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*

PLAINTIFFS' CERTIFICATION FACTUM

November 15, 2019

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PART I - OVERVIEW

1. The plaintiffs are seeking to certify a class action on behalf of a class of unitholders in mutual funds that were negligently audited by the defendant over the course of nearly a decade.

2. The plaintiffs were unitholders in Funds operated by Crystal Wealth. In order to continue to operate those Funds, Crystal Wealth was required to deliver audited financial statements for each of the Funds to both the OSC and unitholders in the Funds. From 2007 to 2017, Crystal Wealth retained BDO as its auditor.

3. Year after year, BDO provided clean audit opinions for each of the Funds, which audit opinions were addressed directly to the unitholders of the Funds. Unknown to the unitholders, Crystal Wealth was being mismanaged and looted by fraud, which has cost unitholders more than $100 million. Crystal Wealth's conduct was masked by BDO's clean audit opinions.

4. The misconduct at Crystal Wealth was discovered as a result of an OSC investigation and the appointment of a Receiver that followed BDO's inability to provide audit opinions in the spring of 2017. In other words, the misconduct at Crystal Wealth was finally brought to an end days after BDO stopped issuing clean audit opinions.

5. If BDO had conducted proper audits, the misconduct and mismanagement at Crystal Wealth would have been discovered sooner, limiting, and in some cases preventing, unitholder losses.

6. The proposed class action raises a tenable cause of action against BDO in negligence on behalf of an objectively identifiable class. The proposed common issues turn almost entirely on BDO's conduct, and they will resolve the question of BDO's liability. While a Receiver appointed

in respect of Crystal Wealth has managed to make some distributions to unitholders and has commenced a claim against BDO for similar conduct, the proposed class action is the preferable procedure for maximizing investor recovery, ensuring unitholders have access to justice, and deterring auditors from engaging in similar conduct.

7. Indeed, the receivership (and the action commenced by the Receiver against BDO) are complementary to the class proceeding, and ought not to be considered as separate or stand-alone proceedings. Together, these claims can maximize recovery for the devastating losses that unitholders have suffered as a result of BDO's negligence.

PART II - SUMMARY OF FACTS

A. The Parties

8. BDO Canada LLP ("**BDO**") is a national assurance, accounting, tax and advisory firm. It was the auditor for Crystal Wealth Management Systems Ltd. ("**Crystal Wealth**") and its Funds (as defined below) from 2007 to 2017.

9. The proposed representative plaintiff, Anthony Whitehouse, is an individual residing in Mississauga, Ontario. He invested nearly $1 million in five of the Funds, which was his entire life savings. Mr. Whitehouse works as a real estate agent.[1]

10. The proposed representative plaintiffs, Carrie Couch and Jason Couch, are spouses. They live in rural Alberta. Individually and collectively they invested an aggregate of nearly $600,000 in three of the Funds, which was their entire life savings. They operate a beef farm.[2]

[1] Affidavit of Anthony Whitehouse, at paras. 11-12, **Amended Motion Record of the Plaintiffs ("AMR")**, Vol. 1, Tab 3, p. 53-54; Transcript of the Cross-Examination of Anthony Whitehouse, pp. 12-13, Q. 60, Exhibit "J" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1J, at pp. 255-350.

11. Mr. Whitehouse and the Couches bring this action on behalf of a proposed class of any person that invested in any of the Funds (as defined below) of Crystal Wealth from April 12, 2007 to April 7, 2017, and who retained investments in any of the Funds on April 7, 2017, excluding certain individuals and entities that are related to Crystal Wealth and BDO, among others.[3] BDO has failed to provide its best information on the number of members in the class. The plaintiffs have affirmed that there are no more than 4,200 members in the class,[4] and an agreed statement of facts in a settlement agreement between the Ontario Securities Commission (the "**OSC**") and the principal of Crystal Wealth states that there were approximately 1,250 clients of Crystal Wealth.[5]

B. Crystal Wealth

12. Crystal Wealth marketed itself as a discretionary portfolio management firm that specialized in "creating and managing alternative investment strategies that are outside of traditional stock and bond portfolios."[6] It was registered with the OSC under the categories of: (a) Exempt Market Dealer, (b) Investment Fund Manager, (c) Portfolio Manager, and (d) Commodity Trading Manager.[7]

13. Clayton Smith was the directing mind and sole director and officer of Crystal Wealth.[8]

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[2] Affidavit of Carrie Couch, at paras. 3, 8, **AMR**, Vol. 20, Tab 9, pp. 6653-6655.
[3] Amended Statement of Claim, amended November 13, 2019, at para. 1(i), **AMR**, Vol. 1, Tab 2, p. 28.
[4] Affidavit of Anthony Whitehouse, at para. 36, **AMR**, Vol. 1, Tab 3, p. 66.
[5] Clayton Smith Settlement Agreement, at para. 15, Exhibit "A" to the Supplementary Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 20, Tab 6A, p. 6603.
[6] Affidavit of Anthony Whitehouse, at para. 9, **AMR**, Vol. 1, Tab 3, p. 58.
[7] Receiver's First Report, at para. 14, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, p. 3389.
[8] Clayton Smith Settlement Agreement, at para. 6, Exhibit "A" to the Supplementary Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 20, Tab 6A, p. 6602.

14. From 2007 to 2017, Crystal Wealth created, marketed and managed proprietary funds. The funds were all structured as open-ended mutual fund trusts. Units in the funds were distributed to unitholders on an exempt-market basis, pursuant to offering memoranda.[9]

15. Crystal Wealth grew significantly over time. In 2007, it was operating just one mutual fund. By 2017, it was operating 15 funds (individually, a "**Fund**", and collectively, the "**Funds**").[10] As of April 20, 2017, Crystal Wealth claimed that the Funds had an aggregate of approximately $193.2 million in net asset value ("**NAV**"), and they had approximately 1,250 unitholders.[11] As it turns out, the NAV of the Funds was materially overstated.

16. The underlying assets in the Funds were composed both of traditional investments (such as stocks, bonds, and other conventional securities) (the "**On-Book Assets**"), as well as unconventional investments, such as film loans, non-conventional residential mortgages, and factoring contracts (the "**Off-Book Assets**"). [12]

17. The On-Book Assets were held and recorded by one of two independent third parties: the National Bank Correspondent Network and Interactive Brokers Canada Inc. In contrast, the Off-Book Assets were held and recorded by Crystal Wealth or third-parties who, in many cases, had a personal relationship with Smith or other Crystal Wealth advisors and were actively colluding with Smith to manipulate the reported values of the Off-Book Assets.[13]

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[9] Receiver's First Report, at para. 18, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, p. 3390.

[10] Affidavit of Anthony Whitehouse, at para. 10, **AMR**, Vol. 1, Tab 3, pp. 58-59.

[11] Receiver's Second Report, at para. 34, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, p. 4026; Clayton Smith Settlement Agreement, at para. 14, Exhibit "A" to the Supplementary Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 20, Tab 6A, p. 6603.

[12] Receiver's First Report, at paras. 22, 27, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, pp. 3391-3394.

[13] Receiver's First Report, at paras. 22, 27, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, pp. 3391-3394.

18. The Off-Book Assets accounted for approximately $117.4 million (or approximately 60 percent) of the total NAV reported by Crystal Wealth as of April 20, 2017.[14] As it turns out, that amount was materially overstated.

19. In addition, there was substantial inter-fund investment among the Funds, which accounted for approximately $22.9 million (or approximately 12 percent) of the total NAV reported by Crystal Wealth as of April 20, 2017.[15] Notably, the largest recipients of these inter-fund investments were the Media Fund, the Hedge Fund and the Factoring Fund, which held substantial Off-Book Assets.[16]

C. Crystal Wealth's Net Asset Value is Materially Overstated

20. Smith inflated the NAV of the Funds, misappropriated significant amounts and ultimately used the Funds to operate a Ponzi scheme. As discussed in more detail below, in 2017 a Receiver (as defined below) was appointed over Crystal Wealth and the Funds. In a report to the Court, the Receiver stated that Crystal Wealth "disclosed false or manipulated [NAVs] of the Funds, causing the NAVs of certain Funds to be materially overstated" and that the inter-fund investments "may have been used to falsely create liquidity to meet investor distributions and/or redemptions".[17]

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14 Receiver's First Report, at Appendix "9", Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 12, Tab 4C, p. 3727.

15 Receiver's First Report, at Appendix "9", Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 12, Tab 4C, p. 3727.

16 Receiver's Second Report, at para. 43, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, p. 4029; Receiver's First Report, at Appendix "9", Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 12, Tab 4C, p. 3727.

17 Receiver's Second Report, at para. 32, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, p. 4025.

21. In a settlement with the OSC, Smith admitted to misappropriating millions of dollars of investor money from two of the Funds that had substantial Off-Book Assets: the Mortgage Fund and the Media Fund.[18]

22. But the problems were not limited to those two Funds. For instance, the Receiver noted numerous conflicts of interest and personal relationships in respect of the factoring contracts held by the Factoring Fund and Hedge Fund, and there were a number of suspicious transactions relating to those assets. As one example only, the administrator of the factoring contracts could not account for approximately $4.8 million of funding that was provided by the Factoring Fund and Hedge Fund.[19]

23. In its Second Report to the Court, the Receiver noted that the quality and collectability of investments held by six of the Funds (the Mortgage Fund, the Factoring Fund, the Bullion Fund, the Media Fund, the Infrastructure Fund and the Hedge Fund) "may be grossly impaired."[20] The impairment of assets extends beyond those Funds.

24. The impairment of the assets in those (and other) Funds infected the others as a result of the substantial inter-fund investment. For instance, all but six of the funds held, directly or indirectly, inter-fund investments in the Media Fund, which was the largest recipient of inter-fund

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[18] Clayton Smith Settlement Agreement, at paras. 22, 28-29, 32-33, Exhibit "A" to the Supplementary Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 20, Tab 6A, pp. 6605-6608.

[19] Receiver's Fourth Report, at para. 101(l), Exhibit "I" to the Affidavit of Nigel Meakin**, Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 378.

[20] Receiver's Second Report, at para. 32, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, pp. 4024-4025.

investment.[21] The inter-fund investments in the Media Fund accounted for up to 61.4 percent of the NAVs of the other Funds that held direct inter-fund investments in the Media Fund.[22]

25. The result, as discussed in more detail below, is that unitholders of virtually every Fund have suffered impairment in the value of their investments in the Funds.

D. BDO Delivers Clean Audit Opinions for Nearly a Decade

26. BDO was critical to allowing the misconduct at Crystal Wealth to continue. The applicable securities laws required Crystal Wealth and each of the Funds to prepare annual, audited financial statements, which were required to be (a) filed with the OSC, and (b) sent directly to every unitholder in the Fund.[23] Failure to deliver audited financial statements to the OSC and unitholders could result in the suspension of Crystal Wealth's registrations with the OSC.[24]

27. In other words, Crystal Wealth's ability to continue to operate the Funds was contingent on obtaining annual, audited financial statements, which were provided to unitholders.

28. Crystal Wealth retained BDO to audit the Funds, and BDO was the sole auditor of the Crystal Wealth Funds since 2007.

29. BDO was initially retained in 2007 to audit the only Fund that existed at that time: the Mortgage Strategy Fund (the "**Mortgage Fund**"). Over time, Crystal Wealth introduced new

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[21] Receiver's First Report, at Appendix "10", Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 12, Tab 4C, p. 3729; Receiver's Second Report, at paras. 220-222**,** Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, pp. 4080-4081.

[22] Receiver's Second Report, at paras. 220-222, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, p. 4080.

