

**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)

SUPPLEMENTARY FACTUM OF THE PLAINTIFFS (APPELLANTS)

November 13, 2020

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830, P.O. Box 14
Toronto ON M5J 2N7

Simon Bieber (56219Q)
Tel: 416.351.2781
Email: sbieber@agblp.com
Nathaniel Read-Ellis (63477L)
Tel: 416.351.2789
Email: nreadellis@agblp.com

Tel: 416.499.9940
Fax: 647.689.2059

Lawyers for the Plaintiffs (Appellants)
Anthony Whitehouse, Carrie Couch and
Jason Couch

TO: **BLAKE CASSELS & GRAYDON LLP**
Barristers & Solicitors
199 Bay Street, Suite 4000
Toronto ON M5L 1A9

Andrea Laing (43103Q)

Tel: 416.863.4159

Email: andrea.laing@blakes.com

Doug McLeod (58998Q)

Tel: 416.863.2705

Email: doug.mcleod@blakes.com

Daniel Szirmak (70163O)

Tel: 416.863.2548

Email: daniel.szirmak@blakes.com

Tel: 416.863.2400

Fax: 416.863.2653

Lawyers for the Defendant (Respondent)
BDO Canada LLP

PART I - THE COURT OF APPEAL'S DECISION IN *HORIZONS*

1. These supplementary submissions address the recent decision of the Court of Appeal for Ontario in *Wright v. Horizons ETFs Management (Canada) Inc.*,¹ which was released after the Appellants' filed their written submissions on this appeal.
2. *Horizons* involved a certification motion in an investor class action, which advanced a negligence claim against an investment fund manager. At first instance, Justice Perell refused to certify the class action. He applied the *Livent* framework and determined that the negligence claim failed to disclose a reasonable cause of action.
3. The Court of Appeal held that Justice Perell erred in finding that the claim disclosed no reasonable cause of action. Among other things, the Court of Appeal found that Justice Perell erred by too narrowly defining the defendants' undertaking pursuant to the *Livent* framework.²
4. In *Horizons*, Justice Perell held that "Horizons' undertaking was to place on the exchange a financial product that operated in accordance with the accompanying disclosure documents... It did not undertake responsibility for any gains or losses purchasers might realize in purchasing the units."³
5. The Court of Appeal held that the undertaking was broader than that found by Justice Perell. In particular, the Court of Appeal held that Horizons "undertook to its investors to act honestly, in good faith and in the best interests of the investment fund and exercise the degree or

¹ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#).

² *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#) at paras. 111-112.

³ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2019 ONSC 3827](#) at para. 103.

care and diligence that a prudent person would exercise in the circumstances as provided for in s. 116 of the *Securities Act*.”⁴

6. In reaching its decision, the Court of Appeal emphasized that on a certification motion the certification judge is not to assess whether the claim can withstand summary judgment or a trial on the basis of material adduced on the motion. Instead, the court must focus only on “whether the pleadings contain some radical defect such that there is no reasonable prospect of success”.⁵

7. On that basis, the Court of Appeal held that Justice Perell erred in finding that it was plain and obvious that the claim could not succeed. The Court of Appeal found that, as pleaded, Horizons arguably failed to meet its duty to investors by creating a fund that was not suitable for any investor because it was doomed to fail, and by failing to disclose key features of the fund’s design and trading strategy.⁶

8. Justice Perell committed a similar error in this case by too narrowly defining the scope of BDO’s undertaking. Justice Perell held, incorrectly, that “there was no undertaking by BDO to assist the Class Members in their investment decisions or to safeguard them from Crystal Wealth’s non-compliance with the *Securities Act*.”⁷

9. That conclusion is inconsistent with the pleaded facts. In particular, the Statement of Claim pleads that:

- (a) “BDO specifically addressed each of its audit reports to the ‘Unitholders’ of the particular Fund that it was auditing. Accordingly, BDO intended that the

⁴ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#) at para. 113.

⁵ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#) at para. 117.

⁶ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#) at paras. 114-115.

⁷ Reasons for Decision at para. 12, **Appeal Book**, Vol. 1, Tab 3, p

Unitholders receive each audit report and rely on it in making investment decisions.”;

- (b) “BDO knew and intended for the Class to receive and rely on its audit reports”;
- (c) “As part of its audits of the Funds, BDO had access to the individual names and number of units held by each investor of the Funds”; and
- (d) “BDO was aware of the exact amounts held by each investors and in which Funds each of the investors had invested.”⁸

10. Failing to accept those pleaded facts as true caused Justice Perell to define BDO’s undertaking in a manner that was both too narrow, and that was directly contrary to the pleaded facts, which must be accepted as true (as the Court of Appeal emphasized in *Horizons*).⁹

11. On the pleaded facts, BDO undertook to conduct its audits to assist investors in making investment decisions. It is not plain and obvious in the circumstances that there was no proximity, or that there is no reasonable prospect that the negligence claim against BDO will succeed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November 2020.



Nathaniel Read-Ellis

⁸ Amended Statement of Claim, at paras. 64, 67, Appeal Book, Vol. 1, Tab 4, p. 64-65.

⁹ *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#) at paras. 117-118.

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Tel: 416.351.2789

Email: nreadellis@agblp.com

Tel: 416.499.9940

Fax: 647.689.2059

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Jason Couch

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Wright v. Horizons ETFs Management (Canada) Inc.*, [2020 ONCA 337](#)
2. *Wright v. Horizons ETFs Management (Canada) Inc.*, [2019 ONSC 3827](#) (S.C.J.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

NA

ANTHONY WHITEHOUSE et al.
Plaintiffs (Appellants)

-and-

BDO CANADA LLP
Defendant (Respondent)

Court File No. 058/20

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PROCEEDING COMMENCED AT
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