Divisional Court File No.: 058/20
Court File No.: CV-17-579357-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH and JASON COUCH

Plaintiffs
(Appellants)

and

BDO CANADA LLP

Defendant
(Respondent)

Proceeding under the *Class Proceeding Act, 1992*

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March 6, 2020

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PART I – OVERVIEW

1. The appellants appeal from the Order of The Honourable Justice Paul Perell denying certification of this proposed class proceeding against BDO Canada LLP ("**BDO**") for the negligent performance of audits. BDO was the auditor of the now defunct Crystal Wealth Management Systems Ltd. ("**Crystal Wealth**"). The appellants and proposed representative plaintiffs, Anthony Whitehouse, Carrie Couch, and Jason Couch, were investors or "unitholders" in Crystal Wealth's mutual funds. The proposed class is comprised of Crystal Wealth unitholders.

2. BDO was responsible for auditing the financial statements of the mutual funds offered by Crystal Wealth from 2007 until the Ontario Securities Commission obtained a cease trade order in respect of the funds. Under BDO's watch, the Crystal Wealth funds were looted by fraud, self-dealing, and mismanagement. Investors lost over $100 million.

3. For nearly a decade, BDO issued clean audit opinions in respect of all Crystal Wealth funds it audited. In each audit report, BDO stated that the annual financial statements were free from material misstatement. And in each instance, the audit reports were specifically addressed to the "Unitholders" of the particular fund.

4. BDO's engagement letter specifically identified who could rely on its audits: Crystal Wealth and, critically, anyone to whom the audit reports were addressed, i.e., unitholders.

5. Because of BDO's improper audits, the fraud and mismanagement were not discovered sooner. Unitholders were unable to make informed investment decisions, and Crystal Wealth and its funds continued to operate.

6. The motion judge denied certification *solely* because he determined (incorrectly) that it was plain and obvious that BDO did not owe a duty of care to unitholders in the Funds. In doing so, he made a number of errors:

(a) First, the motion judge erred in law in finding that the "cause of action" criterion was not met because the relationship between the parties was not sufficiently proximate to ground a duty of care. The motion judge failed to apply the proper standard under section 5(1)(a) of the *Class Proceedings Act* by failing to accept as true the pleaded facts about the purpose of BDO's audits, the direct relationship between BDO and the unitholders, and the representations BDO made to the unitholders;

(b) Second, the motion judge erred in treating this case as "indistinguishable" from *Hercules Managements Ltd. v. Ernst & Young* and *Lavender v. Miller Bernstein LLP*.[1] Additionally, the motion judge disregarded the Supreme Court of Canada's framework in *Deloitte & Touche v. Livent Inc. (Receiver of)*[2], which calls for an analysis of proximity in consideration of whether a duty of care is owed; and

(c) Third, the motion judge erred with respect to the representative plaintiff and common issues criteria. In refusing to certify "aggregate damages" as a common issue, the motion judge failed to consider (1) that there was no opposition from BDO to certify this as a common issue, and (2) the unchallenged expert evidence

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[1] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, **<u>Book of Authorities ("BOA")</u>**, Tab 11; *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, 142 O.R. (3d) 401, leave to appeal refused, [2018] S.C.C.A. No. 477, **<u>BOA</u>**, Tab 16.

[2] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2. S.C.R. 855, **<u>BOA</u>**, Tab 7.

filed by the appellants. Further, the motion judge erred in finding conflicts among class members and class counsel where none exist.

7. These errors are compounded by the motion judge's direction to appellants' counsel at the motion to restrict their oral submissions to reply only.

8. This is a proper case for certification. If the pleaded facts are accepted as true, it cannot be said that it is plain and obvious that the claim discloses no cause of action. The motion judge himself acknowledged that, save for his finding on the cause of action criterion and minor qualifications, he "would have certified [the] action as a class proceeding."[3]

9. Accordingly, the appellants seek an Order from this Court granting the appeal and certifying this action as a class proceeding.[4]

PART II - SUMMARY OF FACTS

A. The Parties

10. The respondent, BDO, is a national assurance, accounting, tax and advisory firm. It was the sole auditor for Crystal Wealth and its Funds (as defined below) from 2007 until the Ontario Securities Commission (the "**OSC**") obtained a cease trade order in 2017.[5]

11. The appellant, Anthony Whitehouse, invested his entire life savings of nearly $1 million in five of the Funds.[6] To date, Mr. Whitehouse has received only $199,001.33 in distributions from the Receiver (as defined below).[7]

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[3] Reasons for Decision of Justice Perell dated January 8, 2020 (**"Reasons for Decision"**), at para. 5, **Appeal Book and Compendium ("Appeal Book")**, Vol. 1, Tab 3, p. 20.

[4] Fresh as Amended Notice of Motion dated November 15, 2019, **Appeal Book**, Vol. 2, Tab 17, pp. 686-710.

[5] Reasons for Decision, at para. 20, **Appeal Book**, Vol. 1, Tab 3, p. 21.

12. The appellants, Carrie and Jason Couch, are spouses. They invested their entire life savings of nearly $600,000 in three of the Funds.[8] To date, the Couches have received only $104,410.10 in distributions from the Receiver.[9]

13. Mr. Whitehouse and the Couches are the proposed representative plaintiffs for a class action on behalf of a proposed class of any person who invested in any of the Funds 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 (the "**Class Members**").[10]

B. Crystal Wealth

14. Crystal Wealth marketed itself as a discretionary portfolio management firm that specialized in creating and managing alternative investment strategies outside of traditional stock and bond portfolios.[11] 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.[12]

15. From 2007 to 2017, Crystal Wealth created, marketed and managed proprietary funds, structured as open-ended mutual fund trusts.[13] Units in the funds were distributed to unitholders on an exempt-market basis, pursuant to offering memoranda.[14]

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[6] Reasons for Decision, at para. 11, **Appeal Book**, Vol. 1, Tab 3, p. 20.
[7] Affidavit of Anthony Whitehouse sworn June 15, 2018, at para. 34, **Appeal Book**, Vol. 2, Tab 10, p. 427.
[8] Reasons for Decision, at para. 12, **Appeal Book**, Vol. 1, Tab 3, p. 20.
[9] Affidavit of Carrie Couch sworn September 18, 2019, at para. 10, **Appeal Book**, Vol. 2, Tab 13, p. 639.
[10] Amended Statement of Claim amended November 13, 2019, at para. 1(a)(i) ("**Amended Statement of Claim**"), **Appeal Book**, Vol. 1, Tab 4, p. 49.
[11] Reasons for Decision, at para. 6, **Appeal Book**, Vol. 1, Tab 3, p. 20.
[12] Reasons for Decision, at para. 6, **Appeal Book**, Vol. 1, Tab 3, p. 20.
[13] Reasons for Decision, at para. 8, **Appeal Book**, Vol. 1, Tab 3, p. 20.

16. 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**").[15] 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 approximately 1,250 unitholders.[16] As it turned out, however, the NAV of the Funds was materially overstated.

17. The underlying assets in the Funds were composed both of traditional investments (the "**On-Book Assets**"), as well as unconventional investments, such as film loans, non-conventional residential mortgages, and factoring contracts (the "**Off-Book Assets**").[17]

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.[18] Again, however, that amount turned out to be materially overstated.

