Divisional Court File No.: DC-20-00000058-0000
Court File No. CV-17-579357-00CP

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(DIVISIONAL COURT)**

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

B E T W E E N:

ANTHONY WHITEHOUSE, CARRIE COUCH and JASON COUCH

Plaintiffs

- and -

BDO CANADA LLP

Defendant
(Respondent)

# FACTUM OF THE RESPONDENT, BDO CANADA LLP

August 7, 2020

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# FACTUM OF THE RESPONDENT

## PART I - INTRODUCTION

1. The decision of the Motion Judge that it is "plain and obvious" that the pleadings do not disclose a cause of action against the respondent BDO is supported by appellate precedents – including jurisprudence from the Supreme Court of Canada – and sound reasoning. It should be upheld.

2. The proposed class action at issue in this appeal is brought on behalf of investors in the Crystal Wealth Funds.[1] BDO audited the annual financial statements of the Crystal Wealth Funds between 2007 and 2015 pursuant to the requirements of the Ontario *Securities Act* and related securities regulations. The central issue on this appeal is whether BDO owed a duty in negligence *simpliciter*, not only to its audit clients but also to investors of those clients.

3. In their pleading and on the certification motion below, the appellants alleged two distinct bases for a duty owed to Crystal Wealth investors:

(a) a duty owed directly to Crystal Wealth investors in relation to their investment decisions (referred to below as the "Direct Duty"); and

(b) an indirect duty arising from alleged reliance by the Ontario Securities Commission on BDO's audit work in connection with its oversight and regulation of Crystal Wealth's operations (referred to below as the "OSC-Mediated Duty").

[1] All defined terms in this section are defined below.

4. With respect to the Direct Duty, the Motions Judge appropriately situated the proposed class action within a settled body of jurisprudence. This jurisprudence is anchored by the Supreme Court of Canada's seminal decision on auditors' duties: *Hercules Managements* v. *Ernst & Young LLP*.[2] *Hercules* holds that an auditor performing a statutory audit of a company does not owe a duty of care to individual investors in that company for the purposes of their personal investment decisions. The Supreme Court unanimously determined that the existence of a duty is precluded by policy concerns about indeterminate liability and lack of proximity.

5. With respect to the OSC-Mediated Duty, the Motion Judge correctly determined that it is indistinguishable from the duty alleged, and rejected, in *Lavender v. Miller Bernstein LLP*.[3] In *Lavender*, the Ontario Court of Appeal found that the interposition of the Ontario Securities Commission and the audit client between the defendant auditor and the proposed class rendered the relationship too remote to ground a duty of care.

6. The focus of this appeal is the Motion Judge's threshold determination that certification should be denied due to the plaintiffs' failure to meet their onus of establishing that the pleadings disclose a cause of action under s. 5(1)(a) of the *Class Proceedings Act* (the "*CPA*"). However, the appellants also take issue with certain *obiter* determinations under sections 5(1)(c) and (e) of the *CPA*.[4] The appellants contend that His Honour erred in refusing to certify a proposed common issue premised on aggregate damages. They also take issue with his determination that the

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[2] [1997] 2 SCR 165 ["*Hercules*"], Appellants' Book of Authorities ["ABA"] Tab 11.

[3] 2018 ONCA 729 ["*Lavender*"], ABA Tab 16.

[4] The determinations on these issues were not necessary to decide the motion, and are *obiter dicta* in this sense. See *Duggan v. Durham Region Non-Profit Housing Corporation*, 2018 ONSC 1811 at paras. 48-49, Respondent's Book of Authorities ["RBA"] Tab 10. As *obiter*, the Motion Judge's determinations on the certification criteria other than s. 5(1)(a) are not appropriate subjects of this Court's appellate review. See *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964 (Ont. C.A.) at paras. 79-82, RBA Tab 21; *Bearcat Explorations Ltd., Re*, 2003 ABCA 365 at para. 13, RBA Tab 4.

proposed representative plaintiffs would not fairly and adequately represent the class owing to conflicts of interest. As with his reasons on the duty of care issue, the Motions Judge employed the correct approach in deciding these issues.

## PART II - SUMMARY OF FACTS

### A. Crystal Wealth

7. Crystal Wealth Management Services Limited ("CWMS") was a Burlington, Ontario-based Investment Fund Manager, Portfolio Manager, and Commodity Trading Manager. In its role as Investment Fund Manager, Crystal Wealth operated and managed 15 proprietary investment funds (the "Crystal Wealth Funds" or the "Funds" and together with CWMS, "Crystal Wealth").[5]

### B. Regulatory Oversight by the Provincial Securities Commissions

8. As a registrant with provincial securities regulators,[6] Crystal Wealth was overseen by multiple securities regulators, including the Ontario Securities Commission ("OSC"). As part of the Funds' regulatory obligations, they were required to file audited financial statements with the OSC on an annual basis pursuant to the *Securities Act* and National Instruments 31-103 and 81-106.[7]

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[5] Affidavit of Marcel Tillie sworn April 17, 2017 at para. 13 ["Tillie Affidavit"] , AC Volume 1, Tab 8A, p. 148.

[6] Tillie Affidavit at para. 12, AC Volume 1, Tab 8A, p. 148; Grant Thornton Limited's First Report dated June 22, 2017 ["First Receiver Report"] at para. 12, Exhibit C to the Affidavit of Marlie Patterson-Earle sworn June 14, 2018, AC Volume 1, Tab 8B, p. 178.

[7] *Securities Act*, R.S.O. 1990, c. S.5, ss. 72, 73.3, RBA Tab 29; *Securities Act*, RSBC 1996, c 418, Part 10, s.76, Tab 28; *National Instrument 45-106 Prospectus and Registration Exemptions*, BC Reg 227/2009, ss. 1.01, 2.6, RBA Tab 27; Canadian Securities Administrators, *National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations*, s. 7.1, RBA Tab 26.

## C. BDO's Audits of the Crystal Wealth Funds

9. During the period that encompassed the fiscal years 2007 to 2015 (the "BDO Audit Period"), BDO audited the annual financial statements of CWMS and, for differing lengths of time, the annual financial statements of the individual Crystal Wealth Funds. As noted above, and as recognized by the Motion Judge, BDO's annual audits of the Crystal Wealth Funds were strictly a function of the OSC's regulatory oversight over the Crystal Wealth Funds.[8]

10. BDO's audits of CWMS and the Funds were conducted pursuant to retainer agreements negotiated and signed by Clayton Smith, in his capacity as the principal of CWMS (the "BDO Retainers").

## D. OSC Investigation and Crystal Wealth Receivership

11. On April 6, 2017, following an expansive investigation into Crystal Wealth's affairs, the OSC issued a temporary order against Clayton Smith, his companies, Crystal Wealth and the Funds that ceased all trading of units of the Funds and froze the assets of Mr. Smith and his companies. On or about April 26, 2017, Crystal Wealth was put into receivership by application of the OSC (the "Receivership"). On application by Staff of the OSC, the Ontario Superior Court of Justice (Commercial List) made an order appointing Grant Thornton Limited as receiver and manager of all assets, undertakings and properties of Crystal Wealth, the Funds, Mr. Smith and certain of his personal companies (the "Receiver" and the "Appointment Order").

