crystal Wealth unitholders would be paid in priority to the interests of unitholders;
>
> (b) Unitholders would only receive pro-rata distributions of recoveries to the extent that all such creditor claims had been satisfied; and
>
> (c) The amounts that have been withheld by the Receiver to date from distributions to unitholders may not be sufficient to cover all creditor claims.[119]

125. It is evident that the Receiver believes there is a possibility that creditors will have priority claims against any recovery the Receiver achieves against BDO in the Receiver's Action. However, as creditors are not part of the proposed class, AGB's duties conflict. Second, as set out above in connection with preferable procedure arguments, the proposed class action will burden any recovery against BDO with litigation risks, legal fees and other costs that will not be imposed by the Receiver's Action. The Receiver has a duty to maximize recoveries for Stakeholders and its ability to exercise this duty is compromised by its counsel's alternative agenda, which is to promote a needlessly complex and appeal-prone proceeding when one claim by the Receiver will achieve the same objectives.

126. Finally, the Receiver has confirmed that AGB stands to be paid on a contingency basis in both the class action and the Receiver's Action and will, unless determined or

[119] Receiver's Answers to Written Questions, DR Volume 2, Tab 2B, p. 645.

agreed otherwise, receive "30 percent from the combined recovery" in both actions.[120] This means that AGB's interests are not aligned with those of its clients. AGB stands to profit regardless of which action proceeds, or indeed if both proceed. However, if its certification arguments prevail, its clients' potential recoveries will be burdened by duplicative, competing proceedings

127. These problems are compounded by concerns about the degree to which AGB's various clients understand the potential for its multiple retainers to compromise their rights. While independent legal advice may not be sufficient to alleviate the conflicts in this case, at a minimum it should have been obtained.

128. During their respective cross-examinations, the proposed representative Plaintiffs were instructed by AGB not to answer questions regarding whether they received independent legal advice about allowing AGB to also act for the Receiver. Counsel to BDO was clear that it was not seeking to know the content of any independent legal advice, only whether it was obtained.[121] This Court is entitled to draw an adverse inference from these refusals given that they pertained to questions that are directly relevant to the conflicts issue and, by extension, the interests of the proposed class.[122]

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[120] Email from Aird & Berlis (Mark van Zandvoort) to Andrea Laing dated August 28, 2018, Exhibit C to Rogers Affidavit, DR Volume 2, Tab 2C, p. 651; Grant Thornton Limited's Fourth Report dated July 20, 2018 at para. 331, Exhibit I to Meakin Affidavit, DR Volume 2, Tab 1I, p. 434.
[121] Carrie Couch Cross-Examination Transcript at line 26, p. 47 – line 14, p. 48, DSR Tab 1H, p. 187; Jason Couch Cross-Examination Transcript at lines 11-16, p. 38, DSR Tab 1I, p. 227; Whitehouse Cross at lines 2-12, p. 71, DSR Tab 1J, pp. 326.
[122] *1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc*., 2018 ONSC 7423 at paras. 31 and 40, DBA Tab 1; *2235512 Ontario Inc. v. 2235541 Ontario Inc*., 2016 ONSC 1956 at paras. 57 and 71, DBA Tab 2.

129. The proposed representative Plaintiffs' evidence makes clear that, without independent legal advice, they are not in a position to understand and consider the conflict issue AGB's dual retainer raises on behalf of the proposed class. For his part, Mr. Couch conceded that he cannot evaluate the appropriateness of AGB acting in both the class action and the Receiver's action as he is "not trained to know all the ins and outs of those [types] of proceedings."[123]

2. Conflicts of Interest Relating to Individual Retainers in Connection with the Media House Action

130. Mr. Whitehouse acknowledged during his cross-examination that he is concurrently pursuing an action (the "Media House Action") against the Media House Defendants who were third parties connected to the alleged fraud that is alleged to have occurred in the Crystal Wealth Media Fund but who are not named in the proposed class action or the Receiver's Action.[124] As noted above, alleged misconduct in connection with the Media House Defendants formed a basis for the OSC's April 2017 Receivership Application[125] and is a central focus of the Plaintiffs' allegations against BDO in this proceeding.[126] Significantly, AGB is also counsel of record for Mr. Whitehouse and other individual Plaintiffs pursuing the Media House Action.