19. 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.[19]

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[14] Reasons for Decision, at para. 8, **Appeal Book**, Vol. 1, Tab 3, p. 20.

[15] Reasons for Decision, at para. 14, **Appeal Book**, Vol. 1, Tab 3, p. 21. The fifteen Funds were the following: ACM Growth Fund, ACM Income Fund, Crystal Enlightened Bullion Fund, Crystal Wealth Conscious Capital Strategy (the "**Conscious Capital Fund**"), Crystal Wealth Enlightened Factoring Strategy (the "**Factoring Fund**"), Crystal Wealth Enlightened Hedge Fund (the "**Hedge Fund**"), Crystal Wealth High Yield Mortgage Strategy, Crystal Wealth Infrastructure Fund, Crystal Wealth Media Strategy (the "**Media Fund**"), Crystal Wealth Medical Strategy, Crystal Wealth Mortgage Strategy (the "**Mortgage Fund**"), Crystal Enlightened Resource and Precious Metals Fund, Crystal Wealth Retirement One Fund, Absolute Sustainable Dividend Fund (the "**Sustainable Dividend Fund**"), and Absolute Sustainable Property Fund: see Reasons for Decision, at para. 15, **Appeal Book**, Vol. 1, Tab 3, p. 21.

[16] Reasons for Decision, at para. 14, **Appeal Book**, Vol. 1, Tab 3, p. 21.

[17] Reasons for Decision, at para. 16, **Appeal Book**, Vol. 1, Tab 3, p. 21.

[18] Reasons for Decision, at para. 16, **Appeal Book**, Vol. 1, Tab 3, p. 21.

[19] Reasons for Decision, at para. 17, **Appeal Book**, Vol. 1, Tab 3, p. 21.

C. BDO Delivered Clean Audit Opinions to the Unitholders for Almost a Decade

20. 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.[20]

21. Crystal Wealth retained BDO to audit the Funds. Over the course of nearly a decade, BDO provided clean audit opinions in respect of all the Funds that were in existence at the relevant times. By 2015, there were ten Funds and BDO issued clean audit opinions for all of them (the "**BDO-Audited Funds**").[21]

22. BDO's role as auditor of the Funds was disclosed to prospective unitholders in the Offering Memoranda for the Funds, and in the audited financial statements of the BDO-Audited Funds, which were available on Crystal Wealth's website. [22]

23. In addition, BDO had access to a repository of unitholder data that included unitholder names, contact information, and holdings in the Funds.[23] BDO also knew that its audits would be sent to the unitholders of the Funds, in accordance with s. 79 of the *Securities Act*, and the appellants plead that BDO knew or ought to have known that Class Members would rely on its audit reports.[24]

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[20] *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).

[21] Reasons for Decision, at para. 22, **Appeal Book**, Vol. 1, Tab 3, pp. 21-22.

[22] See, for example: Confidential Offering Memorandum for Crystal Wealth Media Strategy dated September 27, 2015, at p. 4, **Appeal Book**, Vol. 1, Tab 6A, p. 103; Excerpts from the Transcript from the cross-examination of Anthony Whitehouse held October 31, 2019, q. 179, pp. 31-32, **Appeal Book**, Vol. 1, Tab 6, pp. 93-95.

[23] Amended Statement of Claim, at para. 67, **Appeal Book**, Vol. 1, Tab 4, p. 65.

[24] Amended Statement of Claim, at para. 64, **Appeal Book**, Vol. 1, Tab 4, p. 64.

24. BDO's engagement letter with Crystal Wealth specifically provided that "[o]ur 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**."[25] Critically, the assurance reports in the financial statements were addressed directly to the "Unitholders" of the Fund in question.[26]

25. BDO's clean audit opinions were contained in all of the financial statements for the Funds that were provided directly to unitholders.[27] In each instance, BDO opined that the annual financial statements were free from material misstatement.[28]

D. BDO Refuses to Deliver Clean Audit Opinions in 2017 and the OSC Obtains the Appointment of the Receiver

26. In early 2017, BDO refused to deliver audited financial statements for the 2016 fiscal year unless Crystal Wealth provided further information and supporting documentation. Crystal Wealth did not deliver the requested information, and subsequently failed to meet its deadline to file audited financial statements with the OSC by March 31, 2017.[29]

27. The OSC issued a temporary order on April 7, 2017 prohibiting trading in the Funds' units and trading in securities held by the Funds (the "**Temporary Order**").[30] On April 26, 2017, on application by the OSC, Grant Thornton LLP was appointed as receiver (the "**Receiver**") over all assets of Crystal Wealth and the Funds.[31]

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[25] Engagement Letter between BDO Canada LLP and Crystal Wealth Management System Ltd. dated December 21, 2016, at p. 7, **Appeal Book**, Vol. 2, Tab 15A, p. 655 (emphasis added).

[26] 2015 Financial Statement for Media Fund, **Appeal Book**, Vol. 2, Tab 10A, pp. 429-451.

[27] See, for example: 2015 Financial Statement for Media Fund, **Appeal Book**, Vol. 2, Tab 10A, p. 432.

[28] Reasons for Decision, at para. 22, **Appeal Book**, Vol. 1, Tab 3, pp. 21-22.

[29] Reasons for Decision, at para. 25, **Appeal Book**, Vol. 1, Tab 3, p. 22.

[30] Reasons for Decision, at para. 26, **Appeal Book**, Vol. 1, Tab 3, p. 22.

[31] Reasons for Decision, at para. 27, **Appeal Book**, Vol. 1, Tab 3, p. 22.

28. As a result of the Temporary Order and the appointment of the Receiver, unitholders have been unable to redeem their investments in the Funds since April 7, 2017.[32]

29. Through its investigation, the Receiver found 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".[33]

30. The Receiver also found there were numerous conflicts of interest and personal relationships with the directing mind of Crystal Wealth in respect of contracts held by certain of the Funds, suspicious transactions relating to the underlying assets, and serious deficiencies in Crystal Wealth's books and records to support the Funds' investments and their respective values.[34]

31. Following the appointment of the Receiver, the directing mind of Crystal Wealth admitted in a settlement with the OSC to committing fraud and 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.[35]

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[32] Reasons for Decision, at para. 43, **Appeal Book**, Vol. 1, Tab 3, p. 24.

[33] Second Report of the Receiver dated November 24, 2017 (without appendices), at para. 32, **Appeal Book**, Vol. 1, Tab 8C, p. 268; Reasons for Decision, at para. 29, **Appeal Book**, Vol. 1, Tab 3, p. 22.

[34] Fourth Report of the Receiver dated July 20, 2018 (without appendices), at paras. 78(c), 101(l), **Appeal Book**, Vol. 2, Tab 12A, pp. 555, 568; Second Report of the Receiver dated November 24, 2017 (without appendices), at para. 29, **Appeal Book**, Vol. 1, Tab 8C, p. 268.

[35] Settlement Agreement between the Ontario Securities Commission and Clayton Smith dated May 28, 2018, at paras. 22, 28-29, 32-33, **Appeal Book**, Vol. 2, Tab 9A, pp. 403-406; Reasons for Decision, at para. 34, **Appeal Book**, Vol. 1, Tab 3, p. 22.