[23] *Securities Act*, R.S.O. 1990, c. S.5, ss. 78-79; *Investment Fund Continuous Disclosure*, OSC NI 81-106, Part 2, at s. 2.7(3).

[24] *Securities Act,* s. 28.

Funds. By 2016, Crystal Wealth was operating 15 Funds. Two of those funds were created in 2015, and five of them were created in 2016.[25]

30. Over the course of nearly a decade, BDO provided clean audit opinions in respect of all 10 of the Funds that were in existence by 2015 (the "**BDO-Audited Funds**"). BDO's clean audit opinions were contained in all of the financial statements for the Funds that were filed with the OSC and provided to unitholders.

31. BDO's opinion in each instance stated that the annual financial statements were free from material misstatement.

32. For instance, the 2015 financial statements for the Crystal Wealth Media Strategy Fund (the "**Media Fund**") contained an Independent Auditor's Report from BDO that was addressed "To the Unitholders of Crystal Wealth Media Strategy". The Independent Auditor's Report explained that BDO had conducted an audit of the Fund's financial statements in accordance with generally accepted auditing standards ("**GAAS**"), and that BDO selected its audit procedures based in part on the risk of material misstatement due to both error and – critically in this case – fraud. BDO ultimately expressed the unqualified opinion that "the financial statements present fairly, in all material respects, the financial position of" the Fund.[26]

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[25] BDO Statement of Defence (Whitehouse Class Action), at para. 10, Exhibit "E" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1E, p. 127; Affidavit of Anthony Whitehouse, at paras. 10-11, **AMR**, Vol. 1, Tab 3, pp. 59-60.

[26] 2015 Financial Statement for Media Fund, Exhibit "C" to the Affidavit of Anthony Whitehouse, **AMR**, Vol. 1, Tab 3C, p. 121.

33. That statement was false as it turned out that the assets of the Media Fund (and other Funds) were substantially overstated.[27]

34. BDO and its clean audit opinions were critical to the growth of Crystal Wealth and the proliferation of Funds. First, the clean audit opinions allowed Crystal Wealth to retain its registrations with the OSC, which, in turn, allowed it to continue to maintain and solicit new investments, and to create new Funds, including five funds that were created in 2016 (the "**2016 Funds**"), for which BDO never delivered an audit opinion.

35. Second, BDO's involvement was a significant factor in attracting new investors to the Funds, and in retaining existing unitholders. BDO's role as auditor of the Funds was disclosed to prospective unitholders in the Offering Memoranda for all 15 Funds.[28] It was also disclosed in the audited financial statements of the BDO-Audited Funds, which were available to existing and prospective unitholders on Crystal Wealth's website.[29]

36. Third, unitholders were given the impression that the Funds were valuable and increasing in value. The year over year increases in value were reflected in the (comparative) audited annual financial statements that BDO told investors "present fairly, in all material respects, the financial position" of the Funds. That led investors to continue to invest in the Funds (or remain invested in the Funds).

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[27] See, for example: Receiver's Second Report, at paras. 32(h), 43, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, pp. 4025, 4029.

[28] See, for example: Confidential Offering Memorandum for Crystal Wealth Media Strategy, at p. 4, Exhibit 1 to the Cross-Examination of Anthony Whitehouse, Exhibit "J" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1J.1, p. 359.

[29] Transcript of the Cross-Examination of Anthony Whitehouse, pp. 30-31, Q. 179, Exhibit "J" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1J, pp. 286-287.

37. All three of the representative plaintiffs provided evidence that BDO's involvement as the auditor of the Funds was a significant factor in their respective decisions to invest with Crystal Wealth, and they all reviewed the audited financial statements when making investment decisions.[30] There is no evidence that they are unique among unitholders in that regard.

38. There can be no doubt that BDO specifically contemplated that investors would rely on BDO, and its audit services. For instance, BDO's engagement letter for a number of the Funds dated December 21, 2016 provides specifically that: "Our Services will not be planned or conducted in contemplation of or for the purpose of reliance by any third party other than you and any party to whom the assurance report is addressed."[31]

39. The assurance reports in the financial statements were addressed directly to the "Unitholders", and accordingly BDO's professional services were planned and conducted in order to permit the unitholders to rely on BDO's work. Crystal Wealth maintained a repository of unitholder data that included unitholder names, addresses and holdings in the Funds. BDO was aware of this list, and reviewed a third party audit of the repository.[32]

40. In other words, BDO and its clean audit opinions provided cover for the misconduct that was plaguing Crystal Wealth and its Funds.

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[30] Affidavit of Anthony Whitehouse, at paras. 18, 20, **AMR**, Vol., Tab 3, p. 61; Affidavit of Carrie Couch, at paras. 6-7, **AMR**, Vol. 20, Tab 9, pp. 6654-6555.

[31] BDO Engagement Letter, dated December 21, 2016, p. 7, Exhibit "A" to the Affidavit of Erin Tucker, **Reply Motion Record of the Plaintiff**, Tab 1A, pp. 1-12 (emphasis added).

[32] Receiver's First Report, at paras. 171-174, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, pp. 3439-3440.

41. The importance of BDO in masking the misconduct is apparent from what transpired in the spring of 2017. For all but three of the Funds, BDO was unable to complete is audits for the 2016 financial statements by the March 31, 2017 deadline.[33]

42. Seven days later, on April 7, 2017, the OSC issued a temporary order that prohibited trading in the Funds' units, and trading in securities held by the Funds (the "**Temporary Order**"). Later that month, on April 26, 2017, on application by the OSC, Grant Thornton LLP was appointed as the receiver (the "**Receiver**") over all assets of Crystal Wealth and the Funds.[34] In other words, the music stopped as soon as BDO stopped issuing clean audit opinions.

43. As a result of the Temporary Order and the appointment of the Receiver, unitholders have been prohibited from redeeming their investments in the Funds since April 7, 2017.

E. The OSC Investigation Unearths Evidence of BDO's Negligence

44. The OSC sought and obtained the appointment of the Receiver based on evidence of fraud that it had obtained during its investigation of Crystal Wealth.[35]

45. The evidence of fraud at that time related primarily to the Media Fund, which was the largest of the Funds. In general terms, the assets of the Media Fund were loans to support the production of films (the "**Media Loans**"). The Media Loans were purportedly purchased by the

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[33] Affidavit of Marcel Tillie in OSC Application Record, at paras. 58-61, Exhibit "B" to the Affidavit of Marlie Patterson-Earle, **AMR,** Vol. 2, Tab 4B, pp. 420-421.

[34] Affidavit of Anthony Whitehouse, at paras. 21-22, **AMR**, Vol. 1, Tab 3, pp. 61-62.

[35] See, for example: OSC Notice of Application, dated April 25, 2017 at paras. 2(a)-(d), Exhibit "A" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 1, Tab 4A, pp. 276-277.

Media Fund from Media House Capital (Canada) Corp. ("**MHC**"). The loans would be repaid from the proceeds of films.[36]

46. As part of the OSC's investigation, Marcel Tillie, a Senior Forensic Accountant with staff of the Enforcement Branch of the OSC, reviewed documents relating to BDO's audit of the 2015 financial statements for the Media Fund. Based on his review of those materials, he had concerns about the existence and valuation of the Media Loans. Mr. Tillie was critical of BDO's audit. In an affidavit filed in connection with the OSC's application to appoint the Receiver, Mr. Tillie stated that:

(a) "For the existence of the Film Loans, BDO relied only on confirmation from [MHC] by e-mail dated April 2, 2016 regarding the outstanding principal and interest of the loans, rather than confirmations from the film production companies (the underlying borrowers)";

(b) "BDO relied on MHC as an objective expert in their knowledge of the film industry and for independent confirmation with respect to the existence and collectability of the Film Loans. This is concerning [because MHC and Smith were coordinating responses to BDO's requests for information]";

(c) "Based on my review of the 2015 audit file for the Media Fund, approximately $4.5 million in NAV appears to have been unsupported by BDO's audit";

(d) "BDO tested the accuracy of forecasted 2015 Film Loan receipts of $31.8 million at December 31, 2014 by comparing them to the actual 2015 Film Loan receipts of

[36] Affidavit of Marcel Tillie in OSC Application Record, at paras. 26-28, Exhibit "B" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 2, Tab 4B, pp. 408-409.

$6.6 million, and found that actual receipts were $25.2 million less than originally forecasted"; and

(e) "Notwithstanding BDO's conclusion that based on its retrospective review, the forecasted 2015 Film Loan receipts 'differed from actual by a material amount' further leading to a high degree of estimation uncertainty, BDO continued to rely on forecasted Film Loan receipts in the 2015 Media Loan Audit".[37]

47. The OSC subsequently commenced proceedings against BDO for making false representations in its opinions in the 2014 and 2015 financial statements for the Mortgage Fund and the Media Fund that it had conducted its audits in accordance with GAAS.[38] In particular, the OSC has alleged that BDO failed to conduct its audits in accordance with GAAS for the following reasons:

> **First, BDO did not obtain sufficient appropriate audit evidence of the existence and valuation of the Funds' assets.** To begin, BDO did not perform all the retrospective reviews for accounting estimates required by GAAS. Without those reviews, BDO could not design audit procedures responsive to the risk that the financial statements were materially misstated. Next**, in completing the audit procedures it did design, BDO unduly relied on the Funds' service providers – who were not independent of Smith – and on Smith himself. Finally, even though BDO identified a material misstatement in the Media Fund's 2015 financial statements, it provided an unmodified audit opinion on them.**
>
> **BDO's second principal violation of GAAS was its failure to undertake its work with sufficient professional skepticism. Throughout the Audits, BDO disregarded contradictory audit evidence and other circumstances that could be indicative of fraud.** BDO failed to recognize the resultant, increased risk of

[37] Affidavit of Marcel Tillie in OSC Application Record, at paras. 40-46, Exhibit "B" to the Affidavit of Marlie Patterson-Earle, **AMR,** Vol. 2, Tab 4B, pp. 412-414.

[38] Statement of Allegations in the Matter of BDO Canada LLP, dated October 12, 2018, Exhibit "A" to the Affidavit of Erin Tucker, affirmed March 19, 2019, **AMR**, Vol. 20, Tab 8A, pp. 6635-6651.

> material misstatement and did not address the heightened risk with enhanced audit procedures. The enhanced procedures would have resulted in BDO obtaining additional evidence before determining whether it could issue unmodified audit opinions on the financial statements.
>
> **Last, before issuing its audit opinions, BDO did not complete the engagement quality control reviews ("EQCRs") of the Audits that it had determined were required.**[39] [Emphasis added.]

F. BDO Fell Below the Applicable Standard of Care

48. When the Receiver was appointed, it obtained access to the books and records of Crystal Wealth and the Funds. The Receiver quickly discovered that the documentation of Crystal Wealth was not sufficient to support the reported NAVs of the Funds. In light of the lack of documentation, BDO could not have met its standard of care in completing GAAS-compliant audits.

49. In its First Report to the Court, the Receiver noted that "there are little to no internal tracking mechanisms in place at the Company with respect to the Off-Book Assets. In addition, there appears to be no protocol in place for organizing documentation with respect to the investments and no central location or repository for same."[40]

50. The Receiver noted that "significant deficiencies in the Company's books and records … have created additional complexities for the Receiver and its counsel in understanding and supporting investments and their respective values."[41]

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[39] Statement of Allegations in the Matter of BDO Canada LLP, dated October 12, 2018, at paras. 5-7, Exhibit "A" to the Affidavit of Erin Tucker, affirmed March 19, 2019, **AMR**, Vol. 20, Tab 8A, p. 6637.

[40] Receiver's First Report, at para. 25, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, p. 3392.

[41] Receiver's Second Report, at para. 29, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, p. 4024.