12. In their presentation of the facts, the appellants have overstated the proximity between BDO and the Appointment Order. The appellants imply that the Appointment Order was triggered

[8] See, for example, Reasons for Decision of Justice Perell dated January 8, 2020 ["Reasons for Decision"] at para. 98, AC Volume 1, Tab 3, p. 33.

by BDO's refusal to provide audit opinions in 2017. Contrary to the appellants' assertions, the record pertaining to the Appointment Order makes clear that the Order resulted from the OSC's lengthy investigation, and not from any precipitating decision made by BDO regarding its audit opinions.[9]

13. Following the Appointment Order, Mr. Smith reached a settlement with OSC Staff, which was approved by the OSC in May 2018. As part of his settlement, Mr. Smith admitted to committing fraud in his role at Crystal Wealth, namely the direct misappropriation of assets held by the Media Fund and Mortgage Fund. He also admitted to having misled both BDO and the OSC in concealing his fraud.[10]

14. While there is no dispute that a fraud was committed by Mr. Smith, the appellants have exaggerated the extent of Mr. Smith's fraud in asserting that it was in the range of $100 million. The OSC's evidence in support of its receivership application as well as Mr. Smith's settlement with the OSC (discussed below) indicates that the amount of Crystal Wealth assets subject to fraud was in the range of $9-11 million, and was restricted to investments entered into by only two funds – the Media Fund and Mortgage Fund.[11]

## E. Overview of Receivership

[9] Tillie Affidavit at paras. 58-61, AC Volume 1, Tab 8A, pp. 164-165; Affidavit of Michael Ho sworn April 17, 2017 ["Ho Affidavit"], Tab B of Application Record of the OSC dated April 25, 2017, Exhibit B to the Affidavit of Marlie Patterson-Earle sworn June 14, 2018, RC Tab 1. See also Reasons for Decision at para. 44, AC Volume 1, Tab 3, p. 24.

[10] Smith Settlement at paras. 45-46, AC Volume 2, Tab 9A, pp. 403, 408-409.

[11] Settlement Agreement between the OSC and Clayton Smith dated May 28, 2018 at para. 7 ["Smith Settlement"], Exhibit A to the Supplementary Affidavit of Marlie Patterson-Earle sworn June 15, 2018, AC Volume 2, Tab 9A, p. 400; Ho Affidavit at para. 20, RC Tab 1, p. 8.

15. The Receiver is an independent officer of the court acting in a fiduciary capacity, whose duties and obligations must be performed honestly and in good faith. A fundamental duty of the Receiver is to protect and preserve the interests of and realize value for the benefit of all parties who may have an economic interest in the debtor's assets, property and undertakings (the "Stakeholders"). Stakeholders in the Crystal Wealth Receivership include both creditors and unitholders (i.e., debt holders and equity holders).[12]

16. During an insolvency proceeding, claims are satisfied in order of priority. Certain statutory priorities and claims secured by Court-ordered charges (such as receiver fees and disbursements) typically have priority over ordinary secured claims, and ordinary secured claims have priority over unsecured claims. Only when all other debt claims have been satisfied or provided for are shareholder, or in the circumstances of this case, "unitholder" claims (i.e., equity) addressed.[13]

17. Since the Appointment Order, the Receiver has made use of its powers to (i) realize on assets, (ii) investigate potential causes of action against third parties, and (iii) initiate litigation proceedings when it considers it appropriate to do so.[14]

18. The Receiver also sought and obtained court approval to rely on a Third-Party Unitholder Listing for the purposes of making interim distributions to unitholders.[15] Accordingly, unitholders recovered some of their investments early in the Receivership – in advance of the final resolution of creditor claims. The Receiver has made two such interim distributions to unitholders to date. As discussed below, on June 2, 2020, Justice Koehnen of the Ontario Superior Court of Justice

[12] Affidavit of Nigel Meakin sworn August 22, 2019 ["Meakin Affidavit"] at paras. 8, 18, 20, 22, 23, 24, 25, AC Volume 2, Tab 12, pp. 474-475, 479-481.

[13] Meakin Affidavit at para. 38, AC Volume 2, Tab 12, p. 487.

[14] Meakin Affidavit at paras. 7, 17, 51, 69, 77, AC Volume 2, Tab 12, pp. 474, 479, 492, 499, 503.

[15] Meakin Affidavit at paras. 39, 65, 74, AC Volume 2, Tab 12, pp. 487, 498, 501.

(Commercial List) issued an order approving a third interim distribution. Upon the completion of the third interim distribution, the unitholders will have received approximately $103 million in Fund assets as a result of recoveries by the Receiver. This amount includes BDO's payment under the Receiver Settlement (discussed below).[16]

## F. Overview of Class Action

19. The proposed class action underlying this appeal was commenced by the proposed representative plaintiff, Anthony Whitehouse, on July 20, 2017 and seeks damages in the amount of $275,000,000 (including $25,000,000 in punitive damages) from BDO on the basis that BDO performed its services negligently.[17] The crux of the appellant's claim in negligence *simpliciter* is that, in addition to any duty BDO owed to its audit clients CWMS and the Crystal Wealth Funds, BDO also owed duties to investors in the Crystal Wealth Funds. As a result, the appellants seek to make BDO liable for damages arising from investments made by investors who invested in the Funds at any point and continued to hold those investments as of April 7, 2017.

## G. The Receiver's Action

20. On May 3, 2018, the Receiver commenced a civil action against BDO (the "Receiver's Action"). The Receiver's Action claims damages against BDO in negligence *simpliciter*, amongst other causes of action, on behalf of CWMS and the Crystal Wealth Funds. Adair Goldblatt Bieber LLP ("AGB"), counsel to the appellants, was also counsel of record in the Receiver's Action.[18] On the certification motion BDO asserted that, as the Receiver's Action was effectively pursuing

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[16] Fifth Report of the Receiver dated May 19, 2020 at para. 80 ["Fifth Receiver Report"], RC Tab 11, pp. 251-262.

[17] Amended Statement of Claim amended November 13, 2019 ["Amended Statement of Claim"] at para. 1, AC Volume 1, Tab 4, pp. 49-52.

[18] Reasons for Decision at paras. 62-63, AC Volume 1, Tab 3, p. 26.

the same claim for the benefit of the same claimants, the class proceeding was duplicative of the Receiver's action and therefore the preferable procedure criterion was not satisfied.