32. The impairment of assets extended to virtually every Fund as a result of the substantial inter-fund investments. 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 investment.[36]

E. BDO's Audits Fell Below the Applicable Standard of Care

33. BDO's audits fell below the applicable standard of care as it failed to conduct its audits in accordance with generally accepted auditing standards ("**GAAS**").

34. In its application to appoint the Receiver, the OSC was very critical of BDO's 2015 audit of the Media Fund. The assets of the Media Fund were loans to support the production of films ("**Media Loans**"). The Media Loans were purportedly purchased by the Media Fund from Media House Capital (Canada) Corp. ("**MHC**").[37] In an affidavit filed in support of the application, the OSC's investigator, Mr. Marcel Tillie, identified numerous, significant issues with BDO's auditing.[38]

35. The OSC subsequently commenced proceedings against BDO for making false representations that it had conducted its 2014 and 2015 audits of the Mortgage Fund and Media Fund in accordance with GAAS.[39] After 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 insufficient to support the reported NAVs of the Funds. [40]

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[36] Reasons for Decision, at para. 31, **Appeal Book**, Vol. 1, Tab 3, p. 22.

[37] Affidavit of Marcel Tillie sworn April 17, 2017, at paras. 26-28, **Appeal Book**, Vol. 1, Tab 8A, pp. 153-154.

[38] Affidavit of Marcel Tillie sworn April 17, 2017, at paras. 40-46, **Appeal Book**, Vol. 1, Tab 8A, pp. 157-159.

[39] Statement of Allegations in the Matter of BDO Canada LLP dated October 12, 2018, **Appeal Book**, Vol. 2, Tab 11A, pp. 453-470.

[40] First Report of the Receiver dated June 22, 2017 (without appendices), at paras. 25, 94, **Appeal Book**, Vol. 1, Tab 8B, pp. 181, 207.

36. Lastly, the appellants retained Barry Myers, a former auditor with substantial audit experience, to provide an expert opinion in respect of the standard of care.[41] Mr. Myers 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."[42] He expressed the opinion that BDO could not have obtained sufficient audit evidence in light of the deficiencies in Crystal Wealth's records. In the absence of sufficient audit evidence, BDO expressed inappropriate opinions in respect of the financial statements.[43]

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

37. The losses to Crystal Wealth unitholders are substantial. The Receiver has undertaken significant efforts to monetize assets held by the Funds and to distribute those assets to unitholders.[44] However, the amounts recovered and distributed to date represent less than 30 percent of the approximately $193.2 million aggregate NAV falsely reported by Crystal Wealth as of April 20, 2017.[45] The Receiver 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."[46]

38. BDO's negligence in delivering clean audit opinions year after year is a proximate cause of the substantial unitholder losses. Its clean audit opinions were critical to the growth of Crystal Wealth and the proliferation of the Funds: they allowed Crystal Wealth to solicit new investments

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[41] Report of Barry Myers dated April 13, 2018, at p. 4, **Appeal Book**, Vol. 1, Tab 7A, p. 133.

[42] Report of Barry Myers dated April 13, 2018, at pp. 6-9, **Appeal Book**, Vol. 1, Tab 7A, pp. 135-138.

[43] Report of Barry Myers dated April 13, 2018, at pp. 6-9, **Appeal Book**, Vol. 1, Tab 7A, pp. 135-138.

[44] Reasons for Decision, at paras. 70-71, **Appeal Book**, Vol. 1, Tab 3, p. 27.

[45] Reasons for Decision, at para. 71, **Appeal Book**, Vol. 1, Tab 3, p. 27.

[46] Fourth Report of the Receiver dated July 20, 2018 (without appendices), at paras. 4-5, **Appeal Book**, Vol. 2, Tab 12A, p. 515. The Receiver's attempts to monetize the assets of the Funds included 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: Statement of Claim in the Receiver's Action, at para. 1(c), **Appeal Book**, Vol. 2, Tab 16A, p. 668. To date, amounts that the Receiver has distributed to unitholders is exclusive of any amounts from BDO.

based on inflated representations of its NAVs, and they deprived unitholders of the ability to make informed investment decisions.

39. But for the clean audit opinions, Crystal Wealth would not have been able to continue to operate and solicit investments in the Funds. Without BDO's negligent audits, unitholder losses would have been limited and, in some cases, prevented.

40. 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 its audits for the 2016 financial statements.[47] After Crystal Wealth missed its deadline, the OSC stepped in.

G. The Pleading

41. In the Amended Statement of Claim, the appellants specifically pled a direct relationship between BDO and unitholders as follows:

- BDO knew investors were relying on BDO's audits in purchasing units in the Funds and making decisions in respect of their investments;[48]
- BDO specifically addressed each of its audit reports to the "Unitholders" of the particular Fund that it was auditing;[49]
- BDO knew and intended that the unitholders receive each audit report and rely on it in making investment decisions;[50]
- BDO had access to the individual names and number of units held by each investor through the Funds Unit Holder Listing, and was aware of the exact amounts held by each investor and in which of the Funds they were held;[51]
- BDO knew or ought to have known the identities and contact information of Unitholders;[52]

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47 Affidavit of Marcel Tillie sworn April 17, 2017, at paras. 58-61, **Appeal Book**, Vol. 1, Tab 8A, p. 164-165.
48 Amended Statement of Claim, at paras. 64, 68(c), **Appeal Book**, Vol. 1, Tab 4, pp. 64-65.
49 Amended Statement of Claim, at para. 64, **Appeal Book**, Vol. 1, Tab 4, p. 64.
50 Amended Statement of Claim, at paras. 64, 67, **Appeal Book,** Vol. 1, Tab 4, pp. 64-65.
51 Amended Statement of Claim, at paras. 63, 67, 68(a), 68(d), **Appeal Book**, Vol. 1, Tab 4, pp. 64-65.
52 Amended Statement of Claim, at para. 68, **Appeal Book**, Vol. 1, Tab 4, p. 65.

- BDO knew or ought to have known that some or all Class Members knew that BDO was the auditor of the Funds;[53]

- BDO knew that the purpose of the audits was, in part, to enable Crystal Wealth to receive and hold cash and securities owned by the Class Members;[54]

- BDO repeatedly represented to the "Unitholders" that the audit evidence it obtained with respect to the audited Funds was sufficient and appropriate; the financial statements were free from material misstatement; the financial statements presented fairly, in all material respects, the financial position of each Fund and each Funds' financial performance and cash flows; and BDO's audits were conducted in accordance with GAAS.[55]

H. The Motion Judge's Decision

42. The motion judge determined that the cause of action criterion for certification under section 5(1)(a) of the *Class Proceedings Act* was not satisfied because he found it was "plain and obvious" that BDO did not owe a duty of care to the unitholders of the Funds.[56]

43. The motion judge held that the interposition of the OSC between BDO and the Class Members made the relationship too remote to ground a duty of care. He held that the unitholders of the Funds did not rely on BDO directly, but rather on its statutory audits, such that this case was similar to or on all fours with *Hercules* and *Lavender*.