51. With respect to the Media Fund in particular, the Receiver noted that it "was **unable to obtain the information required to fully understand and support the value of the Media Loans. Aside from the Media Loan Schedule, it appears that there was no documentation used by Smith or the Company to understand the performance of the Media Loans**."[42]

52. The Receiver also noted serious issues with oversight and governance of the Funds.[43]

53. The proposed representative plaintiffs retained Barry Myers, a former auditor, to provide an expert opinion in respect of the standard of care. Mr. Myers is a retired auditor with substantial audit experience, including as the former Canadian Financial Services Industry Practice Leader and Canadian Investment Practice Leader of PricewaterhouseCoopers.[44] Mr. Myers has opined that "BDO could not have obtained reasonable assurance about whether the financial statements of each of the Funds as a whole were free from material misstatement, whether due to fraud or error."[45]

54. Mr. Myers arrived at his conclusion after reviewing the Certification Record of the plaintiffs (including the Receiver's First and Second Reports) and the Statement of Claim.[46] Mr. Myers explained that the applicable Canadian Audit Standards require an auditor to obtain reasonable assurance in respect of whether financial statements as a whole are free from material

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[42] Receiver's First Report, at para. 94, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, p. 3418 (emphasis added).

[43] See: Receiver's Second Report, at para. 32(a), Exhibit "E" to the Affidavit of Marlie Patterson-Earle, AMR, Vol. 13, Tab 4E, p. 4024.

[44] Report of B. Myers, at p. 4, Exhibit "B" to the Affidavit of B. Myers, **AMR,** Vol. 20, Tab 5B, p. 6590.

[45] Report of B. Myers, at p. 4, **AMR**, Vol. 20, Tab 5B, p. 6590.

[46] Report of B. Myers, at pp. 1, 9, **AMR**, Vol. 20, Tab 5B, pp. 6587, 6595.

misstatement, whether due to fraud or error. This requires an auditor to obtain sufficient and appropriate audit evidence to reduce audit risk to an acceptably low level.[47]

55. Mr. Myers has expressed the opinion that BDO could not have obtained sufficient audit evidence in light of deficiencies in Crystal Wealth's records. In the absence of having obtained sufficient audit evidence, BDO expressed inappropriate opinions in respect of the financial statements. Mr. Myers also opined that the conflicts of interest noted in the Receiver's Reports and the OSC's application materials suggest that BDO did not exercise healthy skepticism, as required by the applicable Canadian Audit Standards.[48]

G. BDO's Conduct Caused Damage to the Proposed Class

56. BDO's negligence in delivering clean audit opinions year after year is a proximate cause of substantial investor losses. As noted above, but for the clean audit opinions, Crystal Wealth would not have been able to retain is registrations with the OSC and to continue to operate and solicit investments in the Funds. Without BDO's improperly prepared audits, unitholder losses would have been limited and, in some cases, prevented. Indeed, that is precisely what happened when BDO refused to issue clean audit opinions in the spring of 2017.

57. The losses to unitholders are substantial. As of April 20, 2017, Crystal Wealth reported that the Funds had aggregate NAVs of approximately $193.2 million. In its Fourth Report, the Receiver noted that it had "concerns over the quality and ultimate collectability of approximately

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[47] Report of B. Myers, at pp. 5-6, Exhibit "B" to the Affidavit of B. Myers, **AMR**, Vol. 20, Tab 5B, pp. 6591-6592.

[48] Report of B. Myers, at pp. 6-9, **AMR**, Vol. 20, Tab 5B, pp. 6592-6595.

$50.25 million of the remaining Recorded Value, as reflected in the April 20th Package delivered by Smith".[49]

58. The Receiver has undertaken substantial efforts to monetize assets held by the Funds and to distribute those assets to unitholders. To date, the Receiver has distributed approximately $56 million to unitholders (or less than 30 percent of the NAV reported by Crystal Wealth as of April 20, 2017).[50] In other words, to date, unitholders in the Funds have suffered, on average, an impairment of more than 70 percent of the purported value of their investments in the Funds.

59. The impairment suffered by individual unitholders varies depending on the Funds in which they were invested. The Receiver has been making distributions as assets are monetized within the respective Funds. The Receiver managed and accounted for each Fund separately so that there was no co-mingling among the Funds.[51] For example, the proceeds from the monetization of assets in the Media Fund were distributed only to unitholders of that Fund.

60. The information disclosed by the Receiver suggests that unitholders in all but one of the Funds (the Resource Fund) have suffered an impairment on their investments to date that range from approximately 2 percent (in the Sustainable Dividend Fund) to as much as 100 percent (in the Conscious Capital Fund and Factoring Fund).[52]

61. The impairment has caused significant hardship for Class Members. For example, all three of the proposed representative plaintiffs invested their life savings in Crystal Wealth Funds, and

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[49] Receiver's Fourth Report, at para. 3, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 324.

[50] Receiver's Fourth Report, at para. 4, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 325.

[51] Receiver's Second Report, at para. 59, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 13, Tab 4E, pp. 4034-4035.

[52] A table summarizing information from the Receiver's Reports about the NAVs and distributions to unitholders of the Funds is attached to this Factum as Schedule "C".

they have suffered significant impairments on the value of their investments. This has caused severe financial hardship for all of the proposed representative plaintiffs.[53]

62. While the Receiver continues its attempts to monetize assets, it has cautioned that there are challenges associated with further monetization efforts, and that "in the absence of taking further aggressive recovery efforts, including litigation, the recoveries will be minimal."[54]

63. The Receiver's continuing attempts to monetize the assets of the Funds includes a claim against BDO on behalf of Crystal Wealth and the Funds (the "**Receiver's Action**") for negligence, negligent misrepresentation, breach of contract, and gross negligence.[55] To date, amounts that the Receiver has been able to distribute to unitholders is exclusive of any amounts from BDO.

H. The Receiver's Action is no Substitute for the Proposed Class Action

64. The Receiver's Action and this proposed class action are complementary actions that, together, will maximize investor recovery.

65. On May 20, 2018, the Honourable Justice Conway granted an Order approving the retainer of Class Counsel to act for the Receiver in the Receiver's Action. In the event that this class action is certified, it is anticipated that the class action and the Receiver's Action will be consolidated and proceed toward a hearing on the merits in tandem.

66. Both proceedings are necessary, and this proceeding should not be stayed or dismissed on the assumption that the putative class can be made whole in the Receiver's Action. First, the two

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[53] Affidavit of Anthony Whitehouse, at paras. 13, 34, **AMR**, Vol. 1, Tab 3, pp. 60, 65; Affidavit of Carrie Couch, at paras. 8, 10-11, **AMR**, Vol. 20, Tab 9, p. 6655.

[54] Receiver's Fourth Report, at paras. 4-5, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 325.

[55] Statement of Claim in the Receiver's Action, at para. 1(c), Exhibit "F" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Record of BDO Canada LLP**, Tab 1F, p. 141.

proceedings are being brought on behalf of different parties: the Receiver is bringing the Receiver's Action on behalf of Crystal Wealth and its Funds.

67. In contrast, the proposed class action is being pursued solely on behalf, and for the benefit of, unitholders. In the circumstances, it is their only direct route to seeking access to justice for BDO's negligence.

68. In addition, each proceeding offers distinct substantive benefits. For instance, BDO has defended the Receiver's Action on the basis that Crystal Wealth and the Funds are contributorily negligent.[56] If successful, that defence could reduce the Receiver's recovery from the Receiver's Action. BDO has not asserted that defence in the proposed class action for obvious reasons. Similarly, in the Receiver's Action, BDO has asserted that its engagement letters with Crystal Wealth limit damages that can be recovered.[57] There is no such limit in the class action. Permitting only the Receiver's Action to proceed would therefore inherently compromise the unitholders' ability to maximize their financial recovery.

69. Pursuing the Receiver's Action and the proposed class action in tandem will result in significant judicial economy. Indeed, the Receiver recommended to the Court the engagement of class counsel as counsel in the Receiver's Action because the two proceedings are complementary. In its report to the Court, the Receiver noted that:

> (iii) [T]he Proposed Class Action and the Receiver's Action have questions of law and fact in common, and both claim relief arising out of the same transactions; (iv) AGB LLP is already counsel to Whitehouse in the Proposed Class Action, and accordingly, can minimize the current legal costs to the estate of the Company and

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[56] BDO Statement of Defence (Receiver's Action), at para. 34, Exhibit "G" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1G, p. 171.

[57] BDO Statement of Defence (Receiver's Action), at para. 35(f), Exhibit "G" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1G, p. 171.

> Crystal Wealth Funds by similarly acting for the Receiver on a contingency fee basis, and as a result of having access to the Class Proceeding Fund in the Proposed Class Action with respect to certain costs and disbursements which may be duplicative in both proceedings, and (v) the Receiver will be considered to fulfill the role as the administrator of the claims process in the Proposed Class Action, and would consequently be tasked with issuing distributions to investors arising from any recovery in the Proposed Class Action, in addition to any recovery obtained in the Receiver's Action.[58]

I. BDO's Expert Evidence is Inadmissible

70. BDO has adduced the affidavit of Nigel Meakin as expert evidence. However, this evidence is inadmissible because it fails to meet the necessity requirement for admissibility.

71. The stated purpose of Mr. Meakin's evidence is "to assist the court by providing [his] expert opinion with respect to the role, duties and powers of court-appointed receivers", with a focus on the role of Grant Thornton LLP and its efforts as the Receiver of Crystal Wealth.[59] BDO contends that this evidence is relevant to the preferable procedure analysis.[60] Mr. Meakin opines about the Crystal Wealth Funds receivership.[61]

72. Mr. Meakin's affidavit is not proper expert opinion evidence. He purports to give opinion evidence on Ontario law and how court orders operate in Ontario, which are matters that fall directly within the purview of the Court. Therefore, his opinions are not necessary to enable the motion judge to appreciate the matters in issue and reach proper determinations. This evidence should not be admitted. In the alternative, if it is admitted, it should be given little weight.

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[58] Receiver's Fourth Report, at para. 330, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 434.

[59] Affidavit of Nigel Meakin, sworn August 22, 2019, at para. 3, **Responding Motion Record of BDO Canada LLP**, Vol. 1, Tab 1, p. 2.

[60] Affidavit of Nigel Meakin, at para. 3, **Responding Motion Record of BDO Canada LLP**, Vol. 1, Tab 1, pp. 2-3.

[61] Affidavit of Nigel Meakin, at paras. 3(i)-(ii), 73-77, **Responding Motion Record of BDO Canada LLP**, Vol. 1, Tab 1, pp. 3, 30.

PART III - LAW & ARGUMENT

A. The Governing Principles: Certification

73. The *Class Proceedings Act, 1992* (the "***CPA***") is remedial legislation and should be given a large and liberal interpretation. Pursuant to s. 5(1) of the *CPA*, the court shall certify an action as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable litigation plan, and does not have an interest in conflict with other class members on the common issues.

74. The certification stage is not meant to be a test of the merits of the action. Instead, the focus is on the *form* of the action, and the question is whether the claims can appropriately be prosecuted as a class proceeding.[62]

75. The five-part test for certification should be construed purposively and generously, giving effect to the three main objectives of class actions: providing access to justice to litigants; encouraging behaviour modification; and promoting the efficient use of judicial resources.[63]

76. To support a certification order, the plaintiffs need only show "some basis in fact" for each of the certification criteria, other than the criterion that the pleadings disclose a cause of action.[64]

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[62] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16, **Book of Authorities of the Plaintiffs ("PBOA"),** Tab 17.