## H. The Motion Judge's Decision

21. In reasons dated January 8, 2020 (the "Reasons"), the Motion Judge dismissed the appellants' certification motion. The ratio of this decision was that the plaintiffs failed to satisfy the cause of action criterion under s.5(1)(a) because the pleadings did not disclose a duty of care owed by BDO to the class.[19]

22. While the Motion Judge refused certification based on the cause of action criterion, he went on to discuss, in *obiter*, the other criteria for certification under s. 5 of the *CPA* and identified two further deficiencies. First, the Motion Judge held that it would not have been appropriate to certify aggregate damages as a common issue in this proceeding as the damages of the proposed class members would be an individual issue.[20] Second, the Motion Judge found that the three proposed representative plaintiffs could not adequately represent the class in light of conflicts of interest arising from a related action brought by Mr. Whitehouse and other individual clients of AGB against certain third parties who contracted with Crystal Wealth entities.[21]

23. The Motion Judge also commented, in *obiter*, that the Receiver's Action and the proposed class action were capable of proceeding together. On this premise, he observed that there was no need to conduct a full comparative analysis under the preferable procedure criterion in s. 5(1)(d) of the *CPA*.[22] As discussed below, the Motion Judge's comments with respect to the preferable

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[19] Reasons for Decision at paras. 4, 94, AC Volume 1, Tab 3, pp. 20, 31.
[20] Reasons for Decision at para. 77, AC Volume 1, Tab 3, p. 28.
[21] Reasons for Decision at paras. 163-167, AC Volume 1, Tab 3, pp. 43-44.
[22] Reasons for Decision at paras. 145-158, AC Volume 1, Tab 3, pp. 41-42.

procedure criterion no longer apply in light of recent developments. In particular, the settlement of the Receiver's Action means that the class proceeding and the Receiver's Action will not proceed together.

## I. Subsequent Events to the Motion Judge's Decision: The Receiver's Action is Settled

24. On January 15, 2020, BDO and the Receiver entered into a settlement agreement in the Receiver's Action (the "Receiver Settlement") pursuant to which the Receiver would receive consideration of $32.5 million (the "Receiver Payment") to be distributed to the Stakeholders in CWMS and the Crystal Wealth Funds.[23] The Receiver Settlement was contingent upon the OSC (i) approving a contemporaneous settlement between BDO and OSC Staff (the "OSC Settlement") in OSC Staff's regulatory enforcement proceeding against BDO and (ii) ordering that $2.5 million of the Administrative Monetary Penalty agreed to be paid by BDO under the OSC Settlement be paid to the Receiver for the purposes of distribution to unitholders (the "OSC Payment"). The OSC Settlement was approved by the OSC on January 24, 2020.[24]

25. On June 2, 2020, Justice Koehnen of the Ontario Superior Court of Justice (Commercial List) issued an Order approving the Receiver Settlement subject to the Receiver's receipt of the OSC Payment.[25] In his Endorsement approving the Order, Justice Koehnen noted that the Receiver's Settlement was "substantial" and "represent[ed] a substantial benefit to investors in Crystal Wealth" given the early stage of the Receiver's Action.[26]

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[23] Fifth Receiver Report at paras. 72-73, RC Tab 11, pp. 276-277.

[24] Fifth Receiver Report at para. 69, RC Tab 11, p. 276. See also: https://www.osc.gov.on.ca/en/Proceedings_set_20200120_bdo-canada-llp.htm.

[25] Order of Justice Koehnen, RC Tab 9, pp. 241-247.

[26] Endorsement of Justice Koehnen, RC Tab 10, pp. 248-250.

26. Justice Koehnen's Order also approved the Receiver's Fifth Report, as well as a third interim distribution of approximately $47 million to unitholders. The funds comprising the third interim distribution consist of the proceeds of the Receiver and OSC Payments along with certain additional recoveries made by the Receiver since the date of its Fourth Report.[27] On July 27, 2020, following Justice Koehnen's Order and the completion of the steps required under the Receiver Settlement, the Receiver's Action was dismissed on consent.[28]

## PART III - RESPONDENT'S POSITIONS ON ISSUES RAISED BY THE APPELLANTS

### A. The Motion Judge Correctly Determined that the Pleadings Do Not Disclose a Cause of Action

#### *(i) Overview*

27. Subsection 5(1)(a) of the *CPA* requires a plaintiff to demonstrate that the pleadings disclose a cause of action. In order to determine whether the claim in negligence discloses a cause of action against BDO, the Motion Judge's task was to assess whether it "is plain and obvious that no duty of care can be recognized" based on the facts as alleged.[29]

28. In the context of a certification motion, the interests of judicial efficiency and access to justice require a motion judge to engage and address even complex questions of law in deciding whether the 5(1)(a) criterion has been met.[30] The "plain and obvious" test also has important policy implications; as the British Columbia Court of Appeal recently stated:

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[27] Fifth Receiver Report at paras. 80 and Appendix 2, RC Tab 11, pp. 278-279. Like the Receiver's first and second interim distributions, the proceeds distributed to unitholders through the third interim distribution are exclusive of holdbacks relating to creditor claims and the Receiver's professional fees.

[28] Order of Justice Gilmore dated July 27, 2020, RC Tab 12, pp. 283-285.

[29] *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771 (Ont. C.A.) at para. 24, RBA, Tab 13.

[30] *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras. 19-20, ABA Tab 15; *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 at paras. 87-95, RBA Tab 2.

> Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in *all* cases. As recent decisions of the Supreme Court of Canada … illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.[31]

29. In cases alleging duty of care in a claim for pure economic loss – such as this one – courts have held that "significant scrutiny" must be applied as indeterminacy concerns will be particularly pronounced.[32] The analysis of duty of care is governed by the *Anns/Cooper* framework, pursuant to the contemporary approach set out by the Supreme Court of Canada in its recent decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*.[33] The first question to be asked in applying the *Anns/Cooper* test is whether the relationship in question either falls within a recognized category or is analogous to one.[34]

30. Both the Direct and OSC-Mediated Duties alleged by the appellants have been considered and rejected by Canadian appellate courts – including the Supreme Court of Canada and the Court of Appeal for Ontario – in the specific context of auditor's negligence claims. The Motion Judge correctly followed this settled law in holding that, pursuant to the *Anns/Cooper* test, neither of the duties alleged by the appellants discloses a viable cause of action.

### *(ii) The Motion Judge Properly Held that BDO Owed No Direct Duty of Care to Crystal Wealth Investors*

31. The Motion Judge was correct in finding it to be "plain and obvious" that BDO did not owe Crystal Wealth investors the Direct Duty. This alleged duty is precluded by the body of case

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[31] *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante* Inc., 2014 BCCA 36 at para. 64, RBA Tab 25.

[32] *Lavender* at para. 72, citing, for example, *Martel Building Ltd v. R.*, [2000] 2 S.C.R. 860 at para. 35 and *Mandeville v. Manufacturers Life Insurance Co.*, 2014 ONCA 417, paras. 148-150, ABA Tab 16.

[33] 2017 SCC 63 ["*Livent*"], ABA Tab 7.

[34] *Livent* at paras. 25-28, ABA Tab 7.

law anchored by the Supreme Court of Canada's decision in *Hercules*[35] (recently affirmed by the Supreme Court in *Livent*).

32. Canadian Courts have applied a clear and sensible framework for cases involving allegations that an auditor owes duties to investors. This framework distinguishes between:

(a) periodic, statutory audits, which are performed so that the audit client can comply with a periodic (typically annual) requirement set out in legislation; and

(b) audits (or similar work) prepared at the discretion of an audit client for a specific business purpose, such as the solicitation of a specific investment from a discrete group of investors.