131. The Media House Action raises at least three distinct conflicts. First, Mr. Whitehouse is alleging losses in the Media House Action purely in his capacity as a Crystal Wealth unitholder.[127] As such, there is no reason why, if the defendants in that

[123] Jason Couch Cross-Examination Transcript at lines 3-10, p. 38, DSR Tab 1I, p. 227.
[124] Whitehouse Cross at pp. 77-85, DSR Tab 1J, pp. 332-340.
[125] See, for example, First Receiver Report at paras. 4-5, DR Volume 1, Tab 1C, pp. 46-47.
[126] See, for example, Amended Statement of Claim at paras. 28-54, DSR Tab 1C, pp. 12 to 17.
[127] Whitehouse Cross at lines 15-24, p. 80, DSR Tab 1J, p. 335.

proceeding are liable to Mr. Whitehouse, they would not also be liable to other Crystal Wealth unitholders. Notwithstanding this fact, Mr. Whitehouse conceded on his cross-examination that he had not previously considered whether he should have included other Crystal Wealth unitholders in the Media House Action and has no opinion on this issue.[128]

132. Mr. Whitehouse's failure to even consider including other unitholders in the Media House Action casts doubt on his ability to fairly and adequately represent the interests of the proposed class. Following his cross-examination, Mr. Whitehouse attempted to negotiate a temporary stay of the Whitehouse Action in order to "preserve his rights against the Media House defendants in the event that the class action is not successful."[129] This stay has been refused by the Media House Defendants but, in any event, would do nothing to alleviate the conflict.[130] It is inappropriate for Mr. Whitehouse to reserve an avenue of recovery just for himself (and other select clients of AGB discussed below) which will not be reduced by the claims of other unitholders.

133. Secondly, Mr. Whitehouse makes allegations in the Media House Action that undercut the Plaintiffs' allegations against BDO in this action. Most strikingly, Mr. Whitehouse alleges that the Media House Defendants colluded between themselves and Clayton Smith to hide their alleged fraud from BDO and unitholders, including by forging documents provided to BDO and falsely representing to BDO that the Media

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[128] Whitehouse Cross at lines 10-19, p. 85, DSR Tab 1J, p. 340.
[129] Email exchange between N Read-Ellis and A Laing re: follow up from under advisement taken at the Cross Examination of Anthony Whitehouse, Question 3, Exhibit L to Feriozzo Affidavit, DSR Tab 1L, p. 443.
[130] Email from J Wansbrough to A Laing enclosing correspondence with N Read-Ellis ["Wansbrough Email"], Exhibit N3 to Feriozzo Affidavit, DSR Tab 1N, p. 492.

Fund's film loan investments were valid and collectible.[131] These allegations constitute admissions on Mr. Whitehouse's part that directly support BDO's position in this case that the alleged fraud underlying the Plaintiffs' claims resulted from collusion and forgery and was not reasonably detectable.[132] While these admissions are helpful to BDO, they are harmful to the proposed class members and raise further questions about the ability of both Mr. Whitehouse and AGB to represent their interests while at the same time pursuing the Media House Action. Notably, the allegations that the Media House Defendants committed a fraud against BDO are also helpful to BDO in defending the Receivers' Action. The fact that AGB is counsel in the Media House Action and the Receiver's Action further illustrates how the firm's multiple retainers undermine one another.

134. Finally, in January 2018, AGB, on behalf of Mr. Whitehouse, served the Media House Defendants with an Amended Statement of Claim seeking to adding several new named Plaintiffs. The Amended Statement of Claim was not filed with the Court and AGB recently sought the Media House Defendants' consent to the amendments.[133] The proposed additional Plaintiffs include another Crystal Wealth unitholder named Gary Froats.

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[131] See, for example, paras. 31 and 44 of Statement of Claim in Media House Action, Exhibit 3 to the Whitehouse Cross, Exhibit J3 to Feriozzo Affidavit, DSR Tab 1J, pp. 426-428.
[132] Statement of Defence at para. 30, DSR Tab 1E, pp. 133-134.
[133] On November 12, 2019, AGB e-mailed Jonathan Hausman, counsel to certain of the Media House Defendants, advising that the Statement of Claim had not been formally amended and requesting that he consent to the amendments initially proposed in January 2018. In his November 13, 2019 response, Mr. Hausman declined to immediately consent to the amendments on the basis that he needed to consider whether the limitation period to advance claims on behalf of the proposed additional parties had expired (Wansbrough Email, DSR Tab 1N, p. 492).