[63] *Hollick*, at paras. 14-16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29, **PBOA,** Tab 35; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, at para. 37 (C.A.), leave to appeal refused, [2005] 1 S.C.R. vi (note), **PBOA,** Tab 9; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 1, **PBOA,** Tab 34.

[64] *Hollick*, at para. 25, **PBOA,** Tab 17; *Cloud*, at para. 50, **PBOA,** Tab 9.

There is no need to show some basis in fact for the merits of the claim.[65] This standard of proof sets a low evidentiary threshold for plaintiffs. By contrast, the defendant has an "inversely heavy" standard of proof to rebut the plaintiffs' evidence.[66]

B. The Cause of Action Criterion: Section 5(1)(a)

a. General Principles

77. The first criterion for certification is that the plaintiffs' pleading discloses a cause of action. Under this criterion, the court accepts the material facts in the pleadings as true, unless patently ridiculous or incapable of proof.[67] No evidence is admissible for the purposes of determining whether the pleadings disclose a tenable cause of action.[68]

78. This criterion will be satisfied unless it is "plain and obvious" that the pleading discloses no cause of action.[69] At this juncture, the pleading is to be read generously, "and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed."[70] Finally, matters of law that are not fully settled should not be disposed of on a certification motion, and the court should only exercise its power to deny certification in the clearest of cases.[71]

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[65] *Hollick*, at para. 25, **PBOA,** Tab 17; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 100, **PBOA,** Tab 26**.**

[66] *Lambert v. Guidant Corp.,* [2009] O.J. No. 1910, at paras. 68-69 (Ont. Sup. Ct.), leave to appeal to refused, [2009] O.J. No. 4464 (Div. Ct.), at paras. 8-12, 14, **PBOA,** Tab 19; *Pro-Sys Consultants Ltd*, at para. 102, **PBOA,** Tab 26; *McCracken v. Canadian National Railway*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 75-80, **PBOA,** Tab 24.

[67] *Hollick*, at para. 25, **PBOA,** Tab 17; *Cloud*, at para. 41, **PBOA,** Tab 9; *LBP Holdings Ltd. v. Hycroft Mining Corporation*, 2017 ONSC 6342, at para. 95, motion to extend the time for filing leave to appeal granted, 2018 ONSC 1794 (Div. Ct.), **PBOA,** Tab 21.

[68] *Hollick*, at para. 25, **PBOA,** Tab 17; *LBP Holdings*, at para. 95, **PBOA,** Tab 21.

[69] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, **PBOA,** Tab 18; *Cloud*, at para. 41.

[70] *Hollick*, at para. 25, **PBOA,** Tab 17; *LBP Holdings*, at para. 95, **PBOA,** Tab 21.

[71] *LBP Holdings*, at para. 95, **PBOA,** Tab 21.

b. The Plaintiffs' Pleading Discloses a Cause of Action in Negligence

79. The plaintiffs' claim asserts the requisite elements and supporting material facts to make out the cause of action of negligence against BDO.

80. The wrong alleged in this proceeding is that BDO negligently performed its audit services as the auditor of Crystal Wealth and its Funds.

81. To establish a cause of action in negligence, "a plaintiff must demonstrate that: (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach".[72]

i. The Elements of Negligence

1. Duty of Care

82. It is well-established that where an auditor (or other professional service provider) provides an opinion in circumstances where it can reasonably foresee that investors and prospective investors will rely on the contents <u>or</u> existence of the opinion in making investment decisions, there is a tenable claim that the auditor (or other professional service provider) owes a duty of care to investors.[73]

83. That jurisprudence is so well-established that Justice Perell did not even need to engage in a full-blown duty of care analysis to determine that there was a tenable claim that an auditor owed

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[72] *Deloitte & Touche v. Livent Inc. (Receiver of)*,2017 SCC 63, [2017] 2 S.C.R. 855, at para. 77, **PBOA,** Tab 11.

[73] See generally *Haig v. Bamford*, [1977] 1 S.C.R. 466, at paras. 1-3, 17, 19, 24, 34 (duty of care owed to limited class of investors), **PBOA**, Tab 16; *Bellan v. Curtis*, 2007 MBQB 221, 219 Man. R. (2d) 175, at paras. 57-76 (motion to strike proposed class action claim), **PBOA**, Tab 3; *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 15 C.P.R. (4th) 289 (*sub. nom. Mondar*), at paras. 30-37, 45-56, 71 (Ont. Sup. Ct.) (motion to strike out pleading for failure to disclose cause of action), **PBOA**, Tab 8.

investors a duty of care in a case that is analogous to this one. In *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*,[74] a proposed class of accredited investors brought a claim in negligence and negligent misrepresentation against an auditor that issued a clean audit report in respect of a company's financial statements. At the time, the class members were all prospective investors, who invested in the company after receiving a Private Placement Memorandum that included the company's financial statements and the clean audit opinion.

84. The investors pled that they suffered a complete loss on their investment, and that the auditor was negligent in delivering a clean audit opinion. The claim pleaded that a duty of care arose because (a) the private placement (through which the class members invested) would not have taken place without the clean audit opinion, and (b) the auditor knew that investors would rely on the audit opinion in making investment decisions.[75]

85. Justice Perell held that "the argument for a duty of care [is] strong enough to meet the very low threshold of s. 5(1)(a) of the *Class Proceedings Act, 1992*."[76]

86. That finding was based in large part on this Court's decision in a pair of solicitor negligence class actions: *Robinson v. Rochester Financial Ltd.*[77] and *Lipson v. Cassels Brock & Blackwell LLP*.[78] Both cases involved charitable tax schemes for which law firms had prepared opinions in support of the scheme. When the benefits of the proposed tax scheme did not

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74 *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, 31 B.L.R. (5th) 46, at paras. 60-95, aff'd on other grounds 2015 ONSC 1634, 386 D.L.R. (4th) 313 (Ont. Div. Ct.), rev'd 2016 ONCA 913, 135 O.R. (3d) 743, leave to appeal refused, [2017] S.C.C.A. No. 54, **PBOA**, Tab 13.

75 *Excalibur (ONSC)*, at paras. 61, 85, **PBOA**, Tab 13.

76 *Excalibur (ONSC)*, at para. 93, **PBOA**, Tab 13.

77 *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, leave to appeal refused, 2010 ONSC 1899 (Div. Ct.), **PBOA**, Tab 29.

78 *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724, 108 O.R. (3d) 681, rev'd on other grounds, 2013 ONCA 165, 114 O.R. (3d) 481, **PBOA**, Tab 22.

materialize, the investors brought class actions against the law firms alleging, among other things, negligence.

87. In *Robinson*, Justice Lax held that there was a tenable duty of care between the law firm and the investors, even though the investors may not have actually received or relied on the opinion itself. She held that there was tenable claim that the law firm owed investors a *prima facie* duty of care even though "the claim is not pleaded on the basis that the plaintiffs read or relied upon [the opinion letters], but on the basis that [the law firm] issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program."[79]

88. In *Lipson*, Justice Perell followed *Robinson*, noting it was an even stronger case because lawyers "wrote the opinion so that they might be relied on by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by [the] opinion".[80]

89. On similar facts, Justice Strathy (as he then was) refused the lawyers' summary judgment motion, holding that the question of duty of care raised genuine issues requiring a trial.[81]

90. Those decisions are consistent with the Supreme Court of Canada's more recent decision in *Deloitte & Touche v. Livent Inc.*,[82] which refined the *Anns/Cooper* analysis to determine the

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[79] *Robinson (ONSC)*, at paras. 21, 31, **PBOA**, Tab 29.

[80] *Lipson (ONSC)*, at paras. 78-81, **PBOA**, Tab 22.

[81] *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, at para. 540, leave to appeal refused, 2012 ONSC 6101, 112 O.R. (3d) 641 (Div. Ct.), **PBOA**, Tab 6.

[82] *Livent,* **PBOA**, Tab 11. In *Livent*, a theatre company went into receivership after its principals were fraudulently manipulating the company's financial records to attract investment. Deloitte & Touche, the auditor, never uncovered the fraud but identified irregularities in an asset sale. However, Deloitte continued assisting the company in soliciting investments by providing a comfort letter and helping to prepare and approve a press release that misrepresented the basis for the reporting of the fraudulent sale. It also prepared Livent's 1997 audit, finalized after discovering the reporting irregularities. Livent, through its receiver, sued Deloitte for damages in negligence and

existence and content of the duty of care that was owed by an auditor to the company that it was auditing.

91. The Court in *Livent* held that two factors are determinative in the proximity analysis in cases of pure economic loss arising from performance of a service: (1) the defendant's undertaking; and (2) the plaintiff's reliance.[83] Where the defendant undertakes to provide a service in circumstances that invite the plaintiff's reasonable reliance, the defendant is obliged to take reasonable care, and the plaintiff has a right to rely on the defendant's undertaking to do so.[84] The plaintiff's reliance must be within the scope of the defendant's undertaking, namely, the *purpose* for which the service was *undertaken*.[85]

92. The Supreme Court of Canada in *Livent* also held that, in claims for negligent performance of a service, the proximate relationship informs the foreseeability inquiry: a plaintiff's injury will be reasonably foreseeable where (1) the defendant should reasonably foresee that the plaintiff will rely on its services, and (2) reliance would, in the particular circumstances, be reasonable.[86]

93. In this case, the pleaded facts are sufficient to establish a tenable claim that BDO owed the class a duty of care. The plaintiffs have pled that BDO undertook to conduct its audits for two purposes:

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breach of contract. The Supreme Court concluded that Deloitte owed Livent a duty of care in relation to its 1997 statutory audit but not in relation to its representations concerning the solicitation of investment. The statutory audit was prepared for the purpose of scrutinizing management conduct and thus shareholders could reasonably rely on those documents to oversee management.

[83] *Livent*, at para. 30, **PBOA**, Tab 11; see also *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, 142 O.R. (3d) 401, at para. 35, leave to appeal to SCC refused, 38386 (May 2, 2019), **PBOA**, Tab 20.

[84] *Livent*, at para. 30, **PBOA**, Tab 11; *Lavender*, at para. 35, **PBOA**, Tab 20.

[85] *Livent*, at para. 31, **PBOA**, Tab 11; *Lavender*, at para. 36 (emphasis added), **PBOA**, Tab 20.

[86] *Livent*, at paras. 34-35, **PBOA**, Tab 11; *Lavender*, at paras. 24, 37, **PBOA**, Tab 20

(a) to ensure that Crystal Wealth complied with Ontario's securities laws such that it could continue to offer and redeem units in the Funds; and

(b) to allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investing decisions.[87]

94. In other words, BDO undertook to provide its audits for a dual purpose: (a) to assist the OSC in its investor protection mandate; and (b) to assist investors in monitoring their investments and making investment decisions. That the audits were commissioned by Crystal Wealth, not the class, does not negate the existence of a duty of care owed to unitholders.

95. This is consistent with the statutory regime pursuant to which the audits were required. Section 78 of the *Securities Act* required Crystal Wealth to file with the OSC audited financial statements, and section 79 of the *Securities Act* required those statements to be delivered to unitholders of the Fund.[88] Pursuant to section 28 of the *Securities Act*, failure to deliver audited financial statements to the OSC and unitholders could result in the suspension of Crystal Wealth's registrations with the OSC.[89]

96. There can be no real doubt that BDO was or should have been aware of these statutory requirements. Indeed, the Statement of Claim specifically pleads that:

(a) "BDO knew that the OSC would rely on its audits in making decisions about Crystal Wealth and its ability to offer securities to the public";[90] and

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87 Amended Statement of Claim, amended November 13, 2019, at para. 62, **AMR**, Vol. 1, Tab 2, p. 43**.**

88 *Securities Act*, ss. 78-79; *Investment Fund Continuous Disclosure*, OSC NI 81-106, Part 2, at s. 2.7(3); see Amended Statement of Claim, amended November 13, 2019, at para. 72, **AMR**, Vol. 1, Tab 2, p. 46.