33. As correctly found by the Motion Judge,[36] this case concerns an audit falling into the first category – an audit that was required, by statute, to be conducted once per year. It is settled law, due to policy concerns over indeterminate liability and a lack of proximity, that such audits *do not entail* a duty to investors in the audit client.

The Implications of *Hercules*

34. The Supreme Court's reasons in *Hercules* explain why statutory audit mandates do not give rise to a duty of care to investors for the purpose of making investment decisions.[37] In that case, the Supreme Court considered and rejected the assertion that the defendant auditor – by virtue of having audited annual financial statements pursuant to the requirements of corporate legislation –

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[35] *Hercules*, ABA Tab 11.

[36] Reasons for Decision at paras. 19-20, AC Volume 1, Tab 3, p. 21.

[37] While the *Anns* test has been refined since the Court's reasons in *Hercules* (in particular, with the result that matters previously considered at the "policy considerations" stage are now addressed as part of the assessment of proximity), the Court made clear in *Livent* that the findings in *Hercules* on the scope of auditor duties remain good law.

owed a duty of care to shareholders of the client company. In *Hercules*, as here, the audited periodic financial statements had been presented to the plaintiff shareholders.[38] In *Hercules*, as here, the claim was for losses arising from the plaintiffs' investments in the audit client.[39] In *Hercules*, the Supreme Court rejected the existence of a duty to the investors, finding that the only actionable duty owed by the defendant auditor was to its client, the company.

35. In reaching this determination, the Supreme Court expressly recognized that an auditor will owe a *prima facie* duty of care to myriad groups of persons other than its corporate client – including shareholders, creditors, potential takeover bidders, investors and other parties – for a wide variety of purposes.[40] Critically, however, the Supreme Court went on to hold that the *prima facie* duty owed to the plaintiffs was negated by public policy concerns, specifically the concern over indeterminate liability.[41] The Supreme Court reached this decision, in part, out of concern that imposing a duty on auditors to investors in the context of a statutorily-mandated periodic audit would do widespread economic damage not just to auditors but to a range of downstream stakeholders, including corporations and their customers.[42]

36. *Hercules* involved a small group of shareholder investors, all of whom were known to the auditor at the time it completed the audits in issue. In light of the policy considerations noted above, however, the Supreme Court expressly found that knowledge of the investors was insufficient to ground a duty of care, as the audits – again, being periodic statutory audits – had

[38] *Hercules* at para. 42, ABA Tab 11.
[39] *Hercules* at para. 1, ABA Tab 11.
[40] *Hercules* at para. 32, ABA Tab 11.
[41] *Hercules* at para. 33, ABA Tab 11.
[42] *Hercules* at para. 34, ABA Tab 11.

not been prepared for the express purpose of attracting specific investments from those specific investors.[43]

37. The finding in *Hercules* that no duty was owed *to investors* did not mean that the auditor had no duty at all. On the contrary, the Supreme Court considered the rule in *Foss v. Harbottle* in explaining that the audit client (directly, or through a proxy such as by way of a derivative action) would have a claim against the auditor in negligence. By expressly placing the right of action with the audit client, and not investors in that audit client, the Supreme Court explained that it was in part avoiding the "procedural hassle of a multiplicity of actions."[44]

*Livent*

38. In its 2017 decision in *Livent*, the Supreme Court of Canada again considered the issue of auditor liability arising out of a periodic statutory audit. The relationship between the plaintiff and the auditor in *Livent* was different from the relationship at issue in *Hercules.* The claim was brought in the context of an insolvency by a plaintiff receiver, acting on behalf of the defendant auditor's corporate client. The claim was, in other words, not brought on behalf of investors in the audit client. In its reasons explaining why the concerns of indeterminate liability that arose in *Hercules* did not arise in the case before it, the Supreme Court affirmed and emphasized its analysis in *Hercules*.

39. The Supreme Court reiterated the critical distinction between claims brought by "determinate corporate" claimants, on the one hand, and "indeterminate stakeholder claims", on the other.[45] The Court stressed that while an action brought by a single corporate claimant, such

[43] See *Hercules* at paras. 45-47, ABA Tab 11.
[44] See *Hercules* at paras. 58-59, ABA Tab 11.
[45] *Livent* at para. 88, ABA Tab 7.

as the claim brought by the receiver in *Livent,* will not attract indeterminacy concerns, claims brought by investors *will* give rise to indeterminacy. As reasoned by the Supreme Court, "any number of investors could rely on an audit to inform their investment decisions".[46]

40. The Court distinguished the claim brought by Livent's receiver from "indeterminate stakeholder claims" such as those at issue in *Hercules*. The Court stressed that the situation before it was a "far cry" from the concerns expressed in *Hercules* on the facts of that case over a "limitless potential quantum of lost investments by innumerable third parties relying on audit statements for their own investment decisions".[47]

41. As such, the Supreme Court's reasons in *Livent* are entirely consistent with the principles first enunciated by the Court in *Hercules*. In both cases, the Court approved of auditor negligence claims being brought *by or directly on behalf of* the audit client. In *Hercules,* the examples given were claims by a corporation against its auditors, or a derivative action. In *Livent*, the example before the Court was a receiver that had been appointed to stand in the shoes of and act on behalf of the audit client. In contrast, in both cases, the Court made clear that claims brought by investors in the audit clients were *not* acceptable as a form of recourse for auditor negligence.

42. In rendering its decision in *Livent*, the Supreme Court refined the application of the *Anns* test from what it had been at the time *Hercules* was decided. Briefly stated, the Court increased the emphasis on the proximity test conducted at the first stage of the test, including to capture considerations such as indeterminate liability that had previously been engaged at the second, policy considerations stage of the test.[48] Although the Court in *Livent* applied a refined version of

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[46] *Livent* at para. 70, ABA Tab 7.

[47] *Livent* at para. 72, ABA Tab 7, citing to *Hercules* at para. 32, ABA Tab 11.

[48] *Livent* at para. 26, ABA Tab 7.

the *Anns* test, both the substance of the Court's decision (as outlined above) and the Court's express findings reflect that it affirmed *Hercules* and that *Hercules* remains "binding authority governing an auditor's duty of care in relation to a statutory audit".[49]

The Appellants Have Not Viably Pleaded BDO's Knowledge of Identity of Class Members

43. The appellants place significant emphasis on their purported pleading to the effect that BDO knew the identity of all the class members. The appellants assert that, as they have purportedly pleaded this fact, it must be taken as true, and that if it is taken as true, it furnishes an answer to the indeterminacy and proximity bars to their claim. The appellants' argument fails for at least two reasons, and the Motion Judge correctly declined to adopt it.

44. First, even reading the pleadings generously and accepting the facts pleaded as true, it is evident from the face of the appellants' Amended Statement of Claim that BDO *did not know and could not have known* the identity of the investors behind this class action. The pleadings reflect the following:

(a) the Amended Statement of Claim pleads that BDO only issued audit opinions up to and including Crystal Wealth's 2015 fiscal year, yet

(b) the proposed class includes all unitholders who invested in the Crystal Wealth Funds between April 2007 and *April 2017* who retained their investments as of April 2017.[50]

45. Even assuming for the sake of this argument that BDO's audit function gave it knowledge of historic investors, BDO could not have known of any of the new investors. It could not have

[49] *Livent* at para. 22, ABA Tab 7.