135. Mr. Froats was the financial advisor to Jason and Carrie Couch between 2006 and 2012 through his company, S&P Financial.[134] Mr. Froats later worked at S&P Financial with Al Housego, who became the Couches' Investment Advisor in or around 2012 or 2013 in the context of Mr. Froats' impending retirement.[135] According to the Couches, Mr. Froats recommended that the Couches transfer all of their investments with S&P Financial from certain mutual funds to the Crystal Wealth Funds. Mr. Froats and Mr. Housego made various representations regarding the nature and performance of the Crystal Wealth Funds. Moreover, the Couches do not recall being advised that Crystal Wealth was only permitted to solicit investments from "accredited investors" (which they do not appear to have been during the material time).[136]

136. Mr. Froats appears to have played an integral role in the Couches' decision to invest in Crystal Wealth and may be subject to a claim by the Couches in connection with their investment losses. As such, AGB's representation of Mr. Froats in the Media House Action prevents it from fairly and objectively representing the Couches' interests in this Action and other actions that may be in their interest to pursue to recover their losses.

3. AGB's Duty of Candor

137. The various conflict concerns that have been raised may prejudice the rights of the proposed class, Stakeholders and individual litigants, and may compromise the

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[134] Carrie Couch Cross-Examination Transcript at line 6, p. 11 – line 24, p. 12, DSR Tab 1H, p. 178.
[135] Carrie Couch Cross-Examination Transcript at line 4, p. 17 – line 4, p. 20, DSR Tab 1H, p. 180.
[136] Carrie Couch Cross-Examination Transcript, pp. 17-24, DSR Tab 1H, pp. 180-181; Jason Couch Cross-Examination Transcript, pp. 21-28, DSR Tab 1I, pp. 223-224. The Couches were B.C. residents in the 2012/2013 timeframe. Given their assets and income during this period, they did not meet any of the threshold criteria applicable to "accredited investors" under National Instrument 45-106 (which is incorporated as BC Reg 227/2009 into the B.C. *Securities Act*, R.S.B.C. 1996, c. 418, DBA Tab 35).

Receiver. However, it is unclear that these conflicts will harm BDO, except to the extent that it may also be exposed to additional costs, delays and uncertainty if counsel has to be changed.

138. As BDO is not the party who stands to suffer as a result of a conflict, the Court cannot rely on the adversarial system to surface all of the relevant facts that may be relevant to assessing and addressing the conflict concerns in this case. Accordingly, as in a settlement hearing or a carriage motion, it is asserted that AGB has the utmost duty of good faith to place all material facts which can have any bearing on the conflict issues before the Court, whether these may be against its interests or not.[137] It should fully disclose which parties it acts for in all actions relating to Crystal Wealth, which clients have obtained independent legal advice, what joint retainer or waiver terms apply, and whether any limitation periods may have been missed.

139. While BDO takes the position that questions about whether the Couches and Mr. Whitehouse obtained independent legal advice were improperly refused and should be disclosed to the Court, BDO is not directly affected by actual or potential conflicts of interest raised by AGB's overlapping retainers. BDO accepts that there may be sensitivities to this situation that warrant an *in camera* discussion and does not object to these issues being addressed in a confidential hearing without its participation to allow the Court to exercise its gatekeeper function and ensure that the class and individual litigants are protected.

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[137] *Setterington v. Merck Frosst Canada Ltd*., [2006] O.J. No. 376 (Ont. Sup. Ct.) at para. 26, DBA Tab 25.

4. *No Workable Litigation Plan*

140. To meet the s. 5(1)(e) criterion, the litigation plan must be comprehensive and must correspond to the relative complexity of the case. Among other things, it must provide enough detail to allow the court to assess whether a class action is (a) the preferable procedure and (b) manageable, including with respect to the resolution of common issues and any individual issues that remain after the common issues trial.[138]

141. The Plaintiffs have failed to meet the burden of putting forward a workable litigation plan. Of note, the proposed plan fails to even mention AGB's simultaneous pursuit of the Receiver's Action, let alone address the complexities entailed by these parallel proceedings. A workable plan in this case must consider, among other things, how oral and documentary discovery would be conducted, which court will preside, whether and how this Court has jurisdiction to control the process of the Commercial List, and how common issues in the class action that are not at issue in the Receiver's Action (such as whether BDO owed a duty of care) would be resolved. In short, the Plaintiffs' are proposing an unprecedented tandem procedure of extraordinary procedural complexity that cannot be managed with the generic litigation plan they have put forward.[139]

PART IV - CONCLUSION

142. In conclusion, this Court has emphasized that the litigation plan is "often an integral part of the preferability analysis" and that "frequently, in more complex cases,

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[138] *Persaud* at para. 159, DBA Tab 22.