89 *Securities Act,* s. 28.

90 Amended Statement of Claim, amended November 13, 2019, at para. 63, **AMR**, Vol. 1, Tab 2, p. 43.

(b) "BDO knew that investors were relying on its audits in purchasing units in the Funds and making decisions in respect of their investments. Indeed, BDO specifically addressed each of its audit reports to the "Unitholders" of the particular Fund that it was auditing. Accordingly, BDO intended that the Unitholders receive each audit report and rely on it in making investment decisions."[91]

(c) "BDO knew and intended for the Class to receive and rely on its audit reports. As part of its audits of the Funds, BDO had access to the individual names and number of units held by each investor of the Funds through the Funds Unit Holder Listing. BDO was aware of the exact amounts held by each investor and in which of the Funds each of the investors had invested."[92]

97. Based on these pleaded facts, there is a tenable claim of proximity giving rise to a duty of care. It is at least arguable that BDO undertook to provide its audit services (a) to allow Crystal Wealth to maintain its OSC registration and to continue to offer investments in the Funds, and (b) for investors to make investing decisions. It is also at least arguable that class members had a right to rely on BDO in respect of those services.[93]

98. Similarly, there is a tenable claim that there is sufficient foreseeability to establish a duty of care. In fact, the Statement of Claim specifically pleads that BDO knew that class members would rely on its audits, both in respect of ongoing registration with the OSC and their investment decisions, and that BDO specifically invited them to do so by addressing its audit opinions directly to the "unitholders". In the circumstances pleaded, it is at least arguable that it was reasonably

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[91] Amended Statement of Claim, amended November 13, 2019, at paras. 64, 82, **AMR**, Vol. 1, Tab 2, pp. 43, 52.

[92] Amended Statement of Claim, amended November 13, 2019, at para. 67, **AMR**, Vol. 1, Tab 2, p. 44.

[93] Amended Statement of Claim, amended November 13, 2019, at paras. 63-66, 82, **AMR**, Vol. 1, Tab 2, pp. 43-44, 52.

foreseeable to BDO that if it performed its audit services negligently, class members would suffer losses, both because it would frustrate the OSC's investor protection mandate, and because it would frustrate unitholders' ability to properly make investment decisions.[94]

2. Breach of the Standard of Care

99. There is a tenable claim that BDO breached the applicable standard of care. The Statement of Claim specifically pleads that BDO was required to, among other things, (a) audit the financial statements of each Fund in accordance with generally accepted auditing standards, and (b) ensure that the financial statements were free from material misstatements and presented in accordance with applicable accounting standards.[95]

100. The Statement of Claim alleges that BDO breached its duty by, among other things, (a) failing to conduct its audits in accordance with GAAS, and (b) failing to obtain reasonable assurance that the financial statements were free from material misstatement.[96]

3. The Plaintiffs Sustained Damage

101. The representative plaintiffs and proposed class members lost investments as a result of BDO's breach of its duty. BDO's negligently performed audits of the BDO-Audited Funds led it to reach erroneous conclusions about Crystal Wealth's financial position and performance. These audit reports were addressed to the plaintiffs as unitholders of the Funds, and permitted Crystal Wealth to continue offering its Funds. There were improprieties relating to the investments

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[94] Amended Statement of Claim, amended November 13, 2019, at paras. 67-68, 80, 82, **AMR**, Vol. 1, Tab 2, pp. 44-45, 51-52.

[95] Amended Statement of Claim, amended November 13, 2019, at paras. 69-72, 82, **AMR**, Vol. 1, Tab 2, pp. 45-46, 52.

[96] Amended Statement of Claim, amended November 13, 2019, at paras. 73-79, 82, **AMR**, Vol. 1, Tab 2, pp. 47-52.

recorded in the financial statements that BDO failed to detect, resulting in the class members' substantial loss of their investments.[97]

4. The Damage was Caused, in Fact and Law, by the Breach

102. The Supreme Court of Canada in *Livent* held that causation will exist where loss is a reasonably foreseeable consequence of an auditor's breach. In that case, the majority accepted the trial judge's finding that causation was established when clean audit opinions "deprived the honest directors and shareholders of the opportunity to put a stop to the fraud … at an earlier date."[98]

103. The Statement of Claim pleads similar causation. The Claim pleads that if BDO had conducted appropriate audits, "BDO and/or the OSC would have discovered the Media Fund scheme … and the misappropriation of investor funds sooner than they did. If these improprieties had been discovered earlier, losses to investors would have been reduced or avoided."[99]

104. Had BDO properly prepared the audit reports, in accordance with its undertaking, the mismanagement and fraud of the Funds would have likely been discovered, and class members would not have invested in the Funds and would have ceased to do business with Crystal Wealth. It would have prevented Crystal Wealth's continued operation and further solicitation of additional investments. Thus, the losses would not have occurred, or would have been limited.[100]

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[97] Amended Statement of Claim, amended November 13, 2019, at paras. 80, 82, 84, **AMR**, Vol. 1, Tab 2, pp. 51-53.
[98] *Livent*, at paras. 77-84, **PBOA,** Tab 12.
[99] Amended Statement of Claim, amended November 13, 2019, at paras. 85-88, **AMR**, Vol. 1, Tab 2, pp. 53-54.
[100] Amended Statement of Claim, amended November 13, 2019, at paras. 80-81, 85-88, **AMR**, Vol. 1, Tab 2, pp. 51-54.

C. The Identifiable Class Criterion: Section 5(1)(b)

a. General Principles

105. This criterion requires there to be an identifiable class of two or more persons, who share an interest in the resolution of the common issues.[101] The plaintiffs' burden in this regard is not onerous.[102] The representative plaintiffs need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issues.[103]

106. It is not necessary that the every class member be named or known at the time of certification. All that is necessary is that any particular person's claim to membership in the class be determinable by stated, objective criteria.[104] As the Supreme Court of Canada has remarked, the class definition is not usually in dispute in securities fraud actions.[105]

b. There is an Identifiable Class

107. The proposed class definition satisfies all dimensions of s. 5(1)(b). The definition is:

> [E]very person who:
>
> (i) invested in any of the Funds, as that term is defined herein, of Crystal Wealth Management System Ltd. ("Crystal Wealth") at any time from April 12, 2007 to April 7, 2017 (the "Class Period") and who retained investments in any of the Funds on April 7, 2017, including, without limitation, those persons or entities who filed claims in receivership of Crystal Wealth, but excluding the Excluded Persons;

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[101] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, at paras. 9-10, **PBOA**, Tab 2; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57, **PBOA**, Tab 33; *Dutton*, at para. 38, **PBOA**, Tab 37; *Hollick*, at para. 17, **PBOA**, Tab 17.

[102] *Hollick*, at paras. 20-21, **PBOA,** Tab 17; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148, at para. 28, **PBOA**, Tab 14.

[103] *Hollick*, at para. 21, **PBOA**, Tab 17; *Cloud*, at para. 46, **PBOA**, Tab 9; *Frohlinger*, at paras. 19, 23, 27, **PBOA**, Tab 14.

[104] *Dutton*, at para. 38, **PBOA**, Tab 35; *Hollick*, at para. 17, **PBOA**, Tab 17; *Cloud*, at para. 45, **PBOA**, Tab 9.

[105] *Hollick*, at para. 20, **PBOA**, Tab 17.

> (ii) for purposes hereof, "Excluded Persons" means: (1) any client of Crystal Wealth who did not invest in any of the Funds, as defined herein, during the Class period; (2) the Defendant, BDO Canada LLP …[106]

108. This is virtually on all fours with the class definition that was certified by the Court of Appeal for Ontario in *Excalibur*.[107]

109. The proposed class definition clearly and objectively defines those individuals and entities that have a potential claim for relief and notice against BDO. Membership in the class is defined by the objective requirements that an individual or entity: (a) was an investor during a definite and ascertainable period of time (April 12, 2007 to April 7, 2017); (b) was invested in certain ascertainable Funds; and (c) retained investments in any of those Funds on a specified date (April 7, 2017). As BDO explained to the Receiver, there is a repository of unitholder data, which includes names, addresses and holdings in the Funds, that was audited annually by a third party.[108] Accordingly, the class members can be objectively identified using the Crystal Wealth's own records.

110. The rational relationship between all of the class members and the common issues is apparent. [109] *All* of the investors captured by the proposed class definition share the same interest in resolution of the proposed common issues (addressed below).[110]

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106 "Excluded Persons" are particularized in the Amended Statement of Claim, amended November 13, 2019, at para. 1(a)(ii)(1)-(14), **AMR**, **Vol. 1,** Tab 2.

107 See *Excalibur (ONSC)*, at para. 58, **PBOA**, Tab 13, and *Excalibur (ONCA)*, at para. 67, **PBOA,** Tab 13.

108 Receiver's First Report, at paras. 171-174, Exhibit "C" to the Affidavit of Marlie Patterson-Earle, **AMR**, Vol. 11, Tab 4C, pp. 3439-3440.

109 See generally *Frohlinger*, at para. 24, **PBOA**, Tab 14.

110 See generally *Cloud*, at paras. 45- 47, **PBOA**, Tab 9.

D. The Common Issues Criterion: Section 5(1)(c)

a. General Principles

111. Commonality is the central notion of a class proceeding.[111] The common issues criterion focuses on whether certifying the action as a class proceeding will avoid duplication of fact-finding or legal analysis, thereby facilitating judicial economy and access to justice.[112] For an issue to be "common" in the requisite sense, the question must be a substantial ingredient of each class member's claim, and its resolution must be necessary to the resolution of each class member's claim.[113]

112. There is a low bar to meet the common issues criterion.[114] While a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual class member, an issue can be common even if it makes up a small aspect of the liability question and even where many individual issues remain to be decided after its resolution.[115] Importantly, common issues need not dispose of the litigation – they solely need to advance it. [116]

113. The Supreme Court of Canada has recently reaffirmed the principles of "common issues" for the purpose of certification, including, but not limited to the following:

(a) It is not essential that the class members be identically situated *vis-à-vis* the opposing party;

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[111] *Pro-Sys*, at para. 106, **PBOA**, Tab 26.

[112] *Dutton*, at para. 39, **PBOA**, Tab 35; *Hollick*, at para. 18, **PBOA**, Tab 17; see also *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29, **PBOA**, Tab 30.

[113] See *CPA*, s. 1; *Dutton*, at para. 39, **PBOA**, Tab 35; *Hollick*, at para. 18, **PBOA**, Tab 17.

[114] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, at paras. 41-42 (C.A.), **PBOA**, Tab 7; *Cloud*, at paras. 53-53, **PBOA**, Tab 9; *Silver v. IMAX Corp.*, [2009] O.J. No. 5585, at paras. 166-170, leave to appeal refused, 2011 ONSC 1035, **PBOA**, Tab 31.

[115] *Cloud*, at paras. 52-53, **PBOA**, Tab 9.

[116] *Pioneer Corp. v. Godfrey*, 2019 SCC 42, 26 B.C.L.R. (6th) 1, at para. 109, **PBOA**, Tab 25; *Cloud*, at para. 52, **PBOA**, Tab 9; *Carom v. Bre-X (ONCA)*, at paras. 41-42, **PBOA**, Tab 7.