[50] Amended Statement of Claim at paras. 1(a)(i) and 78, AC Volume 1, Tab 4, pp. 49, 71.

known whether historic investors made new investment decisions in 2016 and 2017. Notably, the category of investors that could not possibly have been known to BDO includes the proposed representative plaintiff Mr. Whitehouse, who only invested in the Crystal Wealth Funds for the first time after BDO issued its final audit opinion.[51] Accordingly, on the face of the pleadings – and contrary to the appellants' claims on this appeal – the duty pleaded against BDO would entail obligations to an unknown and unknowable group of prospective investors, including anyone who might have decided to invest in Crystal Wealth *after* the BDO Audit Period.

In any Event, Knowledge of Identity of Class Members is Irrelevant to the Analysis

46. More fundamentally, even if the pleading *did* establish that BDO knew the identity of the investors in the Crystal Wealth Funds, this could not overcome the settled law on indeterminacy and proximity that negates a finding of duty in stage 2 of the *Anns* test. The precedents establish that the specific factual knowledge of the identity of investors is irrelevant: indeterminacy is a question of the character or class of the person(s) to whom a duty is allegedly owed, and is not limited to the specific factual circumstances of a given case.

47. The distinction between specific, factual knowledge of investors, and the concept of the category of investors as an indeterminate class of persons, was developed in *Hercules*. The facts of the case involved a small number of investors in the audit client, all of whom were known to the defendant auditor.[52] Specific knowledge of the investors' identity, by itself, was of no help to

[51] Transcript of the Cross-Examination of Anthony Whitehouse dated October 31 2019, p. 39, lines 1-21 ["Whitehouse Cross-Examination Transcript"], RC Tab 2, p. 45.

[52] *Hercules* at para. 45, ABA Tab 11.

the plaintiff investors because the defendant auditor did not – and could not – know their character in a way that circumscribed the scope of its potential liability.[53]

Cases Where a Duty is Found are Illustrative and Distinguishable

48. Finally, in considering whether a Direct Duty was owed to investors in the Crystal Wealth Funds by the auditor of those funds, it is helpful to consider the cases in which the courts *have* imposed duties upon auditors to investors. The jurisprudence confirms that, for auditors to owe such a duty, the audit work in question must have been undertaken *not* as a periodic statutory audit but rather in furtherance of a specific, business-driven investment. For instance, in *Hercules*, the Supreme Court discussed a prior decision, *Haig v. Bamford*, in which an auditor was found liable to investors in circumstances where the audit was undertaken for the narrow purpose of soliciting a specific, enumerated investment from a discrete class of investors.[54]

49. The Motion Judge recognized the potential for a duty to investors, similar to that found in *Haig*, in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*. In *Excalibur*, the Motion Judge considered whether to certify a class action brought against an auditor on behalf of a small group of investors who had purchased shares in the auditor's corporate client pursuant to a private placement. In that case, and in the context of a specific investment-driven engagement rather than a periodic statutory audit, His Honour determined that the plaintiff's pleading did disclose a reasonable cause of action under s. 5(1)(a).[55]

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[53] *Hercules* at para. 37, ABA Tab 11. Indeed, the Supreme Court went so far as to note that indeterminate liability would arise even in situations where the auditor did not know the specific amounts invested by each investor*:* *Hercules* at para. 47, ABA Tab 11.

[54] *Hercules* at para. 40, ABA Tab 11 citing *Haig v. Bamford*, [1977] 1 S.C.R. 466, ABA Tab 10.

[55] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, aff'd 2016 ONCA 916 at paras. 79-99, RBA Tab 11.

50. As set out above, the applicable jurisprudence – anchored by the Supreme Court's reasons in *Hercules* – makes it clear that auditors simply do not owe a duty to investors engaged in making personal investment decisions in the context of a periodic, statutory audit. The Motion Judge correctly applied binding precedent in holding that the present case fits into an established category of cases which deny the existence of such a duty.

### *(iii) The Motion Judge Properly Held That BDO Did Not Owe a Duty to Class Members Based on Reliance by the OSC*

51. The second, OSC-Mediated Duty alleged by the plaintiffs posits that BDO was liable to investors in the Crystal Wealth Funds because the OSC relied upon BDO. The pleaded theory of liability is circuitous. It alleges that (i) BDO was required to furnish audit reports to the OSC pursuant to Ontario securities laws; (ii) that the OSC allegedly relied upon these audit reports in permitting Crystal Wealth's continued operations; (iii) that Crystal Wealth maintained its operations in light of the OSC's permission; and (iv), that investors in Crystal Wealth were harmed as a result. On this basis, the appellants allege that a duty should be recognized making BDO liable to the investors in the Crystal Wealth Funds.[56]

52. Like the appellants' allegation of a Direct Duty to investors, the appellants' allegation of a duty based on the OSC's reliance has been raised before and has been rejected. The law is settled that such a duty is not recognized by Ontario courts. The decision of the Court of Appeal for Ontario in *Lavender v. Miller Bernstein*, establishes that proximity considerations negate a duty that is mediated through the purported reliance of the OSC. As such, the Motion Judge was correct in holding that the second alleged duty must also fail the s. 5(1)(a) test.

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[56] Amended Statement of Claim at paras. 61-62, AC Volume 1, Tab 4, p. 64.

53. In *Lavender*, a unanimous panel of the Ontario Court of Appeal declined to find that an the OSC-Mediated duty of care was owed by the auditor defendant. In so doing, it followed the Supreme Court's guidance in *Livent* regarding the requirements for a "sufficiently close relationship".[57] The Court of Appeal acknowledged that in cases involving claims of auditors' negligence and economic loss more broadly, "significant scrutiny" and "rigorous examination" were required in order to ensure that the alleged duty met the critical threshold requirements of proximity and reasonable foreseeability.[58] Leave to appeal the Court of Appeal's decision to the Supreme Court was denied.[59]

54. While the Court of Appeal rendered its decision on multiple grounds, its primary finding was that there was a lack of proximity between the auditor and investors in connection with the auditor's preparation of a report *for the OSC*.[60] As stated by the Court of Appeal: "the interposition of the OSC and [the audit client] between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care".[61]

55. The soundness of the Court of Appeal's reasoning in *Lavender* is supported by Supreme Court of Canada and Ontario Court of Appeal jurisprudence which establishes that, due to a lack of proximity, statutory regulators, such as the OSC, do not owe a duty of care to individual members of the public who deal with the organizations overseen by the regulator, including investors in market participants overseen by the regulator.[62] It follows that there cannot logically

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[57] *Lavender* at para. 30, ABA Tab 16.

[58] *Lavender* at para. 72; see also paras. 24 to 49, ABA Tab 16.

[59] (2019), [2018] S.C.C.A. No. 488 (S.C.C.), RBA Tab 16.

[60] *Lavender* at para. 65, ABA Tab 16.

[61] *Lavender* at para. 66, ABA Tab 16.