44. The motion judge concluded that "the statutory scheme cannot be seen as the basis of a duty of care to the investors in making investment decisions [or]…as the basis for a duty of care to ensure that Crystal Wealth complied with Ontario's securities laws such that the OSC would permit it to continue to offer and redeem units in the mutual funds."[57] In short, he determined that the *Hercules* and *Lavender* decisions establish that there is no duty of care owed to investors arising from a statutory audit.

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[53] Amended Statement of Claim, at para. 68(b), **Appeal Book**, Vol. 1, Tab 4, p. 65.
[54] Amended Statement of Claim, at para. 68(e), **Appeal Book**, Vol. 1, Tab 4, p. 66.
[55] Amended Statement of Claim, at paras. 77-79, **Appeal Book**, Vol. 1, Tab 4, p. 71.
[56] Reasons for Decision, at paras. 4, 94, **Appeal Book**, Vol. 1, Tab 3, pp. 20, 31; *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("***CPA***").
[57] Reasons for Decision, at para. 130, **Appeal Book**, Vol. 1, Tab 3, p. 38.

45. Importantly, the motion judge specifically held that but for the failure to satisfy the cause of action criterion under section 5(1)(a) of the *CPA*, he would have certified the action as a class proceeding, albeit with some qualifications.[58]

46. One qualification was that the motion judge held he would not certify the issue of aggregate damages as a common issue.[59] The motion judge stated this conclusion without providing any analysis as to why the proposed Class Members' damages were individual issues, in the face of uncontradicted expert evidence on how to assess damages in the aggregate, and notwithstanding that BDO did not challenge that the common issues criterion had been satisfied.

47. A further qualification was that the motion judge held that there were conflicts of interest for all three of the proposed representative plaintiffs, as well as class counsel. Class counsel is also acting for Mr. Whitehouse and others (but not the Couches) in an individual action against MHC and other defendants in connection with the Media Fund (the "**Media House Action**").[60] The motion judge held that these conflicts could be avoided by replacing all three proposed representative plaintiffs and by a change of lawyers for the plaintiffs in the Media House Action.[61]

48. The motion judge erred in reaching these conclusions.

PART III – ISSUES, LAW & AUTHORITIES

49. The issues on this appeal are: (a) whether the motion judge failed to apply the proper test under section 5(1)(a) of the *CPA*; (b) whether the motion judge erred in his duty of care analysis and in treating *Hercules* and *Lavender* as determinative; and (c) whether the motion judge erred in

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58 Reasons for Decision, at para. 5, **Appeal Book**, Vol. 1, Tab 3, p. 20.
59 Reasons for Decision, at para. 77, **Appeal Book**, Vol. 1, Tab 3, p. 28.
60 Reasons for Decision, at paras. 163-166, **Appeal Book**, Vol. 1, Tab 3, pp.43-44.
61 Reasons for Decision, at para. 164, **Appeal Book**, Vol. 1, Tab 3, pp. 43-44.

concluding that the aggregate damages question was not certifiable, and that the proposed representative plaintiffs and class counsel have disqualifying conflicts of interest.

50. Typically, a decision by a judge on a certification motion is entitled to substantial deference. But no deference is owed in cases like this one, where the motion judge erred in law on matters central to a proper application of section 5 of the *CPA*, or erred in principle on matters directly relevant to the result.[62]

A. The Motion Judge Did Not Accept the Pleaded Facts as True and Applied too High a Threshold to the Section 5(1)(a) Test

51. The first criterion for certification is that the plaintiffs' claim must disclose a cause of action. The test under section 5(1)(a) is the "plain and obvious" test as articulated in *Hunt v. Carey Canada Inc*.[63]

52. A determination that a claim discloses no reasonable cause of action is a determination of law reviewable on a standard of correctness.[64]

53. In this case, the motion judge erred in law by failing to apply the "plain and obvious" test. More particularly, the motion judge did *not* accept pleaded facts as true and, in some instances, ignored the pleaded facts altogether. Furthermore, the motion judge did *not* read the pleadings generously in accordance with the objectives of the *CPA*.

54. There is a very low burden to show a cause of action.[65] A plaintiff will fail on section 5(1)(a) only if it is plain, obvious, and beyond a reasonable doubt that the claim cannot succeed.[66]

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[62] *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 65, **BOA**, Tab 2; *LBP Holdings Ltd. v. Hycroft Gold Corporation*, 2020 ONSC 59, at para. 18, **BOA**, Tab 17.

[63] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, **BOA**, Tab 13; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, at para. 41, leave to appeal refused, [2005] S.C.C.A. No. 50, **BOA**, Tab 5.

[64] *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 30, leave to appeal to SCC requested, **BOA**, Tab 6.

55. The "plain and obvious" test requires the court to accept the material facts pleaded as true and to read the statement of claim generously.[67] The allegations in a statement of claim will be accepted as true unless they are patently ridiculous or incapable of proof.[68] Bald allegations, speculation, or legal conclusions unsupported by relevant pleadings of fact are incapable of proof.[69] Matters of law not fully settled should not be disposed of on a certification motion, and courts should only deny certification on the basis of section 5(1)(a) in the clearest of cases.[70] Novel claims must be a logical and arguable extension of established law, but the law must also be allowed to evolve.[71]

56. On a certification motion, the court must avoid taking an overly restrictive approach to the criteria under section 5(1) of the *CPA*. The legislation must be interpreted in a way that gives full effect to its purposes and benefits – namely, judicial economy, access to justice, and behaviour modification.[72]

57. Above all, the certification stage is *not* a test of the merits of the action.[73] That is, the "question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action".[74]

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65 *Adamson v. Ontario*, 2014 ONSC 3787, 16 C.C.E.L. (4th) 67, at para. 17, **BOA**, Tab 1.

66 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25, **BOA**, Tab 12; *Adamson*, at para. 17, **BOA**, Tab 1.

67 *Hollick*, at para. 25, **BOA**, Tab 12; *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118, at para. 26, **BOA**, Tab 14.

68 *Adamson*, at para. 18, **BOA**, Tab 1; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22, **BOA**, Tab 15; *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273, at para. 2, **BOA**, Tab 19.

69 *Deluca v. Canada (Attorney General)*, 2016 ONSC 3865, at para. 5, **BOA**, Tab 8; *Imperial Tobacco*, at para. 22, **BOA**, Tab 15.

70 *Adamson*, at para. 17, **BOA**, Tab 1; see also *Paton Estate*, at para. 12, **BOA**, Tab 19.

71 *Adamson*, at para. 17, **BOA**, Tab 1.

72 *Hollick*, at para. 15, **BOA**, Tab 12.

73 *Hollick*, at para. 16, **BOA**, Tab 12.

74 *Hollick*, at para. 16, **BOA**, Tab 12.