(b) It is not necessary that common issues predominate over non-common issues. However, as already noted, the class members' claims must share a substantial common ingredient to justify a class proceeding. The court will examine the significance of the common issues in relation to individual issues; and

(c) Success for one member of the class does not necessarily have to lead to success for all, so long as success for one member does *not* mean failure for another. A question is "common … if it can serve to advance the resolution of every class member's claim, even if the answer to the question, while positive, will vary among those members." It is enough that the answer to the question does not give rise to conflicting interests among the Class members.[117]

114. The court should not weigh the merits of the questions, but should only determine whether there is "some basis in fact" that the issues are common.[118]

b. The Claim Raises Common Issues

115. The proposed common issues in the present case do not require fact finding on an individual basis. There will be few issues remaining, such as individual damages assessments, once the common questions are resolved at a common issues trial.[119] Moreover, the proposed common issues, including whether a duty of care is owed to the class and whether a standard of care has been breached, have been routinely certified as common issues, including in analogous circumstances.[120] The class members in this case are in relatively identical positions *vis-à-vis* BDO. They were all unitholders in particular Funds that were audited by BDO. Resolving the common issues will avoid duplication of fact-finding and legal analysis.

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[117] *Pioneer Corp.*, at paras. 104-105, **PBOA**, Tab 25, citing to *Pro-Sys*, at para. 108, **PBOA**, Tab 26; *Dutton*, at paras. 39-40, **PBOA**, Tab 35; *Vivendi Canada Inc.*, at paras. 45-46, **PBOA,** Tab 34.

[118] *Pro-Sys*, at paras. 99-105, **PBOA**, Tab 25.

[119] Section 6 of the *CPA* provides that it is not a bar to certification where "[t]he relief claimed includes a claim for damages that would require individual assessment after the determination of the common issues."

[120] See *Excalibur (Div. Ct.)*, at paras. 110-120, 130-135 (per Sachs J., dissenting), **PBOA**, Tab 13, and *Excalibur (ONCA)*, at paras. 63-67 (affirming Sachs J.'s dissent), **PBOA**, Tab 13; see generally *Collette v. Great Pacific Management Co.*, 2004 BCCA 110, 42 B.L.R. (4th) 252, at paras. 38-39, **PBOA**, Tab 10; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25, at paras. 212-220, leave to appeal allowed, 2012 ONSC 773 (although leave to appeal was granted, an appeal on the merits not pursued), **PBOA**, Tab 12; *Cloud*, at paras. 58-60, **PBOA**, Tab 9; *Rumley*, at paras. 31-32, **PBOA**, Tab 30.

116. The Plaintiffs seek to certify the following common issues:

(i) Were the audit opinions delivered by BDO with respect to the financial reporting of Crystal Wealth and all attestations delivered by BDO with respect to Crystal Wealth's financial statements given for the purpose of:

(1) allowing Crystal Wealth to continue to operate as an Exempt Market Dealer, Investment Fund Manager, Portfolio Manager and Commodity Trading Manager registered in Ontario pursuant to the *Securities Act*, R.S.O. 1990, c. S.5, and its Regulations; and

(2) with the expectation and knowledge on the part of BDO that the Ontario Securities Commission would rely on BDO's opinion and its representations as the basis for OSC registration renewals and to permit continued, additional or new investments by members of the Class?

(ii) Did BDO owe a duty of care to the Class with respect to the audit of the Funds?

(iii) If so, did BDO breach this duty of care by failing to meet the applicable standard of care required of an auditor performing professional services?

(iv) If so, did BDO's breach of the duty of care cause damages to the Class?

(v) Can damages be determined on an aggregate basis? If so, what are the aggregate damages?

(vi) Should BDO pay punitive damages? If so, in what amount?[121]

117. The proposed common issues are all substantial ingredients of the class members' claims. The determination of each issue obviates the need for each class member to prove these elements individually.[122]

118. <u>Common issue #1 (purpose of the audit opinions):</u> the Court will have to determine the purpose of BDO's audits in order to resolve the claim of *each* class member. This issue is a

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[121] Fresh as Amended Notice of Motion, **AMR**, Vol. 1, Tab 1, at pp. 3-4.

[122] See *Hollick*, at paras. 18-19, **PBOA**, Tab 17.

substantial ingredient to each class member's claim. The court will need to consider the purpose of BDO's undertaking in preparing the audit reports to delineate the scope of BDO's duty.[123] That issue will not vary based on a class member's individual circumstances or experience.

119. Common issue #2 (duty): In class actions asserting negligence, it is common to certify the issue of whether a duty of care is owed. Here, each class member would need to determine whether BDO owed it a duty of care in performing its audit services. In a case involving negligence *simpliciter*, the duty inquiry does not require the court to consider the individual circumstances of each class member. Instead, a finding of a duty owed to the class is dispositive of the issue.[124]

120. Common issue #3 (breach): Questions of breach of the duty and whether a defendant's conduct fell below the standard of care have been certified as common issues.[125] The majority of the Court of Appeal in *Excalibur* certified as common issues questions of what the applicable standard of care was, and whether the defendant breached its duty of care to class members by issuing an unqualified, clean audit opinion.[126] The same reasoning should be applied to the plaintiffs' claim in the present case.

121. The issue of breach will turn almost entirely on the applicable standard of care for auditors, and BDO's conduct. Mr. Myers has provided evidence that the applicable standards are informed by the Canadian Audit Standards.[127] Resolution of this issue is a substantial ingredient of each class member's claim, and it does not require individual determinations.

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[123] *Livent*, at paras. 34-36, **PBOA**, Tab 11; *Lavender*, at paras. 32, 36, **PBOA**, Tab 20.
[124] See *Lipson (ONCA)*, at paras. 47, 92-100, 102-105, **PBOA**, Tab 22.
[125] See *Robinson*, at paras. 40, 54, **PBOA**, Tab 28.
[126] *Excalibur (Div. Ct.)*, at paras. 109, 115-120 (per Sachs J., dissenting), **PBOA**, Tab 13; *Excalibur (ONCA)*, at para. 67 (affirming Sachs J.'s dissent), **PBOA**, Tab 13;
[127] Report of Barry Myers, at p. 5, Exhibit "B" to the Affidavit of B. Myers, **AMR**, Vol. 20, Tab 5, p. 6591.

122. Common issue #4 (breach caused damages): In this case, it is a significant portion of each class member's claim that BDO's negligence caused damages. BDO's clean audit reports were necessary in order for Crystal Wealth to maintain its registration with the OSC and to maintain and continue to solicit investments in the Funds. The clean audit opinions were also relied on by investors in making investment decisions. Each class member has a common interest in resolving the question of whether BDO's delivery of clean audit opinions caused the investors' losses by permitting the Funds to continue to operate (and, as a consequence, allowing the fraud to persist and frustrating unitholders' ability to make informed investment decisions). This will not turn on any individual assessments. Indeed, as a factual matter, the fraud was discovered and stopped in the spring of 2017 after BDO refused to provide clean audit opinions.

123. Common issue #5 (aggregate damages): The aggregate damages issue is often certified as a common issue when the common issues will determine liability.[128] In this case, the other proposed common issues will determine liability, such that only an assessment of damages will be required if the other common issues are resolved in favour of the class. The plaintiffs have filed expert evidence from Domenic Marino that there is methodology available to quantify and award damages on a class-wide basis.[129] Notably, BDO elected not to adduce any contradictory expert evidence or to cross-examine Mr. Marino.

124. Common issue #6 (punitive damages): Punitive damages may be certified as a common issue when liability will be determined following the common issues trial. For punitive damages to be certified as a common issue, the trial judge must be in a position to assess the following

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[128] *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 48, leave to appeal refused, [2007] 3 S.C.R. xii (note), **PBOA**, Tab 23; see also *CPA*, s. 24.

[129] Affidavit of Domenic Marino, sworn September 20, 2019, **AMR, Vol. 20, Tab 7, at pp. 6625-6629**; see also *Pro-Sys*, at para. 140, **PBOA,** Tab 26.

considerations: (a) the degree of misconduct; (b) amount of harm caused; (c) availability of other remedies; (d) quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives of retribution, deterrence, and denunciation.[130] The nature of this action – which raises common issues that are dispositive of liability in negligence – means that the trial judge will be furnished with adequate information to decide whether to award punitive damages, and if so, the amount.

E. The Preferable Procedure Criterion: Section 5(1)(d)

a. General Principles

125. This criterion requires the plaintiffs to establish that a class proceeding would be the preferable procedure for the resolution of the common issues.[131]

126. The preferability analysis focuses on whether there is some basis in fact that: (1) the class proceeding is a fair, efficient, and manageable method of advancing the claim; and (2) whether a class proceeding would be preferable to other alternative methods of resolving class members' claims.[132] The same low evidentiary burden applies at this stage.[133]

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130 *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, at paras. 167-191, aff'd 2010 ONSC 3777 (Div. Ct.), at paras. 34-40, **PBOA,** Tab 28.

131 *Hollick*, at paras. 29-30, **PBOA,** Tab 17; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 21, **PBOA,** Tab 1.

132 *Hollick*, at para. 28, **PBOA,** Tab 17. Relevant to the preferable procedure analysis are the five factors listed in s. 6 of the *CPA*.

133 *Fischer*, at paras. 39-41, **PBOA,** Tab 1.

b. The proposed class proceeding is a fair, efficient, and manageable method of advancing class members' claims

127. A class proceeding will fairly, efficiently, and manageably advance the claim.[134] As discussed above, there is some basis in fact that a common issues trial will resolve liability in this case, with individual damages assessments being the only individual issue potentially outstanding. Here, a class proceeding would serve the goal of judicial economy by avoiding a multitude of proceedings that would require duplicative fact-finding and legal analysis, with the risk of inconsistent outcomes.[135]

128. When one considers the importance of the common issues in relation to the negligence claim as a whole, it becomes clear why a class action is the preferable procedure. The resolution of the common issues related to the constituent elements of negligence leaves nothing further (aside from individual damages) to be resolved. In this way, a class proceeding would significantly advance the litigation for each class member. There is no evidence to suggest that the class action would be unmanageable, inefficient, or unfair. Rather, the Litigation Plan illustrates how a class proceeding offers an efficient way to advance litigation while furthering the goals of the *CPA* and serving the ends of proportionality.[136]

c. The proposed class proceeding is preferable to alternative methods of resolving class members' claims

129. The preferability analysis must be conducted through the lens of the three primary goals of the *CPA*: access to justice, behaviour modification, and judicial economy.[137] The exercise under

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[134] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603, at paras. 60-62, **PBOA,** Tab 2.

[135] See *Markson*, at para. 74, **PBOA,** Tab 23; *Cloud*, at para. 86, **PBOA,** Tab 9.

[136] Litigation Plan, Schedule "A" to the Fresh as Amended Notice of Motion, **AMR**, Vol. 1, Tab 1A, pp. 14-24; *Green v. The Hospital for Sick Children*, 2017 ONSC 6545, at para. 141, aff'd 2018 ONSC 7058 (Div. Ct.), **PBOA,** Tab 16; *Fischer*, at para. 25, **PBOA,** Tab 1.

[137] *Hollick*, at para. 27, **PBOA,** Tab 17; *Cloud*, at para. 73, **PBOA,** Tab 9; *Fischer*, at para. 22, **PBOA,** Tab 1; *Amyotrophic Lateral Sclerosis Society of Essex* County, at para. 61, **PBOA,** Tab 2.

this criterion is a comparative one. The ultimate question is whether the representative plaintiff can establish that there is some basis in fact that a class action is preferable to other available means of resolving the claim.[138]

130. It appears that BDO acknowledges that the proposed class action will promote access to justice, encourage behaviour modification, and support judicial economy.