[62] *Morgis v. Thomson Kernaghan & Co*., [2003] O.J. No. 2504 (Ont. C.A.) at para. 27, RBA Tab 19; *Cooper v. Hobart*, 2001 SCC 79 at paras. 40-50, RBA Tab 8; *Piedra v. Copper Mesa Mining Corp*., 2011 ONCA 191 at paras. 61-65, RBA Tab 20.

be sufficient proximity between BDO and the investors to ground a duty of care flowing through the OSC's reliance on BDO's report, as the OSC, which is interposed between BDO and the investors and accordingly more proximate to the investors than BDO, owes no duty of care to the investors due to a lack of proximity.

56. As a further ground for rejecting the alleged OSC-Mediated duty of care alleged in *Lavender*, the Court of Appeal identified the statutory scheme – the Ontario *Securities Act* and related regulations – as providing additional context for the finding that there was no proximity between the auditor and the investor class members.[63]

57. As the Motion Judge correctly determined, *Lavender* cannot be distinguished on the basis that the audit work product in that case was "confidential" but BDO's audit opinions were not.[64] Some Crystal Wealth investors may have been provided with or had access to BDO's audit opinions. However, they were not provided with and had no connection to the audit opinion as provided to and allegedly relied upon by the OSC for the purpose of overseeing Crystal Wealth's operations. In other words, the interface between BDO and the OSC – which is essential to the OSC-Mediated Duty allegations – was just as "confidential" to the plaintiff investors in this case as it was in *Lavender*.[65]

### *(iv) The Motion Judge Properly Held That the Appellants Failed to Plead a Direct Relationship Between BDO and the Unitholders*

58. The appellants make various assertions to the effect that the Motion Judge misapprehended, or too strictly construed the appellants' pleadings, including the purported pleading of a direct

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[63] *Lavender* at para. 71, ABA Tab 16.

[64] *Lavender* at para. 125, ABA Tab 16.

[65] For an illustration of the degree of confidentiality applied by the OSC to the audit opinions in question, see *BDO Canada LLP (Re)*, 2019 ONSEC 21, RBA Tab 3.

relationship between BDO and the investors. While these arguments are primarily addressed by the precedents discussed above, it is also important to point out the difference between pleadings of fact and pleadings of legal conclusions.

59. As the Motion Judge correctly observed, the "plain and obvious" test that governs the analysis under s. 5(1)(a) of the *CPA* requires a judge to accept material facts pleaded as true, but does not require a judge to accept any pleaded legal *characterizations* or *conclusions* based on these facts.[66] Similarly, the Court is under no obligation to accept allegations that are contradicted by other elements of the pleading as true.[67]

60. To the extent that the appellants' Statement of Claim asserts a direct relationship between BDO and the Crystal Wealth investors, that assertion is a legal conclusion which the Motion Judge was entitled to examine. He was not required to accept it as a logical extension of the material facts pleaded by the appellants. The Motion Judge quoted and correctly accepted the appellants' pleading that BDO's audit opinions were addressed to unitholders as fact. However, he was still correct when he determined that, *as a matter of law*, the relationship between BDO and class members was a "conceit of the *Securities Act* and involved the interposition of the OSC".[68]

**B. Aggregate Damages Should Not be Certified as a Common Issue**

61. The Motion Judge declined to certify the appellants' proposed common issue relating to issues of aggregate damages, finding that the class members' damages were by nature individual

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[66] Reasons for Decision at paras. 91-92, AC Volume 1, Tab 3, p. 30, citing *Deluca v. Canada (AG)*, 2016 ONSC 3865. See also *Das v. George Weston Limited*, 2018 ONCA 1053 at paras. 30, 70-78, 91, RBA Tab 9.

[67] *Boudreau v. Bank of Montreal*, 2012 ONSC 3965, RBA Tab 6.

[68] Reasons for Decision at para. 101, AC Volume 1, Tab 3, p. 33.

issues.[69] Having regard to the test set out in s. 24 of the *CPA*, the Motion Judge's decision was entirely appropriate.

62. At the certification stage, in order to establish a common issue with respect to aggregate damages, a plaintiff must show that it is reasonably likely that the requirements set out in s. 24 will be satisfied. Among other requirements, it is necessary that the aggregate or part of the defendant's liability to the class members can be reasonably determined without proof by individual class members.[70]

63. It is unlikely that this requirement would be satisfied.

64. The Ontario Court of Appeal stated in *Fulawka v. Bank of Nova Scotia*[71] that the requirement is intended to restrict the availability of aggregate damages awards to situations where losses are ascertainable on a "global", "top down" basis. The Court contrasted this approach to the "bottom up" approach of aggregating individual claims through proof from individual class members.[72]

65. The Marino Affidavit reflects that the appellants' proposed approach falls into the latter category. The affidavit simply sets out a "Methodology to Calculate Individual Class Member Losses" whereby losses would be determined on a unitholder-by-unitholder basis and in turn combined into an overall aggregate total.[73] As such, the appellants have not provided any methodology for arriving at a "global" damages total that can be determined without assessing and

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[69] Reasons for Decision at para. 77, AC Volume 1, Tab 3, p. 28.
[70] *CPA*, s. 24(1)(c).
[71] 2012 ONCA 443 ["*Fulawka*"], RBA Tab 12.
[72] *Fulawka*, at para. 126, RBA Tab 12.
[73] Affidavit of Domenic Marino sworn September 20, 2019, AC Volume 2, Tab 14, pp. 642-646.

in turn aggregating each individual unitholder's losses based on their particular investments in the Crystal Wealth Funds and distributions, withdrawals and redemptions.

66. Finally, s. 24(3) of the *CPA* bears noting as it further justifies the Motion Judge's conclusion on this issue. This provision provides that in deciding whether to award aggregate damages, the court must 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. In this case, the Receiver's previous *per unit* distributions to Crystal Wealth investors – including following the settlement of the Receiver's Action – makes clear that there are no such concerns in this case.

### C. The Motion Judge Properly Held that the Proposed Representative Plaintiffs Were Not Suitable

67. Mr. Whitehouse has acknowledged that he is concurrently pursuing an action (the "Media House Action") against Media House Capital Corp. and certain related entities (together, the "Media House Defendants") who were third parties connected to the alleged fraud that is alleged to have occurred in the Crystal Wealth Media Fund but who are not named in the proposed class action or the Receiver's Action.[74] The alleged misconduct in connection with the Media House Defendants formed a basis for the OSC's April 2017 Receivership Application[75] and is a central focus of the appellants' allegations against BDO in this proceeding.[76] AGB is also counsel of record for Mr. Whitehouse and other individual Plaintiffs pursuing the Media House Action.

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[74] Whitehouse Cross-Examination Transcript at pp. 77-85, RC Tab 2, pp. 48-56.

[75] See, for example, First Receiver Report at paras. 4-5, AC Volume 1, Tab 8B, p. 175.

[76] See, for example, Amended Statement of Claim at paras. 28-54, AC Volume 1, Tab 4, pp. 58-63.