[139] *Boucher v Public Service Alliance of Canada*, [2005] O.J. No. 2693 (Ont. Sup. Ct.) at para. 30, aff'd (2006), 25 C.P.C. (6th) 219 (Ont. Div. Ct), DBA Tab 6.

it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of 'preferability' as it pertains to manageability, efficiency and fairness".[140]

143. The Plaintiffs have failed to develop a detailed litigation plan because to do so would be to graphically illustrate that the tandem proceeding they are proposing cannot possibly promote access to justice or judicial economy. Instead it would unleash the proverbial "monster of complexity and cost,"[141] that exhausts judicial resources, paralyses a functional, Court-sanctioned resolution process, and endlessly defers a resolution of the claims on the merits.

PART V - ORDER REQUESTED

144. BDO requests that certification be denied with costs to BDO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2019.

Andrea Laing

Doug McLeod

Daniel Szimak

Blake, Cassels & Graydon LLP
Lawyer for the Defendant BDO Canada LLP

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[140] *Caputo et al. v. Imperial Tobacco Limited*, [2004] O.J. No. 299 (Ont. Sup. Ct.) at para. 75, DBA Tab 7.

[141] *Chadha* at para. 37, opinion of Somers J, DBA Tab 8.

SCHEDULE "A"
LIST OF AUTHORITIES

Tab	Case
Jurisprudence	
1.	*1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc*., 2018 ONSC 7423
2.	*2235512 Ontario Inc. v. 2235541 Ontario Inc*., 2016 ONSC 1956
3.	*Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822
4.	*BDO Canada LLP (R*e*),* 2019 ONSEC 21 (Ont. Sec. Com.)
5.	*Berg et al. v. Canadian Hockey League et al*., 2019 ONSC 210
6.	*Boucher v Public Service Alliance of Canada*, [2005] O.J. No. 2693 (Ont. Sup. Ct.)
7.	*Caputo et al. v. Imperial Tobacco Limited*, [2004] O.J. No. 299 (Ont. Sup. Ct.)
8.	*Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.), aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.)
9.	*Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. Sup. Ct. [Commercial List]) var'd on other grounds [2002] O.J. No. 356 (Ont. C.A.).
10.	*Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276
11.	*Fischer v. IG Investment Management Ltd*., 2012 ONCA 47
12.	*Gorecki v. Canada (Attorney General),* [2004] O.J. No. 1315 (Ont. Sup. Ct.)
13.	*Haskett v. Equifax Canada Inc*., [2003] O.J. No. 771 (Ont. C.A.)
14.	*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165
15.	*Lavender v Miller Bernstein,* 2017 ONSC 3958
16.	*McCracken v. Canadian National Railway,* 2012 ONCA 797
17.	*McDonald v. Brookfield Asset Management Inc.,* 2015 ABQB 281, aff'd 2016 ABCA 375
18.	*Meady v. Greyhound Canada Transportation Corp*. 2015 ONCA 6
19.	*Nash v. CIBC Trust Corp* (1996), 7 C.P.C. (4th) 263 (Ont. Gen. Div.)