131. Nonetheless, BDO takes the position that the receivership over Crystal Wealth is the preferable procedure. There is, however, some basis in fact that the class action is preferable on all grounds.

132. The Supreme Court of Canada rejected an argument similar to BDO's in *AIC Limited v. Fischer*. In that case, the Court considered whether (completed) OSC proceedings that awarded compensation to investors were preferable to the proposed class action. The motion judge accepted that it was, but the Supreme Court of Canada disagreed. It held that the class proceeding better advanced the goal of access to justice because: (a) compensation was not the primary goal of the OSC proceedings; (b) the OSC proceedings denied investors meaningful participation in the process; and (c) there was some basis in fact that investors were not fully compensated by the OSC proceedings.[139]

133. Much of the same is true of the receivership in this case. Indeed, in addition to access to justice concerns, there are other goals of the *CPA* that will be met more effectively by the class proceeding than by the receivership, as discussed below.

i. The Class Action is preferable in terms of access to justice

[138] *Fischer*, at para. 23, **PBOA,** Tab 1.
[139] *Fischer*, at paras. 52-59, **PBOA,** Tab 1.

134. Access to justice includes both procedural and substantive justice.[140] In *Fischer*, the Supreme Court of Canada held that a class action will serve the goal of access to justice if: "(1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered."[141]

135. Class members face economic barriers to access to justice. While certain Funds suffered substantial impairment to their assets, others suffered less significant impairment with the result that unitholders in those Funds suffered losses that are not significant enough to justify any proceeding other than a class proceeding.[142] For those unitholders who suffered less significant impairment to their investments, the cost of pursuing a claim individually "would dwarf the[ir] potential recovery."[143]

136. In addition, the Receiver noted that certain unitholders had invested the better part of their life savings in the Funds, in which case it is unlikely that they are in a position to pursue traditional litigation.[144] For example, Mrs. Couch testified during her cross-examination that she was not in a position to pursue a claim in respect of her investment advisor (who advised her to invest in Crystal Wealth) because she does not have the funds to do so.[145]

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[140] *Fischer*, at para. 24, **PBOA,** Tab 1.

[141] In *Fischer*, at paras. 27-38, the Supreme Court outlines a series of five questions that the court should consider to answer the question of whether the goal of access to justice will be served by a class action.

[142] See Schedule "C" of this Factum.

[143] *Excalibur (ONCA),* at para. 57, **PBOA,** Tab 13.

[144] Receiver's Fourth Report, at para. 6, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 325**.**

[145] Carrie Couch Transcript, at p. 45, ll. 14 to 23, Exhibit "H" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1H, p. 187.

137. While the receivership provides a means of some form of recovery for unitholders at no out-of-pocket costs to them, there is some basis in fact to suggest that certain procedural and substantive aspects of access to justice are better addressed by the class action.

138. First, the class action allows unitholders to benefit from greater distributions from the receivership. The proposed representative plaintiffs benefit from funding from the Class Proceeding Fund.[146] The benefits of this are twofold.

139. The Class Proceedings Fund provides financial support for the plaintiffs in the class action.[147] If the claims against BDO were advanced solely in the Receiver's Action, the Receiver would be responsible for all disbursements in that claim. In other words, the Receiver would have to hold back amounts that it could otherwise distribute in order to cover 100 percent of the costs of disbursements that it might incur in the Receiver's Action. By allowing the class action to proceed with the Receiver's Action, it will allow the disbursements to be shared by the estate of Crystal Wealth and the Class Proceedings Fund, freeing up more immediate cash for distribution to investors from the Receivership.

140. In addition, the Class Proceedings Fund indemnifies the representative plaintiffs from an adverse costs award, again defraying the potential costs for the Receiver and permitting greater distributions to investors (in the event that the class action and Receiver's Action are permitted to proceed together).[148] The value of that indemnity is substantial. Indeed, BDO has indicated that its

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[146] Anthony Whitehouse Transcript, at p. 72, ll. 16-25 – p. 73, ll. 1-6, Exhibit "J" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab J, pp. 327-328; Carrie Couch Transcript, at p. 48, ll. 15-18, Exhibit "H" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab H, p. 187.

[147] *Law Society Act*, R.S.O. 1990, c. L.8, s. 59.1(2)1.

[148] *Law Society Act*, s. 59.1(2)1.

estimated fees to defend the class action are $5 million.[149] Its costs to defend the Receiver's Action will likely be the same or similar. Without the support of the Class Proceedings Fund, the Receiver could be on the hook for the entirety of that bill, further limiting the ability to make distributions (that are already relatively small) to unitholders.

141. Indeed, the Receiver recommended to the Court that Class Counsel be engaged as counsel in the Receiver's Action because (among other things) it would "minimize the current legal costs to the estate of the Company and Crystal Wealth Funds … as a result of having access to the Class Proceeding Fund in the Proposed Class Action with respect to certain costs and disbursements which may be duplicative in both proceedings."[150] The Court ultimately approved the appointment of Class Counsel as counsel in the Receiver's Action.

142. Second, there are procedural access to justice issues that will be promoted best by the class action. The Supreme Court's decision in *Fischer* is illustrative. In that case, the Court held that a lack of direct investor participation in the OSC proceedings resulted in procedural access to justice issues.[151] The Court held 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."[152]

143. The same is true in this case. The Receiver is pursuing the receivership (and the Receiver's Action) in the name of Crystal Wealth and the Funds. While unitholders may *benefit* from distributions from the receivership and the Receiver's Action, they have no right to participate

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[149] Receiver's Second Report, at para. 412(c), **Exhibit "E" to the Affidavit of M. Patterson-Earle, AMR**, Vol. 13, Tab 4E, p. 4128**.**

[150] Receiver's Fourth Report, at para. 331, **Exhibit "I" to the Affidavit of Nigel Meakin, Responding Motion Record of BDO Canada LLP**, Vol. 2, Tab 1I, p. 434**.**

[151] See generally *Fischer*, at paras. 25, 29-31, 55, **PBOA,** Tab 1.

[152] *Fischer* at para. 55, **PBOA,** Tab 1.

directly or meaningfully in the monetization efforts of the Receiver, including in connection with the Receiver's Action against BDO.

144. The ability of the investors to participate directly in their own recoveries is not merely a symbolic gesture. It is important that aggrieved parties are permitted to directly seek justice. The appointment of a representative plaintiff who has sufficient commonality with the class, and who conducts the litigation on behalf of the class, is an important consideration.[153]

145. These procedural access to justice issues militate strongly in favour of any argument that the Receiver's Action must be the *only* proceeding.

146. Third, the receivership may deny class members substantive access to justice. In particular, there is some basis in fact to suggest that greater recovery may be achieved through the class proceeding.[154]

147. While the Receiver has monetized certain assets and made distributions to certain class members, it has cautioned that "there are challenged circumstances surrounding the large majority of the remaining assets in the Crystal Wealth Funds" and that "the cost of pursuing recoveries on the remaining assets may be disproportionately high compared to ultimate recovery."[155] Accordingly, there is some basis in fact to believe that Receiver's monetization efforts will not maximize recovery for the investors.

148. This is true even taking into account the Receiver's Action against BDO. In addition to the procedural access to justice issues discussed above, there is some basis in fact to believe that the

[153] *Fischer*, at para. 55, **PBOA,** Tab 1.
[154] See *Fischer*, at paras. 39-41, 47, 60-62.
[155] Receiver's Fourth Report, at paras. 4-5, Exhibit "I" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO Canada LLP,** Vol. 2, Tab 1I, pp. 324-325**.**

Receiver's Action may result in less recovery against BDO than the class action. For example, BDO has asserted the defence of contributory negligence in the Receiver's Action.[156] If that defence is successful, it would have the effect of limiting recovery. Similarly, as it is stepping into the shoes of Crystal Wealth, the Receiver's claim may be limited by the engagement letters between Crystal Wealth and BDO, which contain limitations of liability.[157]

149. Indeed, BDO's preference for the Receiver's Action suggests that it believes that its exposure (and the opportunity for unitholder recovery) is more limited in that proceeding than in the proposed class action.

150. It cannot be that on a certification motion, BDO can point to two proceedings against it, brought by different parties, and pick the one that benefits it to the greatest extent.

151. Overall, by providing unitholders with a direct means to participate in the claim against BDO, the class action would provide "a procedural means to a substantive end", with a meaningful avenue to achieve a just result unimpeded by elements beyond the investors' control.[158]

ii. The Class Action is preferable in terms of behaviour modification

152. A class proceeding will have a greater deterrent effect than the Receiver's Action. The Court of Appeal has recognized that class actions have a greater effect than individual actions "in supplementing and enhancing regulatory oversight of companies seeking to raise capital".[159]

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[156] BDO Statement of Defence (Receiver's Action), at paras. 13, 34, Exhibit "G" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1G, pp. 164, 171.

[157] BDO Engagement Letter, dated December 21, 2016, p. 7, Exhibit "A" to the Affidavit of Erin Tucker, **Reply Motion Record of the Plaintiff**, Tab 1A, pp. 1-12; BDO's Statement of Defence (Receiver's Action), at para. 11, Exhibit "G" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada LLP**, Tab 1G, p. 163.

[158] *Fischer*, at para. 34, **PBOA,** Tab 1.

[159] *Excalibur (ONCA)*, at para. 62, **PBOA,** Tab 13.

153. While the Receiver's Action may advance the goal of behaviour modification to some extent, it is effectively an individual action brought by a company against its auditor. A finding of liability in an *investor* class action against an auditor would have a much more profound effect in holding auditors to account for the services they perform, and would reinforce for auditors that in such circumstances, its considerations may be broader than the interests of the company that engaged them.

iii. Judicial economy militates in favour of certification

154. If the class action is certified, it is anticipated that the class action and the Receiver's Action will proceed together. That is the best way to maximize the chances of recovery in favour of unitholders, as both proceedings come with distinct advantages and risks. For instance, although the class members' direct claims are not subject to a defence of contributory negligence, it is anticipated that BDO will vigorously contest that it owes a duty to class members.

155. Allowing both proceedings to proceed together will result in the most judicial economy. Class counsel has been retained by the Receiver in the Receiver's Action. The class action and Receiver's Action arise from the same facts. The defendant in both actions is identical. The documents and witnesses in both proceedings are likely to be substantially similar, if not identical, and the resolution of both proceedings will require similar factual findings (although the legal issues addressed in both proceedings will differ to some extent). There would be significant judicial economy in certifying the class action and permitting it to proceed with the Receiver's Action.

156. Indeed, if certification of the class action is denied, there is nothing to prevent those individual investors that have the means and incentive to do so from pursuing the same claims in

individual actions. Such a result would frustrate judicial economy, as similar cases would be tried separately, increasing not just the cost and use of judicial resources, but also the risk of inconsistent findings of fact.

d. Nigel Meakin's Affidavit is Inadmissible Because it Fails to Meet the Necessity Requirement

157. BDO has tendered an inadmissible expert affidavit in support of its position that the receivership is the preferable procedure. Expert opinion evidence is admissible when it meets the four preconditions of admissibility: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) a properly qualified expert.[160]

158. The necessity requirement is satisfied where the opinion evidence is necessary to provide information outside of the experience and knowledge of the trier of fact. [161] Inherent in assessing necessity is the concept that experts should not be permitted to "usurp the functions" of the trier of fact.[162]

159. Mr. Meakin's evidence is not necessary, and it should not be admitted. Mr. Meakin gives evidence on the workings of receiverships in Ontario and on related court orders.[163] That evidence is not necessary in order for the motion judge to understand the role, duties, and powers of court-appointed receivers; receiverships generally; and to assess whether Grant Thornton (the Receiver) can adequately represent and advance interests of the proposed Class members. Indeed, matters related to *court*-appointed receivers – appointed pursuant to *legislation*, who are *officers of*

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[160] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 23-24, **PBOA,** Tab 37; *R. v. Mohan* (1994), 18 O.R. (3d) 160 (note), at paras. 17-21, **PBOA,** Tab 27.