58. In this case, the motion judge held that the appellants did not plead "any direct relationship, undertaking, or representation by BDO to the unitholders" and that the only pleaded relationship "between BDO and the unitholders finds its source through the medium of the *Securities Act*, National Instrument 31-103, and National Instrument 81-106."[75]

59. In so holding, the motion judge ignored and failed to accept as true the facts pleaded in support of the appellants' negligence claim against BDO.[76]

60. As set out above, the appellants specifically pleaded that BDO addressed its audit reports to the unitholders of the Fund in question, knew the identities of the unitholders and information in respect of their personal investments, and knew and intended that unitholders would rely on its audit reports in making investment decisions. Furthermore, the appellants pleaded that the unitholders did rely on BDO's audits in purchasing units and in making investment decisions.[77]

61. These pleaded facts are not patently ridiculous or incapable of proof. In fact, BDO's engagement letter with Crystal Wealth specifically provided that the unitholders could rely on its audits.[78] Had the motion judge accepted them as true, as he was required to do, he could not have found that the appellants had not pleaded any direct relationship, undertaking, or representation by BDO to the unitholders or that the only direct relationship was between BDO and Crystal Wealth.[79]

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75 Reasons for Decision, at para. 97, **Appeal Book**, Vol. 1, Tab 3, p. 33.

76 Amended Statement of Claim, at paras. 64-68, 77-79, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66, 71. See also paragraph 43 of this Factum.

77 Amended Statement of Claim, at paras. 64, 77-79, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66, 71.

78 Engagement Letter between BDO Canada LLP and Crystal Wealth Management System Ltd. dated December 21, 2016, at p. 7, **Appeal Book**, Vol. 2, Tab 15A, p. 655.

79 Reasons for Decision, at para. 101, **Appeal Book**, Vol. 1, Tab 3, p. 33.

62. Additionally, the motion judge considered paragraph 61 of the Amended Statement of Claim, which outlined the pleaded purposes for BDO's audits, and held that "the statutory regime under the *Securities Act* is the basis of the relationship between the plaintiff Class Members and the defendant BDO."[80] The motion judge then went on to hold that "[e]verything that follows in paragraphs 62 to 72 is an emanation, deduction, inference, argument, conclusion, or product of the statutory regime as being the source of the Class Members' reliance or of BDO's liability."[81] In effect, he disregarded and failed to accept as true the facts pleaded in paragraphs 62 to 72, and based his analysis entirely on the statutory regime under the *Securities Act*.

63. That the motion judge's analysis under section 5(1)(a) is anchored to *one paragraph* of the pleading reveals the overly narrow and restrictive reading that he gave it. While Crystal Wealth was required to file audits under the *Securities Act* and National Instruments, that was not pleaded as the sum total of the unitholders' relationship with BDO. Rather, the Amended Statement of Claim pleads material facts that establish a direct and proximate relationship between BDO and the Class Members, grounded in BDO's knowledge and intention that the Class Members would rely on its audits.[82] The motion judge's approach is at odds with the generous reading required under section 5(1)(a).

64. The motion judge's error in applying an improper standard under section 5(1)(a) permeated his reasons. The rest of his analysis was tainted by this error, leading him to conclude erroneously that *Hercules* and *Lavender* were determinative cases that robbed the plaintiffs' claim of any reasonable prospect of success.

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[80] Reasons for Decision, at para. 98, **Appeal Book**, Vol. 1, Tab 3, p. 33.
[81] Reasons for Decision, at para. 99, **Appeal Book**, Vol. 1, Tab 3, p. 33.
[82] See, for example: Amended Statement of Claim, at paras. 64-68, 77-79, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66, 71.

65. Had the motion judge applied the proper test – accepting the pleaded facts as true and reading the pleading generously – he would have found that the pleadings disclose a reasonable cause of action in negligence and that it was not "plain and obvious" that there was insufficient proximity between BDO and the Class Members to establish a duty of care.

B. The Motion Judge Erred in his Analysis of the Duty of Care and in Treating *Hercules* and *Lavender* as Determinative

i. The motion judge erred in concluding that it was plain, obvious, and beyond a reasonable doubt that the claim in negligence could not succeed

66. In cases of auditors' liability, the existence of a *prima facie* duty of care requires an analysis of both proximity and reasonable foreseeability.[83]

67. *Proximity* exists when the parties are in a "close and direct" relationship such that it would be "just and fair having regard to that relationship to impose a duty of care in law."[84] When a relationship at issue does not fit within a previously established category of proximity, the court must undertake a full proximity analysis to determine whether there is a sufficiently "close and direct" relationship to ground a duty of care.[85]

68. The Supreme Court of Canada has cautioned against taking an overly categorical approach to this analysis.[86] Rather, the proximity inquiry requires courts to examine *all* relevant factors arising from the relationship between the plaintiff and defendant, including expectations, representations, reliance, property or other interests, and statutory obligations.[87] The proximity

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[83] *Livent*, at paras. 20, 22, **BOA**, Tab 7.
[84] *Livent*, at para. 25, citing *Cooper v. Hobart*, [2001] 3 S.C.R. 537, at paras. 32, 34, **BOA**, Tab 7.
[85] *Livent*, at para. 29, **BOA**, Tab 7; *Lavender*, at para. 60, **BOA**, Tab 16.
[86] *Livent*, at para. 28, **BOA**, Tab 7.
[87] *Livent*, at para. 29, **BOA**, Tab 7; *Lavender*, at para. 61, **BOA**, Tab 16.

analysis is intended to be sufficiently flexible to capture all relevant circumstances that "might in any given case go to seeking out the 'close and direct' relationship".[88]

69. For cases of negligent performance of a service, the defendant's undertaking and the plaintiff's reliance are determinative in the proximity analysis.[89] Any reliance by the plaintiff on the defendant's service for a purpose other than the one for which it was undertaken falls outside the scope of the proximate relationship and the defendant's duty of care.[90]

70. *Reasonable foreseeability* exists when an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence.[91] An injury will be reasonably foreseeable if: (1) the defendant should have reasonably foreseen that the plaintiff would rely on its representation or service; and (2) such reliance would, in the particular circumstances of the case, be reasonable.[92] The proximate relationship between the parties determines the reasonableness and reasonable foreseeability of the plaintiff's reliance. A plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and reliance on the defendant for that precise purpose is reasonable and reasonably foreseeable.[93]

71. The appellants' Amended Statement of Claim pleads the material facts necessary to establish both proximity and reasonable foreseeability sufficient to disclose a reasonable cause of action in negligence against BDO.

72. The appellants pleaded that BDO undertook to conduct its audits specifically to assist investors in making investment decisions. A secondary purpose was to ensure Crystal Wealth

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88 *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 24, **BOA**, Tab 22.
89 *Livent*, at para. 30, **BOA**, Tab 7.
90 *Livent*, at para. 31, **BOA**, Tab 7.
91 *Livent*, at para. 32, **BOA**, Tab 7.
92 *Livent*, at para. 35, **BOA**, Tab 7.
93 *Livent*, at para. 35, **BOA**, Tab 7.

complied with Ontario's securities law, such that it could continue to operate, and offer and redeem units in the Funds.[94]

73. The purpose of the audit is a question of fact.[95] Accordingly, the motion judge was required to accept the alleged purposes of BDO's audits as true, unless they were patently ridiculous or incapable of proof. The motion judge did not find that the pleaded facts were incapable of proof. He simply ignored them.

74. The motion judge narrowly focused on the fact that BDO's audits were statutory audits. He held that, according to *Hercules*, "an auditor just providing a statutory audit does not owe a duty to shareholders or investors in relation to their personal investment decisions."[96] In so doing, he misconstrued the decision in *Hercules*.