68. In January 2018, AGB, on behalf of Mr. Whitehouse, served the Media House Defendants with an Amended Statement of Claim seeking to add several new named Plaintiffs, including another Crystal Wealth unitholder named Gary Froats. Mr. Froats was the financial advisor to the proposed representative plaintiffs, Jason and Carrie Couch between 2006 and 2012 through his company, S&P Financial.[77] Mr. Froats later worked at S&P Financial with Al Housego, who later became the Couches' Investment Advisor.[78] According to the Couches, Mr. Froats recommended that the Couches transfer all of their investments with S&P Financial from certain mutual funds to the Crystal Wealth Funds. Mr. Froats and Mr. Housego made various representations regarding the nature and performance of the Crystal Wealth Funds. Moreover, the Couches do not recall being advised that Crystal Wealth was only permitted to solicit investments from "accredited investors" (which they do not appear to have been during the material time).[79]

69. The Motion Judge found that none of the three representative plaintiffs could fairly and adequately represent the interests of the class due to conflicts of interests arising out of the Media House Action. In doing so, he invoked his prior decisions in *Persaud*[80] and *Vaeth*[81], in which he discussed types of circumstances that may give rise to conflicts in the class actions context. In *Persaud*, the Motion Judge noted two such categories, among others:

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[77] Transcript of the Cross-Examination of Carrie Couch held on October 29th, 2019 ["Carrie Crouch Cross-Examination Transcript"] at line 6, p. 11 – line 24, p. 12, RC Tab 3, p. 57A.

[78] Carrie Couch Cross-Examination Transcript at line 4, p. 17 – line 4, p. 20, RC Tab 3, p. 58.

[79] Carrie Couch Cross-Examination Transcript, pp. 17-24, RC Tab 3, pp. 58-59.; Transcript of the Cross-Examination of Jason Couch held on October 29th, 2019 at pp. 21-28, RC Tab 4, pp. 61-62. The Couches were B.C. residents in the 2012/2013 timeframe. Given their assets and income during this period, they did not meet any of the threshold criteria applicable to "accredited investors" under National Instrument 45-106 (which is incorporated as BC Reg 227/2009 into the B.C. Securities Act, R.S.B.C. 1996, c. 418, RBA Tab 27).

[80] *Persaud v. Talon International Inc*., 2018 ONSC 5377 ["*Persaud*"], ABA Tab 20.

[81] *Vaeth v. North American Palladium Ltd.,* 2016 ONSC 5015 ["*Vaeth*"], ABA Tab 24.

(a) Conflicts arising from a divergence of interest between the representative plaintiff and class members; and

(b) Conflicts arising from the lawyer's divided loyalties arising out of the class proceeding.[82]

70. Both categories apply in this case and justify the Motion Judge's conclusion that Mr. Whitehouse and the Couches cannot be suitable representative plaintiffs. The reasonableness of the Motion Judge's conclusion is amply demonstrated by the specific circumstances of Mr. Whitehouse's and Mr. Froats' involvement in the Media House Action.[83]

71. First, Mr. Whitehouse has made allegations in the Media House action that constitute admissions in favour of BDO's position in the class action and, in turn, undermine the appellants' position. Most strikingly, Mr. Whitehouse alleges that the Media House Defendants colluded between themselves and Clayton Smith to hide their alleged fraud from BDO and unitholders, including by forging documents provided to BDO and falsely representing to BDO that the Media Fund's film loan investments were valid and collectible.[84] Such admissions indicate a divergence of interest as between Mr. Whitehouse and other class members. AGB's own loyalties are divided to the extent that it is advancing the allegations on behalf of Mr. Whitehouse as an individual client in the Media House Action while also representing Mr. Whitehouse in the class action (where the same allegations constitute prejudicial admissions).

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[82] *Persaud* at para. 175, ABA Tab 20.

[83] The Motion Judge's conclusions on this issue involved findings of mixed fact and law; as such, the applicable standard of review is palpable and overriding error (see *McMullen v. Norton Rose Fulbright Canada LLP*, 2019 ABCA 181 (Alta. C.A.) at para. 27, RBA Tab 17.

[84] Statement of Claim in Media House Action, Exhibit 3 to the Whitehouse Cross-Examination Transcript at paras. 31 and 44, RC Tab 5, pp. 73 and 75.

72. Second, the Media House Action is an individual action, and Mr. Whitehouse conceded that he has not previously considered whether he should have included other Crystal Wealth unitholders in the Media House Action.[85] Mr. Whitehouse's unexplained failure to include other unitholders while pursuing an exclusive avenue of recovery against a defendant that could easily have been added in the class action further calls into question his ability to make decisions that bear in mind the interests of all class members and, in turn, his ability to act on their behalf in the class action.

73. Third, contrary to the appellants' submissions, the Motion Judge did not conclude that the Couches were conflicted based on a finding that they were parties to the Media House Action. Rather, his conclusion was based on AGB's above-noted representation of Gary Froats, the Couches' former financial advisor, in the Media House Action. The Couches have a potential claim against Mr. Froats because, by their own account, he made representations that induced them to invest in the Crystal Wealth Funds and failed to advise them that Crystal Wealth was only permitted to solicit investments from accredited investors (which, as stated above, they do not appear to have been at the time they invested).[86] The Couches may have a claim against Mr. Froats, who is an individual client of AGB, for some or all of their investment losses in connection with the Crystal Wealth Funds. AGB cannot effectively represent both Mr. Froats and the Couches in their capacity as representative plaintiffs with undivided loyalty.

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[85] Whitehouse Cross-Examination Transcript at p. 85, lines 10-19, RC Tab 2, p. 56.

[86] Carrie Couch Cross-Examination Transcript, pp. 17-24, RC Tab 3, pp. 58-59.; Transcript of the Cross-Examination of Jason Couch held on October 29th, 2019 at pp. 21-28, RC Tab 4, pp. 61-62. The Couches were B.C. residents in the 2012/2013 timeframe. Given their assets and income during this period, they did not meet any of the threshold criteria applicable to "accredited investors" under National Instrument 45-106 (which is incorporated as BC Reg 227/2009 into the B.C. Securities Act, R.S.B.C. 1996, c. 418, RBA Tab 27). .

## D. The Certification Hearing was Procedurally Fair

74. The appellants argue that the Motion Judge erred in requiring the respondents to argue first at the certification hearing, which, in the words of the appellants, "restricted" their oral submissions to reply. This argument is without merit.

75. First, the Motion Judge was entitled to conduct the hearing as he saw fit pursuant to s.12 of the *CPA*.[87] Second, and in any event, if the appellants took issue with the Motion Judge's conduct of the hearing, they had the opportunity to raise their concerns by way of objection at the relevant time, so that any such concerns could be considered and addressed.

76. It is well settled, including in decisions of this Court, that an appellant cannot raise an issue on appeal where the appellant made a tactical decision not to raise the issue at the first instance.[88] The appellants made such a decision at the certification hearing.

77. Finally, there was no unfairness to the appellants. The parties' arguments were set out extensively and summarized in writing, as evidenced by the more than 60 pages of written arguments submitted by the appellants at certification, including a 12 page reply factum.[89] There is no suggestion that BDO raised any point in oral argument that was not fully briefed in its factum. Even if it had, the appellants were afforded an opportunity to make oral reply.

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[87] See also *Restoule v. Strong (Township)*, [1999] O.J. No 2979 (C.A.), RBA Tab 24, where the Court of Appeal held that a trial judge in a non-jury trial has the discretion to conduct a hearing as the trial judge sees fit.