Tab	Case
20.	*New Brunswick v Rothmans Inc.*, 2009 NBQB 60
21.	*Obonsawin (c.o.b. Native Leasing Services) v. Canada*, [2002] O.J. No. 2502 (Ont. Sup. Ct.)
22.	*Persaud v. Talon International Inc.*, 2018 ONSC 5377
23.	*Price v. H. Lundbeck A/S*, 2018 ONSC 4333
24.	*R. v. F. (D.S.)*, [1999] O.J. No. 688 (Ont. C.A.)
25.	*Setterington v. Merck Frosst Canada Ltd*., [2006] O.J. No. 376 (Ont. Sup. Ct..)
26.	*Sharma v. Timminco Ltd*., [2009] O.J. No. 4511 (Ont. Sup. Ct.)
27.	*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund et al.* v. *SNC-Lavalin Group Inc. et al,* 2012 ONSC 5288
28.	*Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63
29.	*Vaeth* v. *North American Palladium Ltd.,* 2016 ONSC 5015
30.	*Winder v. Marriott International Inc.,* 2019 ONSC 5766
Secondary sources	
31.	*Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019)
Selected pieces of legislation	
32.	*Class Proceedings Act, 1992,* S.O. 1992, c. 6
33.	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b)
34.	*National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations*, s. 7.1
35.	*National Instrument 45-106 Prospectus Exemptions*, BC Reg 227/2009, ss. 1.1, 2.3
36.	R.R.O. 1990, Reg. 194: *Rules of Civil Procedures,* Rule 61.01, 61.04
37.	*Securities Act*, RSBC 1996, c 418, Part 10, s.76
38.	*Securities Act*, R.S.O. 1990, c. S.5, ss. 1.1, 28-29, 72-73, 138.1-138.14.

SCHEDULE "B"
RELEVANT STATUTES

1. *Class Proceedings Act, 1992*, SO 1992, c 6, s. 5

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

2. *Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 6(1)(b)

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

3. *Securities Act*, RSBC 1996, c 418, Part 10, s.76

Exemption order by commission or executive director

76 (1)If the commission or the executive director considers that to do so would not be prejudicial to the public interest, the commission or the executive director may order that

(a)a trade, intended trade, security or person or class of trades, intended trades, securities or persons is exempt from one or more of the requirements of Part 9 or the regulations related to Part 9, and

(b)a trade or intended trade or class of trades or intended trades is deemed to be a distribution.

(2) An order under subsection (1) may be made on application by an interested person or on the commission's or the executive director's own motion.

(3)On application of an interested person, the commission or the executive director may determine whether the distribution of a security has been concluded or is currently in progress.

4. *Securities Act*, R.S.O. 1990, c. S.5, s. 73.3

Exemption, accredited investor

Definition

73.3 (1) For the purposes of this section,

"accredited investor" means,

(a) a financial institution described in paragraph 1, 2 or 3 of subsection 73.1 (1),

(b) the Business Development Bank of Canada,

(c) a subsidiary of any person or company referred to in clause (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary,

(d) a person or company registered under the securities legislation of a province or territory of Canada as an adviser or dealer, except as otherwise prescribed by the regulations,

(e) the Government of Canada, the government of a province or territory of Canada, or any Crown corporation, agency or wholly owned entity of the Government of Canada or of the government of a province or territory of Canada,

(f) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'Île de Montréal or an intermunicipal management board in Quebec,

(g) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government,

(h) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a pension commission or similar regulatory authority of a province or territory of Canada,

(i) a person or company that is recognized or designated by the Commission as an accredited investor,

(j) such other persons or companies as may be prescribed by the regulations.

Exemption

(2) The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.

SCHEDULE "C"
PROCEDURAL COMPARISON CHART

Procedural Feature	Class Proceeding	Receiver's Action	Who Benefits?
Legal costs of multiple Stakeholders shared through common proceeding	Yes. Economy of scale when class counsel acts for entire class of unitholders on contingency basis.	Yes. Receiver is charged with realizing on the assets subject to the Receivership, including pursuit of litigation claims for all Stakeholders. In this case the Receiver has hired counsel on a contingency basis on essentially the same terms as apply to the parallel class proceeding.	In Class Proceeding: unitholders who are class members. In Receivership: all Stakeholders, including creditors. Defendant also benefits from efficiencies of group resolution and finality of outcome.
Representative acts for collectivity of interested parties	Yes. Individual representative plaintiffs with personal interests in the proceeding.	Yes. Professional officer of the Court acts for all Stakeholders as fiduciary.	Neutral: A Receiver is at least as appropriate a representative as a representative plaintiff.
Threshold issue: **Whether BDO owes a duty to unitholders must be established.**	BDO takes the position that there is no duty owed under 5(1)(a). However even if BDO is does not succeed with this argument, the question requires determination on the basis of an evidentiary record.	Per *Livent*, the Receiver stands in the shoes of BDO's clients (*ie.* the Funds and the Fund Manager). Duty cannot reasonably be contested, and is not contested in this case.	All Stakeholders, which includes unitholders, benefit from Receiver's Action because they will not have to incur the costs, delays and litigation risk associated with the resolution of duty issues.