75. While the statutory audits in *Hercules* were prepared for the purpose of allowing shareholders as a collective to oversee company management and affairs, the Supreme Court of Canada did *not* foreclose that an audit could have more than one purpose.

76. In *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, the Court of Appeal for Ontario explicitly recognized that "*Hercules* did not preclude the possibility that an audit could have multiple purposes" and "an auditor can consent – explicitly or otherwise – to a particular person or class of persons relying on its audit opinion for a particular type of transaction".[97] The courts have thus left open the possibility that a statutory audit can have more than one purpose. That is precisely what the appellants pleaded and precisely what the motion judge ignored.

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[94] Amended Statement of Claim, at para. 62, **Appeal Book**, Vol. 1, Tab 4, p. 64.

[95] *Livent*, at para. 150 (per McLachlin C.J., dissenting in part), **BOA**, Tab 7; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at para. 71, **BOA**, Tab 3 ("*CIBC v. Deloitte*").

[96] Reasons for Decision, at para. 108, **Appeal Book**, Vol. 1, Tab 3, p. 34.

[97] *CIBC v. Deloitte*, at para. 68, citing *Hercules*, at paras. 48-51, **BOA**, Tab 3. The *CIBC v. Deloitte* case was an appeal from a partial summary judgment motion decided by Justice Perell in an auditor's negligence case.

77. According to *Livent*, the purpose of the defendant's undertaking – i.e., the representation given or the service undertaken – is critical.[98] In the present case, the appellants pleaded that BDO undertook to provide auditing services, the purposes of which were to allow investors to make informed decisions, and secondarily, to ensure Crystal Wealth complied with securities law. Regardless of whether these were statutory audits, BDO's undertaking gave rise to a proximate relationship with Crystal Wealth's investors, particularly in light of all relevant circumstances.[99]

78. The appellants further pleaded that they relied – with BDO's knowledge and intention of them doing so – on the precise purpose for which the audits were undertaken.[100] Accordingly, on the facts as pleaded, their reliance on the audit reports in making investment decisions was *within* the scope of proximity between BDO and the Class Members. The same is true of the secondary purpose to ensure Crystal Wealth complied with securities laws, given that continued registration with the OSC allowed Crystal Wealth to continue to operate and offer securities to investors, including Class Members.[101]

79. Turning to reasonable foreseeability, the appellants properly pleaded that BDO knew and intended that investors would rely on it and its audits of the Funds.[102] BDO addressed its assurance reports directly to the "Unitholders" of each Fund, and it specifically acknowledged in its engagement letter that by doing so, its audit services were planned and conducted *in order to be relied on by the unitholders*. There can be no doubt that BDO had unitholders in its contemplation

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98 *Livent*, at para. 15, **BOA**, Tab 7; *Darmar Farms*, at paras. 65-66, **BOA**, Tab 6.

99 Amended Statement of Claim, at paras. 64-68, 77-79, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66, 71, and see also paragraph 43 of this Factum.

100 Amended Statement of Claim, at para. 64, **Appeal Book**, Vol. 1, Tab 4, p. 64.

101 Amended Statement of Claim, at paras. 63, 65-66, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66; see also *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman* LLP, 2016 ONCA 916, 406 D.L.R. (4th) 201, leave to appeal refused, [2017] S.C.C.A. No. 54, **BOA**, Tab 9.

102 Amended Statement of Claim, at paras. 64, 67, **Appeal Book**, Vol. 1, Tab 4, pp. 64-65.

when preparing the reports. This "close and direct" relationship obligated BDO to act with reasonable care for the purposes for which it undertook to act.

80. In turn, the appellants pleaded that the Class Members relied on BDO's audits to evaluate their investments in the Funds and to make investment decisions.

81. All three of the appellants 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.[103] There is no evidence that they are unique among unitholders in that regard.

82. The unitholders' reliance on the reports addressed to them was reasonable in the circumstances, and the significant financial losses they suffered as a result of that reliance – in the face of BDO's negligence in conducting the audits – was reasonably foreseeable.

83. Had the motion judge read the pleading generously and applied the proper test, he would have accepted as true the pleaded facts in support of a "close and direct" relationship between BDO and the unitholders, and the unitholders' reliance on BDO's audits for the precise purpose for which they were made.

ii. The motion judge erred in treating Hercules *and* Lavender *as determinative*

84. The motion judge further erred in law by concluding that BDO's relationship to the Class Members with respect to their investment decisions is indistinguishable from the duty of care relationship alleged and analyzed in *Hercules* and *Lavender*. The motion judge treated these cases

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[103] Affidavit of Anthony Whitehouse sworn June 15, 20018, at paras. 18, 20, **Appeal Book**, Vol. 2, Tab 10, p. 423; Affidavit of Carrie Couch sworn September 18, 2019, at paras. 6-7, **Appeal Book**, Vol. 2, Tab X, pp. 638-639; see also Amended Statement of Claim, at para. 22, **Appeal Book**, Vol. 1, Tab 4, p. 57.

as determinative in finding that it is plain and obvious that there is no duty of care owed to investors arising from a statutory audit.[104]

85. *Hercules* and *Lavender* are factually distinguishable. Both cases were decided on the merits. Both cases arose from summary judgment motions, in which the parties furnished extensive evidentiary records in order for the courts to determine whether the auditor owed a duty of care to shareholders and investors with respect to their investment decisions.[105] Accordingly, neither case found that it was "plain and obvious" that no duty of care existed.

86. In relying on *Hercules* and *Lavender*, the motion judge essentially imposed a higher and more onerous burden on the appellants under the section 5(1)(a) test.[106] This is a reversible error.

87. In any event, the analyses and holdings in *Hercules* and *Lavender* do not preclude the appellants' negligence claim against BDO.[107]

(i) *Hercules*

88. In *Hercules*, the Supreme Court of Canada concluded that the auditor's purpose in preparing statutory audits was "to assist the collectivity of shareholders of the audited companies in their task of overseeing management."[108] The Court considered the appellant shareholders' submission that there was an additional purpose for the audits – namely, to provide shareholders

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[104] Reasons for Decision, at para. 113, **Appeal Book**, Vol. 1, Tab 3, p. 36.

[105] See *Hercules*, at para. 50, **BOA**, Tab 11 and *Lavender*, at paras. 56-57, **BOA**, Tab 16. It is worth noting that *Lavender* was certified as a class proceeding.

[106] See: *Darmar Farms*, at para. 38, **BOA**, Tab 6.

[107] Even after *Hercules*, the Court in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* found specifically that it was not "plain and obvious" that no duty of care arose between an auditor and shareholders in respect of a statutory audit: see *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, (2001), 15 C.P.R. (4th) 289 (*sub. nom. Mondor*) (Ont. Sup. Ct.), **BOA**, Tab 4.

[108] *Hercules*, at para. 49, **BOA**, Tab 11.