[161] *Mohan*, at para. 26, **P28,** Tab 27.

[162] *Mohan*, at para. 28, **PBOA,** Tab 27.

[163] Affidavit of Nigel Meakin, at paras. 17-39, **Responding Motion Record of BDO Canada LLP,** Tab 1I, pp. 17-25. For Mr. Meakin's comments in relation to Grant Thornton specifically, see paras. 40-72, pp. 17-30.

the Court, and whose powers, procedures, and duties flow by virtue of their *appointment* – are squarely within the knowledge of the judge.[164]

160. In assessing the receivership, including the Receiver's Action, as an alternative procedure, the motion judge is well-placed and equipped with the expertise to conduct the comparative analysis called for under s. 5(1)(d) of the *CPA*. Mr. Meakin's opinion does not provide specialized knowledge or skill that the motion judge does not already have to make appropriate determinations, and his opinion evidence should not be admitted.[165]

161. Put another way, this Court cannot receive expert evidence to inform it as to how another proceeding, commenced in a neighbouring courthouse, will proceed. In the alternative, if the evidence is admitted, it should be given little to no weight.

F. The Representative Plaintiff Criterion: Section 5(1)(e)

a. General Principles

162. The final criterion for certification requires there to be a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and does not have an interest in conflict with other class members on the common issues.[166] Courts should not expect too much or be too demanding in assessing

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[164] *Mohan*, at paras. 25-26, **PBOA**, Tab 27.

[165] *White Burgess*, at para. 15, **PBOA,** Tab 36.

[166] *Dutton*, at para. 41, **PBOA,** Tab 35.

whether individuals can serve as a suitable representative plaintiff, given that the plaintiff will have the advice of competent counsel.[167]

b. The Fair and Adequate Representative Plaintiff Requirement is Met

163. Anthony Whitehouse, Carrie Couch, and Jason Couch meet the three-part test. The proposed representative plaintiffs have retained competent counsel to prosecute this class action, and the action is being funded by the Class Proceedings Fund, eliminating concerns with respect to whether the proposed plaintiffs can bear the costs of the litigation.[168] Their affidavits and evidence on cross-examination demonstrate that that they have "general knowledge about the nature of the class proceedings" and their "responsibilities on behalf of the class", and have no ulterior purpose.[169] There is nothing to suggest that the representative plaintiffs will not vigorously and capably prosecute the interests of the class.[170]

164. Although Mr. Whitehouse is a plaintiff in an individual claim against parties that helped to administer the Media Loans in which he is claiming damages for his investment losses with Crystal Wealth, that should not disqualify him from acting as a representative plaintiff.

165. A conflict of interest will only disqualify a representative plaintiff where "the differences between the situation of the representative plaintiff and the class members … impact on the outcome of common issues and the differences must affect the representative plaintiff's ability to

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[167] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, at para. 42, **PBOA**, Tab 32.

[168] *Dutton,* at para. 41, **PBOA,** Tab 36; *Sondhi*,at paras. 40, 46, **PBOA,** Tab 33. See, for example: Carrie Couch Cross-Examination Transcript, at p. 45, Exhibit "H" to the Affidavit of Melissa Marie Feriozzo, **Supplementary Motion Record of BDO Canada** LLP, Tab 1H, p. 187.

[169] *Sondhi*, at para. 44, **PBOA,** Tab 32; Affidavit of Anthony Whitehouse, at paras. 21-38, **AMR, Vol. 1, Tab 3**, pp. 57-66; Affidavit of Carrie Couch, at paras. 5-10, 12-14, **AMR**, Vol. 20, Tab 9, pp. 6653-6657**;** Affidavit of Jason Couch, **AMR**, Vol. 20, Tab 10, pp. 6674-6675.

[170] *Dutton*, at para. 41, **PBOA,** Tab 35.

adequately and fairly represent the class."[171] Mr. Whitehouse's individual claim does not in any way put him in a different position from other class members in relation to the common issues.

166. Nor does it impact Mr. Whitehouse's ability to adequately and fairly represent the class. Mr. Whitehouse, like all the other class members, would benefit from a settlement or judgment against BDO, and he and the class members share an interest in ensuring that the claim against BDO is vigorously pursued and that recovery is maximized.

167. The representative plaintiffs have put forth an adequate and workable litigation plan to advance the class proceeding.[172] Specifically, it includes both a claims process for distributing an aggregate award of damages, and a summary reference procedure for the assessment of individual damages, if the court finds that aggregate damages are not viable or appropriate.[173]

PART IV - ORDER REQUESTED

168. The Plaintiffs respectfully request an Order certifying the class action and appointing Anthony Whitehouse, Carrie Couch, and Jason Couch as the representative plaintiffs, with costs.

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[171] *Sondhi*, at para. 47, **PBOA,** Tab 32.

[172] Litigation Plan, Schedule "A" to the Fresh as Amended Notice of Motion, **AMR**, Vol. 1, Tab 1A, pp. 14-24; *Bellaire v. Independent Order of Foresters* (2004), 19 C.C.L.I. (4th) 35, at paras. 53-54 (Ont. Sup.Ct.), **PBOA,** Tab 2; *Sondhi*, at para. 45, **PBOA,** Tab 32.

[173] Litigation Plan, Schedule "A" to the Fresh as Amended Notice of Motion, **AMR**, Vol. 1, Tab 1A, pp. 14-24.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2019.

For: Simon Bieber
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22. *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724, rev'd on other grounds, 2013 ONCA 165

23. *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal refused, [2007] 3 S.C.R. xii (note),

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30. *Rumley v. British Columbia*, 2001 SCC 69

31. *Silver v. Imax Corp.,* [2009] O.J. No. 5585, leave to appeal refused, 2011 ONSC 1035

32. *Sondhi v. Deloitte Management Services LP,* 2018 ONSC 271

33. *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.,* 2013 SCC 58

34. *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3

35. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46

36. *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

A. *Class Proceedings Act, 1992*, S.O. 1992, c. 6

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.

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

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

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Certain matters not bar to certification

6 The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

…

Aggregate assessment of monetary relief

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

B. *Securities Act*, R.S.O. 1990, c. S.5

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair and efficient capital markets and confidence in capital markets; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk.

…

Revocation or suspension of registration or imposition of terms and conditions

28 The Director may revoke or suspend the registration of a person or company or impose terms or conditions of registration at any time during the period of registration of the person or company if it appears to the Director,

(a) that the person or company is not suitable for registration or has failed to comply with Ontario securities law; or

(b) that the registration is otherwise objectionable.

…

Comparative financial statements

78 (1) Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,

(a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and

(b) the period covered by the financial year next preceding the last financial year, if any,

made up and certified as required by the regulations and in accordance with generally accepted accounting principles.

Auditor's report

(2) Every financial statement referred to in subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations.

Auditor's examination

(3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make th81-106report required by subsection (2).

"auditor" defined

(4) For the purposes of this Part,

"auditor", where used in relation to the reporting issuer or mutual fund, includes the auditor of the reporting issuer or mutual fund and any other independent public accountant.

Delivery of financial statements to security holders

79 (1) Every reporting issuer or mutual fund in Ontario that is required to file a financial statement under section 77 or 78 shall send a true copy of the financial statement to every holder of its securities whose latest address, as shown on its books, is in Ontario.

…

Offences, general

122 (1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is

made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or

(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

C. *Investment Fund Continuous Disclosure*, OSC, National Instrument 81-106, Part 2

PART 2 – FINANCIAL STATEMENTS

2.1 Comparative Annual Financial Statements and Auditor's Report

(1) An investment fund must file annual financial statements for the investment fund's most recently completed financial year that include (a) a statement of net assets as at the end of that financial year and a statement of net assets as at the end of the immediately preceding financial year; …

2.6 Acceptable Accounting Principles – The financial statements of an investment fund must be prepared in accordance with Canadian GAAP as applicable to public enterprises.

2.7 Acceptable Auditing Standards
(1) Financial statements that are required to be audited must be audited in accordance with Canadian GAAS.

(2) Audited financial statements must be accompanied by an auditor's report prepared in accordance with Canadian GAAS and the following requirements:

1. The auditor's report must not contain a reservation.

2. The auditor's report must identify all financial periods presented for which the auditor has issued an auditor's report.

3. If the investment fund has changed its auditor and a comparative period presented in the financial statements was audited by a different auditor, the auditor's report must refer to the former auditor's report on the comparative period. 4. The auditor's report must identify the auditing standards used to conduct the audit and the accounting principles used to prepare the financial statements.

D. *Law Society Act*, R.S.O. 1990, c. L.8

Class Proceedings Fund

59.1 (1) The board shall,

(a) establish an account of the Foundation to be known as the Class Proceedings Fund;

(b) within sixty days after this Act comes into force, endow the Class Proceedings Fund with $300,000 from the funds of the Foundation;

(c) within one year after the day on which the endowment referred to in clause (b) is made, endow the Class Proceedings Fund with a further $200,000 from the funds of the Foundation; and

(d) administer the Class Proceedings Fund in accordance with this Act and the regulations. 1992, c. 7, s. 3.

Purposes of the Class Proceedings Fund

(2) The Class Proceedings Fund shall be used for the following purposes:

1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding.
2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

SCHEDULE "C"

Table Summarizing Information Contained in Receiver's Reports

	Reported NAV[174]	First Distribution[175]	Second Distribution[176]	Impairment ($)	Impairment (%)
Mortgage Fund	$27,082,935	$3,876,702	$4,360,000	$18,846,233	70%
Resource Fund	$2,087,807	$1,771,517	$1,175,000	-$858,710	-41%
Factoring Fund	$38,124,168	$0	$0	$38,124,168	100%
Medical Fund	$9,270,090	$1,952,186	$1,146,000	$6,171,904	67%
Bullion Fund	$1,029,555	$166,507	$0	$863,048	84%
Media Fund	$54,466,843	$6,383,729	$13,404,000	$34,679,114	64%
High Yield Mortgage Fund	$5,442,165	$1,585,219	$1,433,000	$2,423,946	45%
Infrastructure Fund	$7,764,601	$1,683,234	$0	$6,081,367	78%
Hedge Fund	$13,918,950	$156,358	$0	$13,762,592	99%
Conscious Capital Fund	$409,206	$0	$0	$409,206	100%
ACM Income Fund	$10,815,417	$657,534	$2,539,000	$7,618,883	70%
ACM Growth Fund	$11,609,064	$5,834,284	$213,000	$5,561,780	48%
Sustainable Dividend Fund	$6,630,175	$6,500,807	$0	$129,368	2%
Sustainable Property Fund	$4,547,935	$904,265	$999,000	$2,644,670	58%
Total	**$193,198,911**	**$31,472,342**	**$25,269,000**	**$136,457,569**	**71%**

174 Receiver's First Report, at Appendix "9", Exhibit "C" to the Affidavit of Marlie Patterson-Earle, AMR, Vol. 12, Tab 4C, p. 3727.

175 Receiver's Second Report, at para. 59, Exhibit "E" to the Affidavit of Marlie Patterson-Earle, AMR, Vol. 13, Tab 4E, pp. 4034-4035.

176 Receiver's Fourth Report, at para. 3, Exhibit "I" to the Affidavit of Nigel Meakin, Responding Motion Record of BDO Canada LLP, Vol. 2, Tab 1I, p. 324.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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