[88] *Black v. Owen*, 2012 ONSC 400 (Div. Ct.) at para. 35, RBA Tab 5; *R. v. Brown*, [1993] 2 S.C.R. 918 in the dissent of L'Heureux Dubé, J., at para. 20, RBA Tab 22; See also *R v. Lima*, [2009] O.J. No 3805 (Sup. Ct.) at paras. 2-5, RBA Tab 23, where an admission by counsel at trial was deemed a tactical decision that was not appropriate to raise on appeal.

[89] This includes the Plaintiffs' Factum and Reply Factum on certification (RC Tabs 6 and 8).

## PART IV - ADDITIONAL ISSUE RAISED BY THE RESPONDENT

### A. If This Court Overturns the Motions Judge on s. 5(1)(a), this Case Should be Returned to the Court Below so that a Full Certification Analysis May be Conducted

78. BDO submits that, for all of the reasons set out above, that the Motion Judge was correct and that his decision should be upheld. However, in the alternative, if this Court determines that the Motion Judge erred in the application of section 5(1)(a), the appropriate recourse is to remit the other certification criteria, including the question of whether a class proceeding would be the preferable procedure, to the court of first instance for reconsideration.[90]

79. While the Motion Judge decided the certification motion on the reasonable cause of action criterion under s. 5(1)(a), His Honour proceeded to discuss the other certification criteria in *obiter*. As he decided the case under the first branch of the test for certification, a comprehensive preferable procedure analysis was unnecessary and the Motion Judge did not conduct one. Further, the Motions Judge's *obiter* comments with respect to the preferable procedure criterion were premised on the assumption that the proposed class action and the Receiver's Action would proceed together. Thus, he concluded that it was not necessary to conduct a full comparative analysis between the two procedures.

80. Subsequent developments now make it clear that the Receiver's Action and the class action *will not* proceed together.

81. Appellate courts have remitted certification decisions back to the lower court when the lower court did not conduct a complete analysis of the certification criteria other than the criterion

[90] This Court has the statutory authority to remit the entire certification hearing or particular issues to the lower court pursuant to s.12 of the *CPA* and ss. 134(1)(b) 134(6) and 134(7) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

on which the motion was decided.[91] In particular, this Court has held that it is appropriate to remit an overturned certification decision back to the lower court on the basis that "it is better for … complex and nuanced decision[s] on the certification motion to be decided in the first instance by one of the judges designated to hear class proceedings".[92] The advantage of reconsideration in the court below is all the more apparent in light of the resolution of the Receiver's Action, which suggests that the Motions Judge should be afforded the opportunity to perform a complete preferable procedure analysis and to determine the balance of the certification criteria in light of the altered procedural landscape.

**PART V - ORDER REQUESTED**

82. BDO requests an Order dismissing this appeal with costs.

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

Andrea Laing

Doug McLeod

[91] *Amyotrophic Lateral Sclerosis Society of Essex (County) v. Windsor (City)*, 2013 ONSC 6276 ["*ALS Society*"] at paras. 2-7 discussing the oral reasons provided by the Divisional Court in remitting a certification decision to the lower court after overturning the motion judge on the s.5(1)(a) criterion, RBA Tab 1; *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2001] O.J. No. 2312 (Ont. C.A.) at para. 34, RBA Tab 18; *Jiang v. Peoples Trust Co*, 2017 BCCA 119 at para. 123, RBA Tab 14.

[92] *ALS Society* at para. 3, RBA Tab 1.

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## SCHEDULE A

## LIST OF AUTHORITIES

| **Jurisprudence** | |
|---|---|
| 1. | *Amyotrophic Lateral Sclerosis Society of Essex (County) v. Windsor (City),* 2013 ONSC 6276 |
| 2. | *Arora v. Whirlpool Canada LP,* 2013 ONCA 657 |
| 3. | *BDO Canada LLP (Re),* 2019 ONSEC 21 |
| 4. | *Bearcat Explorations Ltd., Re*, 2003 ABCA 365 |
| 5. | *Black v. Owen*, 2012 ONSC 400 |
| 6. | *Boudreau v. Bank of Montreal*, 2012 ONSC 3965 |
| 7. | *Cooper v. Hobart*, 2001 SCC 79 |
| 8. | *Das v. George Weston Limited*, 2018 ONCA 1053 |
| 9. | *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63 |
| 10. | *Duggan v. Durham Region Non-Profit Housing Corporation*, 2018 ONSC 1811 |
| 11. | *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP,* 2014 ONSC 4118 |
| 12. | *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 |
| 13. | *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771 (Ont. C.A.) |
| 14. | *Hercules Managements* v. *Ernst & Young LLP*, [1997] 2 SCR 165 |
| 15. | *Jiang v. Peoples Trust Co*, 2017 BCCA 119 |
| 16. | *Lavender v. Miller Bernstein*, 2017 ONSC 3958 |
| 17. | *Lavender v. Miller Bernstein*, 2018 ONCA 729 |
| 18. | *Lavender v. Miller Bernstein* (2019), [2018] S.C.C.A. No. 488 (S.C.C.). |
| 19. | *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.,* [2001] O.J. No. 2312 (Ont. C.A.) |

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| 20. | *Morgis v. Thomson Kernaghan & Co*., [2003] O.J. No. 2504 (Ont. C.A.) |
| 21. | *Piedra v. Copper Mesa Mining Corp*., 2011 ONCA 191 |
| 22. | *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964 (Ont. C.A.) |
| 23. | *Restoule v. Strong (Township),* [1999] OJ No 2979 (Ont. C.A.) |
| 24. | *R. v. Brown*, [1993] 2 S.C.R. 918 |
| 25. | *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 |
| 26. | *R v. Lima*, [2009] OJ No 3805 (Ont. Sup. Ct.) |
| 27. | *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*., 2014 BCCA 36 |
| **Selected Pieces of Legislation** | |
| 28. | National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, s. 7.1 |
| 29. | National Instrument 45-106 Prospectus Exemptions, BC Reg 227/2009, ss. 1.1, 2.3 |
| 30. | Securities Act, RSBC 1996, c 418, Part 10, s.76 |
| 31. | Securities Act, R.S.O. 1990, c. S.5, ss. 1.1, 28-29, 72-73, 138.1-138.14. |

## SCHEDULE B

## TEXT OF STATUTES, REGULATIONS AND BY-LAWS

**1.** ***Class Proceedings Act, 1992*, SO 1992, c 6, ss. 5, 24**

**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.

**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

**2.** ***Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 134**

**Powers on appeal**

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from

(b) order a new trial;

(c) make any other order or decision that is considered just.

**New trial**

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

**Same**

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

**CERTIFICATE**

We certify that an order under subrule 61.09(2) is not required.

We estimate that we will require 1.5 hours for our oral argument.

Dated this 7th day of August, 2020.

Andrea Laing

Doug McLeod

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

Plaintiffs Defendant (Respondent)

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(DIVISIONAL COURT)**

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

Proceeding commenced at Toronto

# FACTUM OF THE RESPONDENT, BDO CANADA LLP


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