"with information on the basis of which they could make personal investment decisions."[109] After considering the evidentiary record, the Court concluded that there was no other purpose for the audits beyond the statutorily-mandated one.[110]

89. Notably, the purpose of the statutory audits in *Hercules* – for the collectivity of shareholders to supervise management – is not, and cannot be, a purpose of BDO's audits. Crystal Wealth did not have shareholders, and the unitholders had no role in supervising management. Therefore, the purpose of BDO's audits could not have been the same one as in *Hercules*. The purpose of addressing and delivering the audit reports directly to "Unitholders" could only have been to assist unitholders in making investment decisions. This distinction between the purpose of the statutory audits in *Hercules* and the present case is critical, yet was ignored by the motion judge.

90. In addition, the motion judge ignored a critical passage in *Hercules*. While the Supreme Court of Canada in *Hercules* held that "[i]n the general run of auditors' cases, concerns over indeterminate liability will serve to negate a *prima facie* duty of care", it also noted there are exceptions to the general rule.[111] The Supreme Court held that "in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed."[112]

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[109] *Hercules*, at para. 50, **BOA**, Tab 11.
[110] *Hercules*, at para. 51, **BOA**, Tab 11.
[111] *Hercules*, at para. 36, **BOA**, Tab 11.
[112] *Hercules*, at para. 37, **BOA**, Tab 11; see also *Haig v. Bamford*, [1977] 1 S.C.R. 466, **BOA**, Tab 10. These "exceptional factors" identified in *Hercules* remain relevant post-*Livent*. However, instead of considering them at the second stage of the *Anns/Cooper* test ("residual policy considerations"), these factors now form part of the "factors

91. The present case fits within the exceptions identified in *Hercules*, and in this way, *Hercules* actually supports the appellants' claim. The appellants pleaded that as part of BDO's audit of Crystal Wealth's Funds, BDO knew or ought to have known the identities and contact information of the unitholders, the number of units and exact amounts held by each investor, and in which Fund each invested.[113] Those are precisely the circumstances that the Supreme Court of Canada found could ground a duty of care.

92. The appellants also pleaded that BDO knew and intended for the unitholders to receive its audit reports and rely on them in making investment decisions, and that the unitholders did rely on the audits for that very purpose.[114]

(ii) *Lavender*

93. The pleaded factual matrix in the present case is materially different from *Lavender* and the motion judge erred in concluding that this case is "on all fours" with it.[115]

94. First, BDO addressed its audit reports *to* the unitholders of each Fund. This is a factor arising from the relationship between BDO and the unitholders that establishes the unitholders were BDO's *intended* audience. As such, BDO was under an obligation to be mindful of their legitimate interests in conducting its affairs.[116] In *Lavender*, the investors did not know that the audited reports existed and never saw them because they were filed confidentially with the OSC.[117]

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that arise from the *relationship* between the parties" and fall under the first stage proximity and reasonably foreseeability analysis: *Livent*, at para. 39, **BOA**, Tab 7.

[113] Amended Statement of Claim, at paras. 67-68, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66.

[114] Amended Statement of Claim, at paras. 64, 67, **Appeal Book**, Vol. 1, Tab 4, pp. 64-65.

[115] Reasons for Decision, at paras. 114 and 116, **Appeal Book**, Vol. 1, Tab 3, p. 36.

[116] *Lavender*, at para. 62, citing *Hercules*, at para. 2, **BOA**, Tab 16.

[117] *Lavender*, at paras. 65, 67, **BOA**, Tab 16.

95. While the motion judge acknowledged that the class members "were provided with BDO's reports", he did not address in his analysis the pleaded fact that the audit reports were *specifically* addressed to unitholders. Unlike *Lavender*, BDO's representations about Crystal Wealth's Funds were being made *directly* to unitholders. In finding the relationship between the parties too remote to ground a duty of care in *Lavender*, Justice Epstein explained that the auditor's undertaking did not extend to assisting class members with making investment decisions. In finding so, she emphasized that the investors never saw the audited reports, and did not know of their existence.[118] Moreover, the class members in *Lavender* conceded that they "did not rely on or review" the reports.[119] This is entirely distinguishable from the present case.[120]

96. Second, the appellants pleaded that the Class Members *knew* that BDO was Crystal Wealth's auditor. This is distinguishable from *Lavender*, where the auditor "made no representations to the members of the Class" and most of them "never even knew of the Auditor's existence or its involvement with [the securities dealer]."[121] In the present case, the motion judge did not acknowledge the appellants' pleading that some or all Class Members knew that BDO was the auditor – a fact that shows a direct connection that was missing in *Lavender*.

97. In *Livent*, the Supreme Court of Canada explained that a "finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but **upon an examination of the particular relationship at issue in each case**."[122]

98. While the Supreme Court made this statement in discussing previously established categories of proximity, the upshot of this statement must also be that when a novel proximate

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118 *Lavender*, at para. 66, **BOA**, Tab 16.
119 *Lavender*, at para. 67, **BOA**, Tab 16.
120 Amended Statement of Claim, at paras. 22, 64, 67, **Appeal Book**, Vol. 1, Tab 4, pp. 64-66.
121 *Lavender*, at para. 65, **BOA**, Tab 16.
122 *Livent*, at para. 28, **BOA**, Tab 7 (emphasis added).

relationship is pleaded, courts must explore the circumstances of that relationship to determine whether proximity exists. Here, the motion judge shoehorned the plaintiffs' claim into the factual context in *Lavender*.[123] The present case is factually distinguishable from *Lavender* and it was an error for the motion judge to treat *Lavender* as determinative.

C. The Motion Judge Erred in Finding that Certification Could Occur with Some Qualifications

i. The motion judge erred in concluding that the aggregate damages issues was not certifiable as a common issue

129. The motion judge found, without explanation or analysis, that the damages in this case are individual issues. He held he would not certify as a common issue the question of whether damages can be determined on an aggregate basis and the amount of those damages.[124]

130. The motion judge erred in reaching this conclusion. First, he failed to consider the appellants' unchallenged expert evidence from Domenic Marino about the methodology available to quantify and award damages on a class-wide basis in the immediate case.[125] Second, BDO did not adduce any contradictory expert evidence or elect to cross-examine Mr. Marino, nor did it dispute that aggregate damages were a certifiable common issue.

131. The motion judge could not have reached the conclusion he did had he considered the appellants' expert evidence, which established some basis in fact that the aggregate damages question was certifiable as a common issue.[126]

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[123] *Livent*, at para. 28, **BOA**, Tab 7.

[124] Reasons for Decision, at para. 77, **Appeal Book**, Vol. 1, Tab 3, p. 28.

[125] Affidavit of Domenic Marino sworn September 20, 2019, **Appeal Book**, Vol. 2, Tab 14, pp. 642-646.

[126] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99-105, **BOA**, Tab 21; and see *Markson v. MBNA Canada Bank*, 2007 ONCA 334, at para. 44, leave to appeal refused, [2007] 3 S.C.R. xii (note), **BOA**, Tab 18.

ii. The motion judge erred in finding disqualifying conflicts of interest

132. Section 5(1)(e) of the *CPA* requires there to be a representative plaintiff who would fairly and adequately represent the interests of the class without any conflicts of interest and who has produced a workable litigation plan.