Procedural Feature	Class Proceeding	Receiver's Action	Who Benefits?
	In either event, leave to appeal/appeal may be necessary for final resolution.		All parties bear costs and delays associated with resolution of duty issues in the class proceeding.
Threshold issue: **Whether individual unitholders have capacity or standing to sue BDO.**	BDO takes the position that unitholders lack capacity to sue. However, even if BDO does not succeed with this argument, the question requires determination on a factual record. In either event, leave to appeal/may be necessary in order to reach final resolution.	Fund documents make it clear that CWMS may pursue all causes of action belonging to the Fund. Capacity of CWMS to pursue the claims (through the Receiver) cannot be reasonably disputed and is not disputed by BDO in this case.	Stakeholders benefit from Receivership by not having to incur the costs, delays and litigation risk associated with capacity issue. All parties bear costs and delays associated with resolution of duty and capacity issues in the class proceeding.
Threshold issue: certification test must be met.	The certification motion itself is a hurdle that exists in the Class Proceeding but not in the Receiver's Action Leave applications and/or appeals may follow.	There is no certification requirement in the Receiver's Action. It may proceed to discovery and a merits determination.	Stakeholders benefit through the Receiver's Action by avoiding the costs, delays and litigation risk associated with the certification motion and any resulting appeals. All parties bear costs and delays associated with

Procedural Feature	Class Proceeding	Receiver's Action	Who Benefits?
			resolution of certification.
Process addresses interests of Stakeholders other than unitholders.	No. The class is limited to unitholders.	Yes, the Receiver also represents the interests of creditors.	The interests of Stakeholders who are not unitholders and may have preferred claims will be respected The Class Proceeding ignores the interests of creditors.
Class Proceedings Fund ("CPF") will extract a 10% levy on an award or settlement.	Yes.	No.	Stakeholders generally benefit as a recovery, if any, from BDO will not be subject to the CPF levy.
Objective gatekeeper.	Yes. The Court performs the role of gatekeeper if the interests of class counsel and the class may not be aligned. The Court must approve any settlement or counsel fee among other matters.	Yes. The Receiver itself is a Court Official with fiduciary duties to all Stakeholders. The Court plays a further supervisory function by approving key steps taken by the Receiver.	Stakeholders benefit from the involvement of gatekeepers under both proceedings.
Mechanisms for communication with class/Stakeholders.	Yes, but only for unitholders as the class does not include other Stakeholders.	Yes, the Receiver has communication mechanisms in place for all Stakeholders.	Stakeholders benefit from reporting and communication mechanisms in both proceedings.

Procedural Feature	Class Proceeding	Receiver's Action	Who Benefits?
Contractual defences may be asserted.	No. Unitholders are not in privity of contract with BDO. This is one basis for no duty being recognized. However, if the action is certified, BDO may be impeded in asserting contractual defences.	Yes, Plaintiff is BDO's client, bound by service terms.	Defendant benefits from asserting contractual defences in Receiver's Action. However, the Receiver does not need to establish duty and capacity.
Contributory negligence may be raised as a defence.	No—Plaintiffs are unitholders in the class action, not the Funds or the Fund Manager. Third Party claims against the Fund Manager are stayed.	Yes, CWMS as BDO's client is the Plaintiff in Receiver's Action and BDO may claim contributory negligence.	Defendant benefits from assertion of contributory negligence defence in Receiver's Action. However, the Receiver does not need to establish duty and capacity.
Discovery of company records.	Third-party discovery through Receiver will be necessary.	Receiver is in possession of records of Company and does not require third-party discovery.	Stakeholders in Receivership benefit from efficiency in the discovery process.
Rights of appeal.	Yes but only for entire class, not individual class members.	Yes for individual Stakeholders.	Arguably more "individual" procedural rights in a Receivership.

ANTHONY WHITEHOUSE et al. -and- BDO CANADA LLP et al. Court File No. CV-17-579357-00CP

Plaintiffs Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF Proceedings under the Class Proceedings Act, 1992

Proceeding commenced at Toronto

RESPONDING FACTUM OF THE DEFENDANTS (Plaintiffs' Motion for Certification returnable December 9, 2019)

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