133. The motion judge erred in concluding that there were disqualifying conflicts of interest that needed to be resolved in order to certify the action as a class proceeding.[127]

134. To begin, the motion judge made a plain and obvious error of fact in finding that Carrie and Jason Couch have a conflict of interest.[128] The motion judge found that all three of the proposed representative plaintiffs are conflicted because they are pursuing individual claims in the Media House Action. But the Couches are not plaintiffs in the Media House Action. The Couches have no perceived or actual conflict, and readily satisfy the representative plaintiff criterion.

135. Second, the motion judge made conclusory statements that a conflict arises from Mr. Whitehouse's pursuit of the Media House Action and Adair Goldblatt Bieber LLP's role as his counsel in that action.[129]

136. No conflicting interest arises from Mr. Whitehouse pursuing the Media House Action, which involves a claim against parties associated with the administration of the Media Loans. BDO is **not** a party to the Media House Action.

137. The primary concern in the cases relied on by the motion judge[130] was that class counsel may receive conflicting instructions from members of the class and from individuals who opt out

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127 Reasons for Decision, at paras. 164-165, **Appeal Book**, Vol. 1, Tab 3, pp. 43-44.
128 Reasons for Decision, at para. 164, **Appeal Book**, Vol. 1, Tab 3, pp. 43-44.
129 Reasons for Decision, at para. 164, **Appeal Book**, Vol. 1, Tab 3, pp. 43-44.

of the class in respect of tactics and strategy for the pursuit of the same defendant, and that the opt-outs might ultimately obtain a more favourable settlement than the class from the same defendant because of the defendant's limits on funds available to satisfy claims.[131]

138. Those concerns do not exist in this case. The Media House Action is completely independent of the class action, and there is no overlap in defendants. Any settlement or judgment in the Media House Action will not in any way limit the funds that BDO has available to settle the class action, nor is there any possibility there will be any conflict in instructions in respect of tactics and strategy, since there is no overlap in defendants between the two actions.

139. Further, there is no disqualifying conflict of interest arising from Mr. Whitehouse's role as representative plaintiff and his role as a plaintiff in the Media House Action. A disqualifying conflict requires "the differences between the situation of the representative plaintiff and the class members [to] impact on the outcome of common issues and the differences must affect the representative plaintiff's ability to adequately and fairly represent the class."[132]

140. Because BDO is not a defendant in the Media House Action, an entirely independent action cannot place Mr. Whitehouse in a position of conflict *vis-à-vis* other Class Members. Similarly, the Media House Action does not place class counsel in conflict.[133]

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130 *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015, **BOA**, Tab 24; *Persaud v. Talon International Inc.*, 2018 ONSC 5377, **BOA**, Tab 20.
131 *Vaeth*, at paras. 68-73, **BOA**, Tab 24; *Persaud*, at paras. 179-181, **BOA**, Tab 20.
132 *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, at para. 47, **BOA**, Tab 23.
133 See: *Wallace v. Canadian Pacific Railway*, 2013 SCC 39, [2013] 2 S.C.R. 649, **BOA**, Tab 25.

PART IV – RELIEF SOUGHT

141. The appellants request an Order granting the appeal and certifying this action as a class proceeding, with costs of this appeal and the certification motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2020.

Simon Bieber/Nathaniel Read-Ellis/Iris Graham/
Michele Valentini

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Divisional Court File No.: 058/20
Court File No.: CV-17-579357-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH and JASON COUCH

Plaintiffs
(Appellants)

and

BDO CANADA LLP

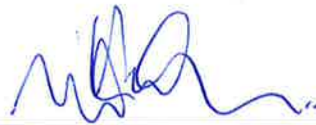
Defendant
(Respondent)

Proceeding under the *Class Proceeding Act, 1992*

CERTIFICATE

I estimate that 90 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 6th day of March, 2020.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Adamson v. Ontario*, 2014 ONSC 3787, 16 C.C.E.L. (4th) 67

2. *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949

3. *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561

4. *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, (2001), 15 C.P.R. (4th) 289 (*sub. nom. Mondor*) (Ont. Sup. Ct.)

5. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, leave to appeal refused, [2005] S.C.C.A. No. 50

6. *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, leave to appeal to SCC requested

7. *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2. S.C.R. 855

8. *Deluca v. Canada (Attorney General)*, 2016 ONSC 3865

9. *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman* LLP, 2016 ONCA 916, 406 D.L.R. (4th) 201, leave to appeal refused, [2017] S.C.C.A. No. 54

10. *Haig v. Bamford*, [1977] 1 S.C.R. 466

11. *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165

12. *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158

13. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959

14. *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118

15. *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45

16. *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, 142 O.R. (3d) 401, leave to appeal refused, [2018] S.C.C.A. No. 477

17. *LBP Holdings Ltd. v. Hycroft Gold Corporation*, 2020 ONSC 59

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

19. *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273

20. *Persaud v. Talon International Inc.*, 2018 ONSC 5377

21. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477

22. *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543

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

24. *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015

25. *Wallace v. Canadian Pacific Railway*, 2013 SCC 39, [2013] 2 S.C.R. 649

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; …

2.2 Filing Deadline for Annual Financial Statements – The annual financial statements and auditor's report required to be filed under section 2.1 must be filed on or before the 90th day after the investment fund's most recently completed 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. ***Registration Requirements, Exemptions and Ongoing Registrant Obligations*****, National Instrument 31-103**

12.10 Annual financial statements

(1) Annual financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division for financial years beginning on or after January 1, 2011 must include the following:

(a) a statement of comprehensive income, a statement of changes in equity and a statement of cash flows, each prepared for the most recently completed financial year and the financial year immediately preceding the most recently completed financial year, if any;
(b) a statement of financial position, signed by at least one director of the registered firm, as at the end of the most recently completed financial year and the financial year immediately preceding the most recently completed financial year, if any;
(c) notes to the financial statements.

(2) The annual financial statements delivered to the regulator or, in Québec, the securities regulatory authority under this Division must be audited.

12.14 Delivering financial information – investment fund manager

(1) A registered investment fund manager must deliver the following to the regulator or, in Québec, the securities regulatory authority no later than the 90th day after the end of its financial year:

(a) its annual financial statements for the financial year;
(b) a completed Form 31-103F1 Calculation of Excess Working Capital, showing the calculation of the investment fund manager's excess working capital as at the end of the financial year and as at the end of the immediately preceding financial year, if any;
(c) a completed Form 31-103F4 Net Asset Value Adjustments if any net asset value adjustment has been made in respect of an investment fund managed by the investment fund manager during the financial year.

(2) A registered investment fund manager must deliver the following to the regulator or, in Québec, the securities regulatory authority no later than the 30th day after the end of the first, second and third interim period of its financial year:

(a) its interim financial information for the interim period;
(b) a completed Form 31-103F1 Calculation of Excess Working Capital, showing the calculation of the investment fund manager's excess working capital as at the end of the interim period and as at the end of the immediately preceding interim period, if any;
(c) a completed Form 31-103F4 Net Asset Value Adjustments if any net asset value adjustment has been made in respect of an investment fund managed by the investment fund manager during the interim period.

ANTHONY WHITEHOUSE et al. -and- **BDO CANADA LLP**
Plaintiffs (Appellants) Defendant (Respondent)

Divisional Court File No.: 058/20
Court File No.: CV-17-579357-00CP

ONTARIO
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PROCEEDING COMMENCED AT
TORONTO

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